51C/H/207/4

THE

ONTARIO REPORTS,

VOLUME I.,

CONTAINING

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

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO,

1882,

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

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QUEEN'S BENCH DIVISION..... S. J. VANKOUGHNET,
CHANCERY DIVISION..... A. H. F. LEFROY,
COMMON PLEAS DIVISION..... GEORGE F. HARMAN,
BARRISTERS-AT-LAW.

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JUDGES

OF THE

HIGH COURT OF JUSTICE,

DURING THE PERIOD OF THESE REPORTS.

QUEEN'S BENCH DIVISION:

HON. JOHN HAWKINS HAGARTY, C. J.
" JOHN DOUGLAS ARMOUR, J.
" MATTHEW CROOKS CAMERON, J.

CHANCERY DIVISION:

HON. JOHN ALEXANDER BOYD, C.
" WILLIAM PROUDFOOT, J.
" THOMAS FERGUSON, J.

COMMON PLEAS DIVISION:

HON. ADAM WILSON, C. J.
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REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

THE CORPORATION OF THE VILLAGE OF GANANOQUE V. STUNDEN.

Principal and surety—Innocent misrepresentation—Discharge of surety.

S. had been treasurer of a municipal corporation, and a bond which he had given having been mislaid, the council being under the impression that he had given no security, required him to furnish it.

The council having examined his books concluded that they were in his debt, as the books shewed, and the reeve, believing this was the case, represented to defendant that S., defendant's son, "was all right on the books." Defendant, on this, signed a bond, as surety for the due performance by S. of his duties, which he said he would not have done but for the reeve's statement. The reeve also said that if defendant did not go his surety S. would lose his position. Afterwards, as S. had been drinking, defendant wrote to the council desiring to have his bond annulled, but he withdrew this letter at the request of S. After S. had been dismissed, and the deficiency in his accounts discovered, defendant said he would pay whatever had occurred since he signed the bond.

Upon the first trial no plea of fraud was put in, and a new trial was granted on affidavits not raising this defence; but defendant gave notice that he would at the trial move to add such a plea. The learned Judge at the trial refused the application, holding that the plea could not be supported on this evidence; but he found that the bond was given upon the assumption and statement that the treasurer was not then in arrear.

Held, HAGARTY, C. J., dissenting, that the plea should have been added, and that defendant was entitled to a verdict upon it.

Per HAGARTY, C. J.—There was no false statement and no fraud, and therefore the plea was not sustained.

Action on a bond, tried at Brockville before Osler, J., without a jury. The defendant pleaded eight pleas, all

in effect averring performance, but not disputing in any way the legal validity of the bond.

By the bond, dated the 14th day of May, 1879, but not executed till the 14th day of June, 1879, defendant became bound to the plaintiff in the sum of $2,000 for the faithful performance of his duties, as treasurer of the corporation, by Jesse Stunden, who for some years had performed those duties, and who had previously given security by bond signed by other sureties; but owing to this bond having been mislaid an impression was produced upon members of the council that the treasurer had not given security as required by law; and as a report had got abroad that the treasurer of the county held a note of the corporation for the amount of the county rate, and that such rate had not been paid, the treasurer was called on to furnish security. After some time it was proposed that the defendant and one Edward Stunden should execute a bond to the corporation for this purpose. Before the bond was executed the members of the council had examined the treasurer's books, and came to the conclusion from such examination that the corporation was indebted to the treasurer in about $260, and the Reeve, George Taylor, represented to the defendant that his son, the treasurer, was "all right." His evidence as to this at the trial was as follows: "Previous to his father and brother going bail the council met at his office and informally looked over his books. We took the auditors' report of the 1st of June, and we took the debit and credit side of his cash book, Mr. Button and I; and we figured out, the way the book shewed, a balance in favour of the treasurer of somewhere in the neighbourhood of $260. We had not got the bond then (meaning the former bond), and we insisted on having them. He proposed his father and brother as sureties. I had a conversation with the father about it. I satisfied Mr. Stunden (defendant), as I was then satisfied myself, and told him that Jesse (the treasurer) was all right on the books. The conversation was with this defendant. He objected; he did not seem to have confidence in him. I

do not remember whether he said if Jesse was behind he would not sign any bonds; but I told him, and felt justified in telling him, he could put confidence in his son if any body could, and if he did not go his surety he would have to lose his position. If I had not thought honestly this was the state of affairs I would not have told Mr. Stunden so. The whole council thought so. I knew there had been another bond—that is, taking the clerk's word for it." Again, in cross-examination, he said: "In speaking with Mr. Stunden about going security for the treasurer, I acted in perfect good faith with him. I concealed nothing from him, and misrepresented nothing knowingly." Question: "In giving him the information were the books produced and gone over"? Answer: "Well, the council met there in the treasurer's office. Mr. Stund n was not present, and in going away we talked it over among the council, and then I told him we had gone over the books, and the way we found things. The books from which I gave this information to the surety were in the treasurer's own keeping."

The defendant himself swore: "I recollect being called upon about signing a bond for my son. When it was first spoken of it was in my son's store. I think they told me he was behind, or something to that effect; and were talking about signing a bond, and I said I would not sign a bond. I said if he was behind I had $400 in the bank, and I would give it to him if he was not behind more than that. This was in the spring, before I signed the bond." The statement of the defendant was considerably confused as to when he was first asked to join in the bond; but in reply to the question, what induced him to sign the bond, he said: "They said they had been through the books, and there was some two hundred and odd dollars in his favour—$250 or $260. It was on the 14th of June, Mr. Taylor told me that he was ahead some $200 odd. I signed the bond that day. I signed the bond after he told me he was ahead $250 or $260. It was sometime in the afternoon he told me this. I signed the bond at the same time, perhaps in half an hour."

It appeared, also, that on the 1st December, 1879, the defendant and his co-surety, Edward Stunden, wrote to the council, notifying the council of their wish to have the bond annulled from date. This letter they withdrew at the request of the treasurer. At this time it was not known that any default had occurred, but the treasurer had been drinking, and the defendant did not wish to remain bound in consequence. The treasurer continued in office until the end of 1879. It further appeared that after the treasurer had been dismissed, and the deficiency in his account of about $1,500 had been discovered, which was in June, 1880, the defendant said, according to the evidence of Mr. Britton, the deputy reeve, "that he would pay all he was liable for," and according to his own evidence, they asked the son if he could "pay the $1,500 and odd, and he said he could not. Then Mr. Britton asked me if I was prepared to pay, and I told him no. Then Mr. Burgess asked me what portion of it I would pay, or something to that effect, and I told him I would pay whatever deficiency had occurred since I signed the bond, if there was any. I told them if they would make up the books, if there was any, I would pay it."

The moneys actually received by the treasurer after the execution of the bond amounted to $5,255.92, and the amounts paid in the aggregate to $5,011.22, as found by the learned Judge. The plaintiffs owed the treasurer the following sums: for a safe purchased by the treasurer without authority from the council, to keep the papers and moneys of the corporation in, $118, which, after the dismissal of the treasurer, the council by resolution agreed to accept, crediting the treasurer with the amount; an item of $269.60 for stone for the use of the roads, used in 1879, but not allowed for by the plaintiffs till 1880, after the treasurer's dismissal; and $75, the salary of the treasurer for the year 1879, with which according to his custom he had credited himself in the books of the plaintiffs kept by him. These several sums in the aggregate exceeded the amount of the moneys received by the treasurer after the execution of the bond.

The case was tried at a previous sitting of the Court of Assize and *Nisi Prius*, upon a record containing no plea of fraud or misrepresentation, and a verdict rendered in favour of the plaintiffs. A new trial was moved for and granted upon affidavits, without the question of fraud or misrepresentation having been raised or urged as a defence; but before the second trial the defendant gave notice to the plaintiffs that he would at the trial move to be allowed to add such a plea, and at the trial made the motion, but the learned Judge did not think, upon the evidence above set out, that the plea could be supported, and refused to allow it to be added, and found a verdict for the plaintiffs, the other pleas not having been proved in his opinion, for $244.70.

The learned Judge disallowed the claim for salary, and some of the other items above mentioned, and did not apply the payments made after the date of the bond upon the earliest items debited against the treasurer, because, as he found, the bond was given and accepted upon the assumption and statement that the treasurer was not then in arrear.

May 28, 1881. *McMichael*, Q. C., obtained a rule *nisi*, calling on the plaintiffs to shew cause why the verdict for the plaintiffs should not be set aside, and a nonsuit or verdict entered for the defendant, or for a new trial, on the grounds that the verdict was contrary to law and evidence: that the learned Judge should have credited to the defendant payments which were made by the principal Jesse Stunden to the plaintiffs, and accepted by them, and should not have ruled that the said payments belonged to a prior period, and could not be credited to the defendant, and that the same were appropriated by the said Jesse Stunden, and the plaintiffs had no right to refuse such appropriation; and on the ground that the bond was invalid, because the fact was concealed from the defendant, at the time the bond was given, that the said Jesse Stunden was then a defaulter, and the defendant was assured to the contrary by the plaintiffs.

The plaintiffs moved for a cross rule, in the same Term, calling on the defendant to show cause why the verdict should not be increased to $1600, or such other sum as the Court should find upon the evidence to be the proper amount, on the grounds that the plaintiffs' treasurer received other moneys for which the defendant was liable than those found by the learned Judge. 2. That the defendant ought not to have got credit for certain moneys paid out by the said treasurer after the making of the bond, as those payments were made against, and should have been appropriated against, the former moneys received by the said treasurer. 3. That the treasurer, having mixed the plaintiffs' money with his own, was a defaulting debtor, and any payment by him made must be considered, even as against the defendant as a surety, as a payment upon the earliest indebtedness on the part of the said treasurer.

December 1, 1881. *McMichael*, Q. C., supported one rule, and shewed cause to the other. When the defendant was about to give the bonds for his son he asked if the latter was a defaulter. They said not, when he in fact was; therefore, the defendant was discharged, and was entitled to plead this in defence.

Britton, Q. C., contra, contended that it was too late now to allow the plea.

March 8, 1882. HAGARTY, C.J.—In *Davies* v. *London and Provincial Marine Ins. Co.*, L. R. 8 Ch. D. 474, (1878), Fry, J., very fully states what he considers to be the rule from all the cases as to disclosures between creditor and surety. He considers the argument unsound, that such a contract is one of those spoken of as being *uberrimæ fidei*, such as contracts of insurance. He says, (p. 475) "If one of the negotiating parties has made a statement which is false in fact, but which he believes to be true, and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement, although if he had said nothing he very likely might have

been entitled to hold his tongue throughout. So again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances. * * I do think that the contract of suretyship is, as expressed by Lord Westbury, in *Williams* v. *Bayley*, one 'which should be based upon the free and voluntary agency of the individual who enters into it'. * * It is one, furthermore, in which I think that every thing like pressure used by the intending creditor will have a very serious effect on the validity of the contract; and the case is stronger where that pressure is the result of maintaining a false conclusion in the mind of the person pressed."

Williams v. *Bayley*, referred to by Fry, J., L. R. 1 H. L. 200, was, like *Davies* v. *London and Provincial Ins. Co.*, a case in which security was in fact obtained by threats or pressure of criminal proceedings for felony.

Cranworth, C., says, p. 209: "It is not pressure in the sense in which a Court of Equity sets aside transactions on account of pressure, if the pressure is merely this: 'If you do not do such and such an act, I shall reserve all my legal rights, whether against yourself or against your son.' If it had only been, 'if you do not take on yourself the debt of your son, we must sue you for it,' I cannot think that that amounts to pressure where parties are at arms' length."

The judgment of Pollock, C. B., in *North British Ins. Co.* v. *Lloyd*, 10 Ex. 523, reviews the authorities, and also condemns the *uberrimæ fidei* argument.

This case is noticed in *Lee* v. *Jones*, 17 C. B. N. S. 482, in Error. Blackburn, J., says, p. 507: "It is not essential to constitute fraud that there should be any misleading by *express words*. It is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant to enter into the contract by leading him to believe that which the plaintiffs knew to be false, the plaintiffs

knowing that, if he had not been thus misled, he would not have entered into the contract."

The cases are very numerous.

The general law is fully stated in *Brandt* on Suretyship, secs. 365, 6, 7; *Baylies* on Sureties, 214, *et seq.* *Municipal Corporation of East Zorra* v. *Douglas*, 17 Gr. 466, reviews a number of the authorities. See also *Peers* v. *Oxford*, *Ib.*, 472; *County of Frontenac* v. *Breden*, *Ib.*, 645.

I see very serious objections to allowing defendant to raise the question as to the invalidity of the bond at the time and in the manner he has chosen to select.

He had the fullest knowledge of all the facts connected with his defence, and could have urged it as readily at the first trial as at the second. After hearing all the evidence (including that of the reeve, Mr. Taylor, his chief witness on this head) he applies to re-open the case and obtain another trial, still in no way suggesting such a defence as this.

There is no evidence that any mistake was made by his legal adviser, or otherwise, as to why such a defence, if it existed, was not urged at the proper time.

If he had urged it at the usual time, the Court would have considered and pronounced judgment on it, and if in his favour, no second trial would have been required.

But he allows a new trial to be granted on the general question of the accounts, with costs to abide the event, and now raises this previously neglected defence, going to the root of the claim.

This seems to me to be exceedingly unfair to the plaintiffs, after all the very heavy expense previously incurred in a very small matter, as the result of the last verdict shews this to be.

I quite agree that if from accident or wrong advice an important matter of defence had not been urged at the proper time, and an estate or some large interest were involved, the Court would endeavour to open the defence, and allow a new trial on such terms as to costs as would

properly protect the plaintiff; but in a small matter like this, involving some $250, I cannot see why such utter looseness of proceeding should be tolerated.

If the defence now urged had, in due course, been presented, one trial would have sufficed for its decision. The carelessness of defendant has rendered the first trial useless. All could have been decided as it is now, and I do not see why plaintiffs should not be reimbursed by defendant to the extent of the useless expense they have been put to.

I have not seen any direct decision as to the effect of the creditor in perfect good faith stating that the principal debtor was not in default, or was "ahead" in his accounts, as here stated.

I think we should not add another to the already too numerous methods of defeating a contract like the present.

The position of the treasurer of a municipality is such that individual members of the council may very honestly believe his accounts are quite correct and that he is not in any default, and next day one or more items or transactions may appear shewing that such belief was unfounded.

But it is suggested that even if such mistaken statement may not wholly relieve the surety, yet that there is a *quasi* estoppel on the creditor from afterwards asserting a different state of facts.

The bearing of this argument in the present case would amount to this, that if he must be taken at the time the surety bond was given to have been not in default, all payments subsequently made by him to the plaintiffs must go in discharge of his liability for moneys thereafter received by him as treasurer.

There was no fraud whatever, in the ordinary sense of the term, practised upon him.

Taylor, the reeve, said that when he was asked to become surety, "I satisfied him, as I was satisfied myself, that Jesse was all right in the books. * * He objected. He did not appear to have confidence in him. * * I told him and felt justified in telling him that he could put confi-

dence in his son, if any body could, and that if he did not go his surety he would have to lose his position: at the same time I advised him to give him some bank accommodation."

At that time defendant did sign an accommodation note for $1,500.

Taylor says that as he and Mr. Butler made it out with the auditors' report for 1878, and taking the debit and credit side of his cash book, the book shewed a balance in favour of the treasurer of somewhere in the neighbourhood of $260.

He says the whole Council thought as he did: that he told defendant they had gone over the books, and the way they found things, and everything was done in good faith.

The defendant's evidence is not very clear. I understand when his going security was first spoken of, it was said that Jesse was behind, and he at first declined to be bound, and said he must consult a lawyer: that afterwards he met the council, and Taylor told him they had been through the books, and there was some $250 or $260 in his favour; this was the day the bond was given; and that he would not have signed the bond if he had not been told that. That soon after he had signed the bond he found there was something wrong, that Jesse was breaking out, and doing what was wrong again. He says that he wrote a letter to the council saying that he would not be responsible: this was sometime in the fall of 1879; and he retracted it, "because he came and felt so bad about it that I let him go on again."

On being called on by the Council, defendant said he would pay whatever deficiency had occurred since he signed the bond, if there was any: "if they would make up their books I would pay it."

Jesse (the treasurer) was examined. He says that at the date of the execution of the bond he was insolvent. He made an assignment two or three months after the bond was given.

Mr. Butler, deputy reeve, says he did not know the treasurer was short in his accounts till the auditors for 1879 reported: that was in June, 1880: that treasurers usually put out half yearly statements of the money to the credit of the corporation.

Notes from time to time were discounted at the bank agency on the credit of the corporation or individual members, the treasurer receiving the proceeds and having to account therefor; for instance, one on 31st May, 1879, for $12.

I am of opinion, that what took place at the execution of the bond ought not in any way to relieve the defendant from liability.

Let us understand what took place.

The councillors say to defendant, that according to the books kept by his son, the treasurer, he was not in default, but ahead.

There is no suggestion that this was not true.

The treasurer kept the books, entered what he pleased on the debtor and creditor side of the account. This was in the middle of the year, and these accounts would not be audited or verified till after the close of 1879.

We must assume that defendant knew as well as the members of the council that his son kept books as treasurer, and had the control of the entries therein. They then appeared with a balance in his favour.

By subsequent investigations this is shewn to be erroneous; in other words, that his books did not correctly shew his true position.

The alleged representation was not an absolute assertion of his being in arrear or in advance, but merely that they had gone over the books, and by them he appeared to be in advance.

I cannot understand on what principle a bond given under such circumstances can be avoided.

The utmost defendant can urge is, that he was induced to become surety on the representation that the books shewed the treasurer to be in advance, not in arrear. This was true as to the books.

Unless, therefore, we add to what was really said a guarantee by the plaintiff that the books truly shewed the real position of the parties, I think the defence must fail. The defendant has very little reason to complain in any view of the case.

We find that the learned Judge took a very favourable view as to payments and receipts. He charges defendant with moneys received after the 14th June, 1879, the day of the actual execution of the bond. He says, "I do not apply the payments made after date of bond, (14th June,) upon the earliest items debited against him, because I find that the bond was given and accepted upon the assumption and statement to defendant that the treasurer was not then in arrear."

This was very much in the surety's favour. He refused to allow for the safe and the stone, and in my opinion rightly.

I have seldom seen a case in which I have felt more difficulty, on a perusal of the evidence and accounts, to form a clear opinion on the exact state of the figures.

I certainly am unable to point out any serious error in the result arrived at by the Judge, who saw and heard the witnesses.

I was at first inclined to think that the salary should have been credited, $75; but on consideration I am inclined to think the learned Judge was correct. The treasurer had been in the habit of crediting himself with the amount. The defendants now say that he has not earned his salary, and that its payment was never ordered by them. This is a matter between them and their servant, the treasurer, and must be settled between them, and does not properly arise here.

The surety has not, I think, the right to have the earning or non-earning of the salary decided in this action.

We may hope that this municipality and others will at last come to the conclusion that difficulties may be readily anticipated where officers charged with the receipt and

disbursement of thousands of dollars are remunerated at the rate of $75 a year.

If this defence succeed, the result seems plain, that the employer of any person who keeps books which are apparently correct, but who has in fact left some money received by him unentered, can hardly obtain a valid bond for future dealings from a surety. He may tell everything that he knows, and exhibit every book and paper in his possession, act with perfect good faith, concealing nothing and mis-stating nothing, not having even been improperly careless or negligent in looking after the accounts; and yet the supposed security is to be held worthless, because it is afterwards discovered that the servant had been previously dishonest or false in his entries. But for the declared opinions of my learned brothers, I should have thought the question very clear.

ARMOUR, J.—I think that the plea of fraud sought to be pleaded ought to have been and ought to be allowed, and that the verdict should be entered thereon in favour of the defendant.

The learned Judge found that the bond sued on was given and accepted upon the assumption and statement to the defendant that the treasurer was not then in arrear.

The fair conclusion to be drawn from the evidence is, that the defendant was induced to execute the bond sued on by the representation of the plaintiffs' Reeve, upon the faith of which he acted, that the treasurer was not then in default.

This representation having turned out to have been false in fact, the defendant became entitled to be relieved from the obligation which he had entered into upon the faith of its truth.

And it makes no difference whether the representation was made with an honest or dishonest intention. The defendant was deceived all the same, and was entitled to be relieved all the same.

"But," says Lord Cairns, in *Reese River Silver Mining*

Co. v. *Smith*, L. R. 4 H. L. 79, "I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue."

I see no evidence upon which it could fairly be said that the defendant waived his right to be relieved from this bond on the above ground.

CAMERON, J.—Assuming that the plea of fraud or misrepresentation had been pleaded, I am of opinion the defendant was, on the evidence, entitled to the verdict. There is no question that a representation was made by the reeve and other members of the corporation to the defendant that the treasurer was not in default or indebted to the corporation, and conceding that this representation was made in good faith, and in the full belief of its truth, the fact being otherwise, and it appearing that the defendant would not have entered into the bond sued on if he had known his son, the treasurer, was in default, the representation was such as to relieve the defendant from all liability on the bond. That he would not have entered into it would seem to be clear from his uncontradicted evidence. He swore: "I recollect being called upon about signing a bond for my son. * * * I think they told me he was behind, or something to that effect, and were talking about signing a bond, and I said I would not sign a bond. I said if he was behind I had $400 in the bank, and I would give it to him if he was not behind more than that." And afterwards they told him they had been through the books, and there was some two hundred and odd dollars in his favour. This was told to him on the very day he signed, and before he signed the bond. The reeve swore that "the defendant did not seem to have had confidence in his son." It would thus seem that he was induced by the representation that his son was not in default to become his surety, and this representation

was made by the agents of the plaintiffs in the matter of the security; so that the representation was clearly part of the *res gestæ*, and was what is termed the *locus contractui*.

It was urged on behalf of the plaintiffs that there must be some wilful or intentional misrepresentation to avoid a contract, and that a representation made as it was in this case in the honest belief of its truth, though it might have been the inducement to the defendant to become surety, would not avoid the contract: that the contract of suretyship is not one based on the *uberrimæ fidei* which governs in contracts of partnership or marine insurance, wherein everything must be disclosed material to the contract; for which last position there is no doubt authority. In *Davies* v. *London and Provincial Marine Ins. Co.*, L. R. 8 Ch. D., 469, Fry, J., said: "It has been argued here that the contract between the surety and the creditor is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view."

Assuming this to be a just exposition of the law where the question is, has the surety been discharged by the concealment of some fact or circumstance that might have influenced him in declining to be a surety if it had been made known to him, it has no bearing upon a case like the present, where there has not been a mere concealment of the indebtedness of the treasurer, but a positive statement there was no such indebtedness, contrary to the fact. The effect of this representation was just the same upon the defendant, the party making it believing it to be true, as it would have been if that party had known it to be false; and as a matter of reason it is impossible to see on what principle its effect in law should be different.

In the case of *Davies* v. *The London and Provincial*

Marine Ins. Co., already referred to, Fry, J., further said, as to the character of the contract of suretyship, "But I do think the contract of suretyship is, as expressed by Lord Westbury, in *Williams* v. *Bayley*, L. R. 1 H. L. 200-219, one which 'should be based upon the free and voluntary agency of the individual who enters into it.' I think that principle especially applicable here, because there is no consideration in this case, as in many cases of suretyship, for the contract so entered into; and, therefore, I think, to use the language of Lord Eldon, in *Turner* v. *Harvey*, Jac. 169, 178, it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid. It is one, furthermore, in which I think that every thing like pressure used by the intending creditor will have a very serious effect on the validity of the contract; and the case is stronger where that pressure is the result of maintaining a false conclusion in the mind of the person pressed." The circumstances in reference to which this language was used were, that the officers of a company believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in the day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his default, no mention being made of the withdrawal of the direction of the arrest.

The sum of money was afterwards deposited with trustees on an agreement for the security of the company. A large sum was found to be due from the agent to the company, which latter sued the trustees to recover the money deposited with them, and one of the depositors or sureties brought an action to cancel the agreement, and it was held

that it should be cancelled by reason of the company not having informed the sureties of the withdrawal of the directions to arrest the agent. It was objected, on behalf of the company, that the representations made did not induce the contract, and that if there was *dolus malus*, it was not *dolus malus* of which it could be predicated that it was *dans locum contractui;* as to which Mr. Justice Fry said: "I do not think that that view is tenable. It is said, no doubt, that Evans," (the agent) "was supposed to be a rich man, and that Evans was not believed by his friends to have committed this offence. That may have been their state of mind when they began the negotiations. It certainly was not their state of mind on the 14th, still less was it their state of mind at their first interview on the 15th, and I think their state of mind was well known and appreciated by Mr. Burn," (the company's solicitor.)

I have made this extract as probably presenting an additional ground of defence; namely, the representation that there was no existing surety bond of the treasurer, and that unless he gave fresh bonds he would be deprived of his office, which, in view of the above case, might constitute such pressure as to relieve the surety, the bond having been procured without that fact having been communicated to the defendant. This point however was not taken, and I do not make it any part of the reason for arriving at the conclusion that the verdict ought to be entered for the defendant, which is based solely upon the ground that a representation false in fact, being a representation inducing a person to become surety for another, will avoid the contract of suretyship, where such representation is made by the creditor or some one acting for and in his behalf in the obtaining or accepting of such surety, although the person making the representation may believe it to be true: that an actual representation, which is a totally different thing from non-disclosure where the surety does not choose to make enquiry, will, when false, avoid a contract, though the thing represented, by reason of its existing in fact, would not from mere omission intentionally or inadver-

tently to disclose it have that effect. The language of the Judges in most of the cases of concealment would seem to support this view.

In *Hamilton* v. *Watson*, 12 Cl. & F. 109, Lord Campbell said that if the principles contended for, that everything should be disclosed by the creditor that is material for the surety to know, it would knock up transactions in giving security on a cash account, because no bankers would rest satisfied that they had a security for the advance they made. "If such was the rule," he said, "it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept: whether the debtor was in the habit of over drawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner—for all these things are extremely material to the surety to know. But unless questions be particularly put by the surety to gain this information, I hold it quite unnecessary for the creditor to whom the suretyship is to be given to make any such disclosure." This clearly implies, if a question as to the indebtedness of the principal had been asked, a true answer must have been given, or the contract would have been avoided. If the question had been asked, and the bank manager had applied to the ledger keeper to ascertain the condition of the principal's account, and was told there were $500 to his credit, and this arose from the clerk having placed this sum erroneously to the credit instead of the debit of the account; and the manager, in ignorance of this, had informed the surety that the principal had at his credit this sum—could it be said, because he was so ignorant, the surety could be held responsible? It is true Blackburn, J., in *Lee* v. *Jones*, 17 C. B. N. S. at page 505, lays it down that inaccurate representation would not be enough to support a verdict on a plea of fraud, unless it was further established that the plaintiffs made the inaccurate representation intending to deceive the defendant, and to induce him to enter into the contract in the belief that what was represented did exist, whilst the

plaintiff knew it did not exist. But this proposition was not necessary to the decision of the case, and does not appear to be borne out by other authority. In the same case Mr. Justice Shee referred with approval to the case of *Railton v. Mathews*, 10 Cl. & F. 934, where it was held it was a misdirection to tell the jury, on an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, "that the concealment to be undue must be wilful and intentional, with a view to the advantages the employers were thereby to gain."

Lord Cottenham, on page 941, said: "The learned Judge lays it down distinctly that the concealment, to be undue, must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantages the parties were to receive."

Lord Campbell thus expressed himself at page 942: "The question really is, what is the issue which the Court directed in this case? Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders or either of them? The material words are, 'undue concealment on the part of the defenders.' What is the meaning of these words? I apprehend the meaning of these words is, whether Railton was induced to subscribe the bond by defendants having omitted to divulge facts within their knowledge, which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond. There are plenty of decisions to that effect both in the law of Scotland and the law of England. If the defendants had facts within their knowledge which it was material the surety should be acquainted with, and

which the defendants did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another I apprehend is wholly immaterial. It certainly is wholly immaterial to the interest of the surety, because to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond appears to me preposterous; for that would make the obligation of the surety depend on whether the other had a good memory, or whether he was a person of good sense, or whether he had the motive in his mind; or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed; upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for witholding them, I apprehend, is wholly immaterial."

I have made this long extract from Lord Campbell's judgment, as it expresses what I believe to be the law relating to the present question better and more clearly than my own language would, and I cannot doubt if the case under the consideration of the House of Lords had been, as in this case, that the surety acted upon a positive statement of the creditor, Lord Campbell would have said that the knowledge of the creditor of the fact represented, as well as the motive with which the statement was made, would be wholly immaterial. The concealment complained of in that case was the existence of previous defaults and indebtedness of the principal. The general principles applicable to this case are thus stated by Lord Romilly, in *Pulsford* v. *Richards*, 17 Beav. 94. "The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth in all the dealings of mankind. The

principle itself is universal in its application to these cases of contract. It affects not merely the parties to the agreement, but it affects also those who induce others to enter into it. *It applies not merely to cases where the statements were known to be false by those who* made them, but to cases where statements false in fact were made by persons *who believed them to be true,* if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered the fact which negatives the representation made. A strong illustration of this is to be found in the case of *Burrows* v. *Lock*, 10 Ves. 470, and in my opinion, as I held in the case of *Money* v. *Jordan*, 15 Beav. 372, this principle applies to all representations made on the faith of which other persons enter into engagements, so that, whether the representation was true or false at the the time when it was made, he who made it shall not only be restrained from falsfying it thereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted."

In the case of *Money* v. *Jordan*, above referred to, Lord Romilly said at p. 377: "The principle of the law was, that a man was responsible for his solemn statement, if made with the view of inducing another to act upon it. The doctrine of the common law, in matters of warranty, is but another branch and illustration of the same doctrine. Equity in following this doctrine of common law has, I apprehend, done so to this extent: it does not stay to enquire whether in such cases the statement made were false or true; but if a deliberate statement be made by one person to another who, believing that statement to be true, and upon the faith of it, enters into engagements, the person who made the statement shall not be permitted by any act of his to falsify it; nay more, he shall be compelled, as far as lies within his power, to make good the statement he asserted to be true."

In the present case the learned Judge found that the plaintiffs had represented to the defendant that the principal was not indebted or in default, when in fact he was;

and I think it would not have been possible to arrive, on the evidence, at any other conclusion. This was positively stated, and to confirm it, the reeve said, "We have gone through the books." The defendant was suspicious of his son, not of his being dishonest, but, by reason of his habits of drinking, that he might have got into default, and wished to be informed as to this. The reeve, to remove the suspicion, asserted that defendant's son was not in default, and to strengthen the assertion said, "We have gone through the books." This, I take it, is the effect of the evidence, and it cannot be taken to have been equivalent to saying, "We have no knowledge of the matter; your son keeps the books, and as far as we can tell, relying on the books, he is all right."

If this last construction could be put upon what was said, there would have been neither concealment nor misrepresentation, and the defendant would have been responsible as taking the risk of the correctness of the books upon himself. But without doing violence to the evidence, I do not think such a construction can be placed upon it. I am therefore of opinion the defendant should be allowed to add the plea of which he gave notice: that judgment should be given for him on such plea, and that the plaintiffs' action should be dismissed with costs. I think the misrepresentation avoided the contract altogether; but assuming it to have no other effect than to place the parties in the situation they would have been in if the representation had been true, the defendant would still be entitled to have judgment in his favour, as in that case the defendant would be entitled to any set-off that the principal had against the plaintiffs; and as the plaintiffs would then only have a claim for moneys received by the treasurer after the execution of the bond, it is clear upon the evidence and undisputed facts the moneys paid by the treasurer after the 14th of June, the date of execution of the bond, amount to $4,890.29, which sum, with the set-off for stone, safe, and salary, amounting to $462.60, in all $5,352.89, exceeds the moneys received

($5,255.92) by $96.97. The sum of $4,890.29 is made up of the following items: amount of debt to Mrs. McDonald, $2,160.10; note for $1,200 in bank, less rebate of interest, $1,184.65; admitted payments $1,545.64. The learned Judge allowed in addition three other items, amounting in the aggregate to $120.93, thus making the total payments of the principal $5,011.22, which, with the item of set-off for stone, $269.60, without considering the other items of set-off, would be more than sufficient to cover any liability of the defendant. That the defendant would be entitled to avail himself of any set-off which the principal had against the plaintiffs does not seem to admit of doubt. The case cited on the argument of *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372, is directly in point; and the case of *Duncan Fox & Co.* v. *The North and South Wales Bank*, L. R. 6 App. Cas. 1, is an instructive case as to the extent to which equity will go in giving a surety the benefit of securities held by creditors or co-sureties belonging to the principal.

The learned Judge at the trial was right in restricting the plaintiffs' claim to the moneys received by the treasurer after the execution of the bond, and not allowing them to claim in respect of the moneys received between the date mentioned in the bond and the time of its execution, there being nothing in the bond itself or in the evidence to shew it was the intention of the parties it should have a retrospective operation. The plaintiffs must therefore be refused the order they have applied for to increase the verdict in respect of moneys so received, even if the bond was not altogether void.

The defendant not having raised the defence of misrepresentation before or on the first trial, he should have no costs of that trial or the proceedings to set aside the verdict obtained thereat. The costs to be allowed to the defendant will be the general costs of the cause and the costs in Term of setting aside the last verdict or judgment, and each party will bear his and their own costs of the first trial and the proceedings to set the same aside.

I would add that I have not overlooked the plaintiffs' contention that the statement made by the defendant after the dismissal of the principal "that he would pay anything that he was liable for, and that if the plaintiffs would make up the books he would pay all that the treasurer had received and not accounted for after the execution of the bond," prevented the defendant from setting up the defence of misrepresentation; but I do not think it can have that effect. The statement and promise being made after the dismissal, the plaintiffs were not in any manner prejudiced or induced thereby to alter their position, and the promise was made in ignorance of his equitable rights. The withdrawal of the letter of the defendant of the 10th December, 1879, asking to have the bond cancelled, was equally inoperative to deprive the defendant of his equitable defence.

As far as appears from the evidence the defendant was then quite as much in ignorance of any default of the principal as he had been when the bond was executed. The writing and withdrawal of the letter, therefore, could have no other effect than to leave the parties with their legal and equitable rights as they were at that time. No doubt a surety may by his conduct waive his right to set up his equitable defence, but he must do so with full knowledge of his rights, or in such a manner as to alter or prejudice the position of the creditor. The verbal promise to pay in this case was void under the Statute of Frauds, and there being no change in the position of the plaintiffs by reason thereof, there was nothing on which a Court of Equity could set aside the statute, or from which the promise could be treated as evidence of a knowledge by the defendant of the true position of the principal's accounts when the bond was entered into. The doctrine of appropriation of payments to the earlier items of claim, is also inapplicable to the circumstances of this case.

On the general principles of law relating to the effect of untrue representations, in matters of contract, on which a party acts, I would also refer to the language of the

Vice-Chancellor in *Blest* v. *Brown*, 3 Giffard, 450; of Lord Justice Turner in *Rawlins* v. *Wickham*, 3 DeG. & J. 304; of Sir Charles Hall in *Attorney-General* v. *Ray*, L. R. 9 Ch. App. 402, in note, and to that of James, L. J., in affirmance of Sir Charles Hall's decree; also to the language of Lord Cairns in *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 79, wherein he said, "When I say 'a fraud,' I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. Upon that part of the case I apprehend that there is no doubt."

Judgment for defendant.

[QUEEN'S BENCH DIVISION.]

STEERS v. SHAW ET AL.

Boundary line—Wild land—Constructive possession—Statute of Limitations.

Thirty or forty years before action, a blazed line had been run between the lots of plaintiff and defendant, by S., a surveyor, along part of which a fence had been erected. The parties respectively cut timber and exercised acts of ownership on the lands on each side of and up to the blazed line. The plaintiff swore that although he and his father had been governed by this line, and never claimed or went beyond it, it was always their intention to dispute it when they should be able to establish the true line. The learned Judge at the trial found that there was sufficient evidence of defendant's occupation of the land up to the blazed line to extinguish the plaintiff's title. *Held*, ARMOUR, J., dissenting, that the verdict was right

Title by possession to wild land can be made out otherwise than by actual enclosure.

TRESPASS to the south-west part of lot 22 in the 1st, 2nd and 3rd ranges of the township of Chatham.

Pleas 1. Not guilty. 2. That a portion of the land (setting it out by metes and bounds,) was the defendants' land. Issue.

The cause was tried at the last Chatham Spring Assizes, before Patterson, J. A., without a jury.

It appeared that the plaintiff and defendants owned certain parts of lot 22. Thirty or forty years ago a line was run between their portions by one Smith, marked by blazes in the usual way, and down to a very recent period this was treated by both parties as their dividing line.

Fences had been erected along a considerable portion of this line by the action of both parties, and had been maintained by them. The portions so fenced extended more than half way through the lot, and a clear title to such portions seemed to be fully established within the Statute of Limitations.

A portion, however, north of the fenced part, consisted of bush land, and had not been actually fenced in over the statutable period.

A great deal of evidence was given, and the following judgment delivered by the learned Judge, from which the facts will more fully appear.

PATTERSON, J. A.—I do not think that the evidence in this case has left any serious doubt in my mind as to the facts. The paper title of the plaintiff to this piece of land in dispute is I think made out. I think that taking the evidence and the terms of the description contained in the patent it would cover this piece of land. Taking what I am told is the effect of the statute of 1837 (7 Wm. IV. c. 58), taking these lines to be governed by the lines across the river, it would tell more strongly against the defendant. But I do not think that the question can turn just now upon the paper title. I have no doubt that the whole question is under the statute of limitations; and I do not think that the facts under the statute of limitations are involved in any difficulty. The question is as to the effect of the statute under the facts that are shewn. I understand these facts to be, that some forty years ago, a question having arisen between the ancestors of the plaintiff and the defendants,—occasioned, I suppose by the survey of Rankin, which is spoken of as the commissioners' survey, or perhaps occasioned by that statute which was passed in 1837—but, however occasioned, the question having arisen, a survey by Samuel Smith was made, with some reference to the dispute. I do not think it appears that that was an agreed survey between the parties, or that there was any distinct agreement between them that the line which Smith was to run was in any way to settle their rights. As far as the evidence shows, the survey of Smith I take to have been a survey prepared by Shaw, the ancestor of the defendants. I have no doubt, however, that it was a survey of which Steers, the ancestor of the plaintiff, was perfectly well aware; in fact, the evidence which is given of the fencing and recognition of the line, as far as that shows recognition of it, perfectly establishes that fact. It is only necessary to speak of that portion of the line in this one concession or range—this particular part of it south from the walnut tree to the concession road next to it, whatever it is called, being very clearly out of dispute now by reason of the statute. Taking the line running from that concession north to that fourth concession or range, I think it is very clearly established, as to the portion cultivated, 38 or 39 chains back, that there has been not only an actual occupation of it by the defendants and their ancestor, but that kind of acquiescence in that particular occupation on the part of the ancestor of the plaintiff which is shown by his using this lane which ran up alongside of it; fencing, as I understand, at his side of the lane, and in no way interfering with their occupation. It appears further that at a period a good deal more than twenty years ago—I do not know exactly how long—the plaintiff's ancestor fenced that portion in the fourth concession. That is spoken of as an old fence, and it is a fence upon that line, if Smith ran the line back so far, as I suppose he did,—corresponding with the line, at all events. Then there is the evidence that at a recent period, and within ten years, the plaintiff fenced a portion of this intermediate tract, for the purpose of protecting his pasture on the west. That, as I say, is within the statutory period. There is the very distinct evidence given in his own examination that there has been no interference with the defendants or with their acts of ownership, whatever those acts have consisted of, during this period; and no

acts of ownership done by the plaintiff at all upon this unfenced portion of the land, or upon that portion which was unfenced until a comparatively recent period. It is stated in the plaintiff's own deposition that although there was no interference with the defendants or their ancestor, there was no acquiescence in their right to the land, but that there was the intention to dispute their right when, as they express it, they should be in a position to establish the true line. The effect of the evidence is, that while not acquiescing, in the sense of acknowledging his right, they were content to let things remain as they were, and to allow the claim of the defendants to that land to remain practically undisputed, with the idea of disputing it when they were in a better position to do so. Now what the statute says is this, that no entry shall be made or action brought to recover land but within twenty years—or ten years, as it is now,—after the right of entry accrues; and it defines the time when the right of entry accrues in reference to various cases. In that particular which applies to this case, it defines it as being at the time when the person who has been in possession or interested in the rents and profits of the land is dispossessed or discontinues his possession. The statute uses both these expressions; and I have always felt that the statute has not received full consideration —has not had full effect given to its language—if we treat these words, where two of them are used in the statute, as meaning exactly the same thing. The statute used these two expressions, "dispossessed or discontinued"; meaning, as I understand, to convey something different, whatever that difference is. "Discontinue" evidently refers to some act on the part of the owner; "dispossession," to some act on the part of the stranger who enters and holds against him. I am aware that it has been held to be settled law, in the construction of the statute, both in England and with us, that the owner is not said to have discontinued his possession unless there is some person in possession adversely to him. At the same time, it leaves the question open as to what is the meaning of discontinuance. These cases do not settle that there is any force to be given to that word as meaning anything different from dispossession. I think there is a difference, and the question has arisen in some cases; one of them the case of *Pringle* v. *Allan*, in the Queen's Bench, (a) in which one of the Judges—I think the late Mr. Justice Burns—gave a judgment holding rather strongly, in his view, that there was a discontinuance in that case, although I do not think that the case turned on that particular question; it went off upon another question. There the facts differ from the facts here in this particular—that what was relied upon as discontinuance was chiefly the act of a person who afterwards claimed as owner of the land, pointing it out to others as belonging to another person. There was no actual possession, no fencing. It was a very peculiar case—one which reflected a good deal of credit upon the ingenuity of the mind that conceived the idea of bringing the action. I mention that case as one in which the question of discontinuance was discussed more than any one we have had. In the present case I shall be bound to hold that the right of

(a) 18 U. C. R. 575.

entry under the statute was barred—that there was a dispossession or discontinuance, within the meaning of the statute, of this land which was not actually fenced, as well as of the land north of it and the land south of it which was fenced. I think that the distinct acts of the plaintiff and the plaintiff's ancestor recognized the possession of that land by the defendants, although the intention was at some time or other to assert a right to it, when they would be able to assert their right to greater advantage. Their acts were, notwithstanding, a distinct recognition of possession in the meantime, which amounted to a discontinuance of possession on their part. And even if apart from that there was sufficient possession—taking the doctrine of *Davis* v. *Henderson*, (a) and other recent cases into consideration—I think that the purpose they had of disputing the possession afterwards was unfortunately for them deferred too long—has been allowed to remain until the statutory period has passed. I don't think that the possession here is distinguished from that in *Davis* v. *Henderson*. What I understand to be established by that case and others of the same class is, not that possession of one portion will be drawn to another portion merely because they belong to the same Territorial Division; but that when possession is taken of land as a whole it affects it as a whole. The question in *Davis* v. *Henderson*, was whether a person taking possession of the land and only occupying a part of it under a fence could be held to have possession of the whole of it—whether the possession of the unoccupied part was to be taken with the other. There considerations were allowed to come in—payment of taxes, and so on—which carried the doctrine somewhat further than in other cases. I think that the principle of that case applies here. I think that not only the intention of the defendants and their ancestor, but the intention, as recognized and understood, and, to the extent I have mentioned before, acquiesced in by the plaintiff and his ancestor, was to take possession of the whole of this strip; and that within the principle of this case, the possession must be held to have been possession of the whole. I do not think there is anything that should weigh with me at present in reference to the question of the exact extent to which the fence has followed that line of Smith's. The line of Smith I have no doubt is the line which governed this question of possession; and the line of fences, as far as they have been up for the length of time, would of course govern, whether they conformed with the line or not. If the recent fence which stands there at present does not exactly follow Smith's line, there is no evidence before me that any trespass has been committed on the strip of land which would be between them. I do not think that the cutting down of a tree by Macdonald was an act for which an action of trespass could be brought. It is not a question of title, it is only an action of trespass. I think that the title of the plaintiff to the land trespassed upon has been lost by the statute, and that under the statute the title was vested in the other party. I therefore enter a verdict for the defendant.

(a) 29 U. C. R. 355.

If the parties are advised to have the case further considered, and the Court should be of opinion that the plaintiff is entitled to a verdict, I think the verdict should be entered for $100.

May 19, 1881. *H. J. Scott* obtained a rule *nisi* to enter a verdict for the plaintiff for $100, or such other sum as the Court should assess.

November 30, 1881. *C. R. Atkinson*, in support of the rule argued that by the surveys made of the Thames by McNiff and Iredale, the boundaries of the lots were fixed originally and this was ratified by the statute passed making the boundaries on the south side of the river the boundary on the north side: that there was distinct evidence of that boundary and the side line properly blazed out: that the patents had issued according to that survey, and that the parties held according to it on the back, though he admitted that in fact there was title by possession where the old fence stood; that the line up to which the parties respectively supposed they held not being actually fenced, though it could be distinguished, was not such an acquiescence or occupation as was binding or could give title under the statute.

MacMahon, Q. C., and *Douglas*, contra, contended that the line run by Samuel Smith governed: that it was not necessary there should be a fence: that the blazes shewing a line, and by which each party governed himself, were a sufficient line equal to a fence or stone wall for the purpose of giving title under the statute: that the plaintiff was out of possession and there was a discontinuance by plaintiff and his ancestor; that by the descriptions running through the third concession the side line need not necessarily be a continuous straight line, but would conform to the side lines governing in each concession.

The cases cited are referred to in the judgments.

March 8, 1882. HAGARTY, C. J. Assuming, as I do, that, as a matter of survey, the plaintiff has established his paper title to this portion east of Smith's line extend-

ing to the line his evidence has established, we have to decide whether he is or is not barred by the statute.

It was contended for defendant that this portion of unfenced bush had always for a long period of years been treated by both parties as defendant's land, the blazes on Smith's line being taken as indicating the true boundaries: that defendant exercised all the ordinary acts of ownership over this portion, cutting and selling timber thereoff, &c.

He put in evidence the examination of the plaintiff, who states that he never cut over what defendant claims as his: that his father and defendant held according to the jog—"They did not come on our side, and we did not on theirs. We were careful not to go over the part claimed by defendant, for we did not want a fuss until we could prove the line * * There was an old line * * a blazed line to where defendant claimed. * * I think it was run in 1844. * * Samuel Smith ran that line for Shaw. * * I don't know of any dispute from Smith's survey till about a year ago. It was always in dispute. I mean we intended to run the line, but it was never carried out during that time. We were governed by Smith's line. We never went across the line. I never noticed Shaw cutting across the line. * * I did not, nor my father, to my knowledge, since the dispute in 1845, ever object to defendant's cutting or clearing up to the Smith line. I think they or Ninian Shaw did all their cutting on this disputed piece, and up to the line, the Smith line. It must be during the last twenty-five years this has been going on. During that time neither I nor my father, I think, ever went up to there and made any claim to the disputed piece east of the Smith line * * When I was dealing with the bush land, I was guided by the lane in the clearing between Shaw and mine."

In this case, in addition to the evidence of exercising acts of ownership by defendant, which we so frequently hear in boundary cases, we have this strong proof from the plaintiff of his practical abandonment of all attempts to assert his right, or exercise any possessory or other right on this piece of woodland.

It was pressed upon us in argument, that in the absence of a fence there was no sufficient evidence to bar the plaintiff's right to recover this piece of land.

It is quite settled that a statutable possession by a fence, supposed for many years to be correct, but now proved to be erroneous, does not confer any right to have such fence continued in the same direction to the prejudice of the true owner.

It seems also settled that where a squatter or tortfeasor has enclosed for over the statutable period a portion of another man's land, he shall not by isolated acts of trespass, or user of the unenclosed portion, defeat the true owner's right.

But I do not think that it can be laid down, as a defined proposition of law, that title by possession can only be made out where the claimant can prove that he had actually enclosed the land by fences for the statutable period.

No man is to lose his land by the constructive possession of another: the possession should be actual and to the exclusion of the true owner. The evidence to support such a necessary possession may be varied in degree. The best and most significant evidence would be, of course, the enclosure of the land claimed, and juries should be carefully warned not to accept occasional acts of trespass, &c., as a continuous possession. Judges, when they try cases without the aid of a jury, rarely err in the direction of defeating the true owner's claim by insufficient evidence of possession under the statute.

It is urged that there is a recognized distinction as to evidence of possession in the case of a mere trespasser, and that of a person occupying a lot of land under a title supposed at first to be good, but turning out to be defective.

I do not think the defendant in the present case can be fairly likened to the former class.

I believe from the evidence here that for a long series of years the Smith line was supposed to be the true boundary, and any occupation or use by defendant of this woodland

was in the honest belief certainly of himself, and probably of the plaintiff, as that of an owner occupying his property up to the supposed true boundary.

We are not called upon now to discuss whether it might or might not have been better to have originally determined that unenclosed woodland in this country could never be the subject of a statutable possession.

I cannot find that the Courts of Ontario have ever laid down such a proposition as one of legal definition; on the contrary, the authorities seem to me to be all the other way.

It is not necessary to go through the cases. They are to be found in the Digest, Vol. 1. under title "Limitation of Actions."

I may especially refer to such cases as *Davis* v. *Henderson*, 29 U. C. R. 355, in the judgment of Wilson, C. J., where he specially discussed the question, "How is wild land to be possessed? It is settled that it need not be enclosed." Many of the cases are there noticed, as they also are in *Heyland* v. *Scott*, 19 C. P. 170. See also *Mulholland* v. *Conklin*, 22 C. P. 372.

I do not think that any practical injustice will be done by upholding the verdict for defendants in this case. I think it is in accordance with the spirit of the Statute of Limitations—an enactment which, with its occasionally unavoidable interference with the rights of property, has, on the whole, been of incalculable benefit to a young country like ours.

CAMERON, J., concurred.

ARMOUR, J.—Assuming that the plaintiff has proved, as the learned Judge found he had proved, his paper title to the land in dispute, I am of opinion that the plaintiff is entitled to recover in respect of the trespass to that part of it which has not been substantially enclosed by the defendant for more than ten years, according to the reasons I have given in *Shepperdson* v. *McCullough* (*a*). To hold that

(*a*) 46 U. C. R. 573.

there has been a discontinuance of the possession of it by the true owner would be simply to overrule decision after decision in this Court on that subject, which I have no power or inclination to do.

Rule discharged.

[QUEEN'S BENCH DIVISION.]

BATES ET AL. v. MACKEY.

Replevin bond—Action on—Staying proceedings on equitable grounds.

The defendant's timber limits adjoined those of B. & C., but from uncertainty of description in their respective licenses the division line was not defined. The defendant replevied 216 pieces of timber cut within a line run under instructions of the Crown timber agent as the boundary of the defendant's limits, but on account of the infirmity in his license, he failed in the action as to 175 pieces, for a return of which B. & C. were entitled to judgment. The latter procured an assignment of the replevin bond to themselves, and assigned it to the plaintiffs, who brought this action thereon. The Court was of opinion that the timber in question was cut upon lands intended by the Crown to be within the limits of the defendant's license, though B. & C. had some grounds for asserting title thereto.

Held, that, there having been a breach of the condition of the bond, B. & C. became entitled to recover such damages as they had sustained by replevin proceedings; that the bond, after it was assigned by the sheriff to B. & C., was a debt and chose in action assignable pursuant to the statute; and that the plaintiff having the beneficial interest therein by assignment was entitled to recover; but, it being a case for the equitable interference of the Court, it was directed that, upon payment by the defendant of the cost incurred by B. & C., in cutting and transporting the timber up to time it was replevied, less a set-off found for the defendant in this action, (the amount to be ascertained by a reference if the defendant should so elect) further proceedings should be stayed.

ACTION on a replevin bond to the sheriff of Renfrew, conditioned that if said Mackey should prosecute his suit with effect against Benjamin Batson and Joseph Merrill Currier, for the seizure of 216 pieces of timber, &c., the said bond should be void: that said Mackey did not prosecute with effect; but that in a suit by him against said Batson and Currier, a verdict was rendered in favour of said Mackey only as to 41 pieces of timber, and in favour of said Batson and Currier as to the residue, or 175 pieces, which it was found belonged to said Batson and Currier:

that notwithstanding the said sheriff, by the instructions of said Mackey, seized the whole 216 pieces in possession of said Batson and Currier, and delivered them to said Mackey, who retained the same, and had not returned the 175 to Batson and Currier found to belong to them, but converted them to his own use; and though Batson and Currier had, by reason of the premises, sustained damages, yet the said Mackey did not pay the same, contrary to the terms of the said bond, which the said sheriff therefore assigned to Batson and Currier, who then assigned the same, and all benefit, &c., to the plaintiffs.

There was also a count in trover for the 175 pieces of timber.

Pleas—1. *Non est factum.* 2. To first count, denial of assignment of bond by sheriff. 3. To first count, that Batson and Currier did not duly assign to plaintiff as required by statute. 4. To first count, that he did prosecute his suit with effect. 5. To first count, that the 175 pieces were unlawfully cut by Batson and Currier upon Brown's ungranted lands, and after action the Crown granted the said 175 pieces to defendant. 6. To first count, on equitable grounds, that the said 175 pieces grew on ungranted lands of the Crown, and a license was granted to defendant to cut timber thereon, vesting the same in him when so cut, and all those cut by others during the license, with power to seize the same: that during the said license Batson and Currier cut the said 175 pieces, when defendant brought replevin against them for said trees: that the Court in Term, after the trial and verdict alleged in the declaration, on motion by defendant to increase said verdict by said 175 pieces, decided that the description in the said license was insufficient to define the extent of the same; and therefore the 175 pieces were found by the said Court not to be defendants': that final judgment was afterwards entered in the said suit, but no return of the said timber was or could be adjudged to Batson and Currier; and because the said pieces were so unlawfully cut by Batson and Currier, within the area intended to be covered by the said

license, the same became the property of the Crown, of all which the plaintiff had notice; and afterwards the Crown granted the said 175 pieces to defendant, with full knowledge of the premises. 7. To first count, that as to $275 parcel of the moneys claimed, the cause of action arose out of contract, and was not assignable by delivery; and that before action and notice of assignment, Batson and Currier were indebted to defendant in $246 on a judgment still unpaid, &c. 8. To second count, not guilty. 9. To second count, not plaintiff's goods; 10. To second count, alleging the cutting of the 175 pieces as in fifth plea.

Replications, &c.: Joinder on 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, and 10th pleas.

2. Joinder on seventh plea.

3. To fifth plea. That defendant should not be allowed to plead the said plea, because that by the said judgment in the first count mentioned the 175 pieces were adjudged to belong to Batson and Currier, which judgment was still in force, and plaintiffs claimed through Batson and Currier.

2. To sixth. Same as the last.

2. To tenth plea. The same.

Rejoinders: 1. Joinder in replication to seventh plea. 2. To replication to 5th, 6th, and 10th pleas, that the defendant should not be allowed to plead the same, because the said judgment in the first count mentioned was in the said suit between defendant and Batson and Currier, and not defendant and the now plaintiffs, between whom and Batson and Currier no privity existed; and because the subject matter of the said pleas arose since the said judgment, and was not and could not be set up in the said suit, and the same could not estop the Crown, which owned the timber, and subsequently to the said judgment granted it to defendant, &c.

The cause was tried at the Fall Assizes in 1878, at Ottawa, by and before Morrison, J.A. The replevin bond sued on was put in and proved, also the assignment thereof mentioned in the declaration, made, pursuant to the Statute, to Batson and Currier. A chattel mortgage, dated Feb-

ruary, 27th, 1877, was put in and proved, made by Batson and Currier to the plaintiffs, of the timber which was afterwards replevied, for securing certain promissory notes endorsed and to be endorsed by the plaintiffs for the accommodation of Batson and Currier. An assignment, dated the 11th day of July, A.D. 1878, was put in and proved, by Batson and Currier to the plaintiffs, whereby, after reciting the said replevin bond, and the assignment thereof by the sheriff, and that the goods, chattels, and timber mentioned in the said bond, (although they were in the possession of Batson and Currier at the time of the commencement by the said Mackey of the suit in the said bond mentioned,) were, previously to the commencement of the said suit, for valuable consideration, assigned and conveyed by them to the plaintiffs, who had requested them to assign to the plaintiffs the said bond, which they had agreed so to do, said Batson and Currier did assign to the plaintiffs the said bond.

An exemplification of the judgment mentioned in the declaration was also put in, and it was admitted that 175 pieces of timber were taken out of the possession of Batson and Currier by the defendant under the writ of replevin, and delivered to the defendant by the sheriff, and that they were then in Quebec. It was proved that Batson had made an assignment in insolvency, but it was not proved when he had done so, or that it was before the assignment of the bond to the plaintiffs.

It was objected, as ground of nonsuit, that the replevin, bond assigned to the defendants in replevin was not assignable to other parties: that it was not a chose in action within the Act making choses in action assignable: that the plaintiff were mortgagees of it, and as such could not maintain their action. This objection was overruled.

It appeared that the defendant and Batson and Currier were the holders of adjoining timber limits: that there was a dispute between them about the boundary between their respective limits: that the defendant had replevied the 175 pieces of timber as having been cut on

his limits; and that he failed in his suit in respect of those pieces owing to the uncertainty in the description of his limits in the license for them. It was admitted that the 175 pieces were cut south of a line run by one Forrest under instructions from Russell, the Crown timber agent, who intended it for the northerly boundary of the defendant's limits and the southerly boundary of Batson & Currier's limits. The defendant put in a grant from the Crown to him, dated September 10th, 1878, of the 175 pieces of timber mentioned in the pleadings.

These letters patent were issued subject to the following condition, contained in a telegram from the Attorney General to the defendant's solicitor: "I have assented to assignment of Crown interest in timber to Mackey.

I, of course, expect you to admit that Batson and Currier's license was in force at time of cutting, disputing as you think fit its extent either in law or equity."

The learned Judge found as follows: "Many of the matters arising in this case I can satisfactorily dispose of without a regular argument, so I give no opinion as to the right of the plaintiffs to sustain this action, or upon the effect of the pleadings; and as the parties intend taking the opinion of the full Court, whatever my verdict may be, I shall enter a verdict for the defendant formally. I find Mr. Forrest ran a line according to instructions from the department defining the north line of defendant's limit: that the timber now in question was cut south of that line, and upon defendant's limits according to that boundary: that the timber seized and taken by the defendant was in cribs, and that in each of the cribs there were pieces of timber which had been cut within and south of Forrest's line: that such timber was generally of the largest size, or rather of the average size of Batson and Currier's: that said timber seized was kept separate and taken to Quebec, where it still remains unsold. If the Court should be of opinion that the plaintiff is entitled to recover for the 175 pieces, I assess the damages at the value put on the timber by the plaintiffs at $3543. I do not think, on the evidence, the plain-

tiffs are entitled to damages for the alleged diminished value of the intended raft, by seizing the ten cribs, as I find that the timber so taken, which is still in Quebec, did not, by its absence from the raft, appreciably depreciate the average value of the raft, as contended for by the plaintiffs. The evidence of the length and character of the 175 pieces, as well as the length and character of the other timber of the raft, is far from being clear; and assuming that the ten cribs contained the best timber, the average of the whole raft was not depreciated so as to affect the value of the timber in the raft. As to the alleged damages for the detention of the raft of two days when the cribs were seized by the sheriff, I find that Batson and Currier suffered no damage on account of delay. The raft was not ready to go; and also in each of the ten cribs there was timber belonging to the defendant, and which he recovered for in the replevin suit; and as Batson and Currier mixed his timber with their own, it would become necesary for the defendant to take out of the cribs such timber; and if they had broken up the cribs for that purpose, it would have created delay and expense to Batson and Currier in reconstructing the cribs for rafting. I find also that the plea of set-off was proved. The defendant has leave to move to enter a verdict for him for that amount, $275.27. The plaintiffs have also leave to move to enter a verdict for them for such amount as the Court may order."

November 27th, 1878, *Robinson*, Q. C., obtained a rule calling upon the defendant to shew cause why a verdict should not be entered for the plaintiffs for such sum and upon such issues as to the Court might seem right, pursuant to the Common Law Procedure Act.

February 13, 1879, *Bethune*, Q. C., shewed cause, citing *Bletcher* v. *Burn*, 25 U. C. R. 124; *Casselman* v. *Hersey*, 32 U. C. R. 333; *Attorney-General* v. *Price*, 15 Grant 304.

Robinson, Q. C., contra, referred to *Patterson* v. *Fuller*, 31 U. C. R. 323; R. S. O. ch. 116; *Robinson & Joseph's* Digest, "Replevin."

March 8, 1882. ARMOUR, J.—The primary cause of the litigation which has taken place respecting the one hundred and seventy five pieces of timber now in question, arose from the want of a proper description of the limits granted to Batson & Currier and to the defendant by their respective licenses from the Crown.

The license to Batson & Currier was of the earlier date, and would have been held void for uncertainty in the description of its limits, for the same reason that compelled us to hold the license to the defendants, the limits of which were bounded by the limits of the license to Batson & Currier, void for uncertainty.

If Batson & Currier had brought replevin against the defendant for timber alleged by them to have been cut by him on their limits, we would have been obliged to determine it against them, by reason of the infirmity of their license, just as we were obliged, in the replevin suit brought by the defendant against Batson & Currier for this timber alleged by him to have been cut by them on his limits, to determine it against him by reason of the infirmity of his license.

The timber in question was, I think, cut upon lands intended by the Crown to be within the limits of the defendant's license, and not to be within the limits of Batson and Currier's license; but I think also that Batson and Currier had good grounds for asserting and maintaining that the lands upon which it was cut were within their limits.

It is therefore eminently a case for an equitable disposition of the controversy, and I think that such a disposition can be made of it as will do complete justice between the parties.

It would be hard that the defendant should be deprived of the timber cut from lands intended to be within the limits of his license; but it would be much harder if, after Batson and Currier had cut this timber, and made it and drawn and transported it to where it was replevied, the defendant should be allowed to deprive Batson and

Currier of the cost of cutting, making, drawing, and transporting the timber, and appropriate the fruit of such their cost to his own use.

The replevin bond, after it was assigned by the sheriff to Batson and Currier, was, in my opinion, a debt and a chose in action assignable at law by any form of writing: that it was properly assigned to the plaintiffs: that at the time of action brought they had the beneficial interest in it; and that they had the right to receive the moneys thereby secured, and to give an effectual discharge for the same; and that the action was properly brought in their name.

Hostrawser v. *Robinson*, 23 C. P. 350, is obviously distinguishable, and does not affect the present case.

Under the plea in the replevin suit denying the property to be the plaintiffs, and the finding upon that plea, the then defendants were entitled to a judgment for a return of the 175 pieces of timber, and the judgment ought to have been so entered; and as the then plaintiff, the now defendant, entered that judgment as it is entered, we might, if it stood in the present plaintiffs' way in their action upon the replevin bond, direct it to be amended now; but I do not think that this is required.

One of the conditions of the replevin bond, upon which a breach has been assigned, is, that the now defendant should pay such damages as the said Benjamin Batson and Joseph Merrill Currier should sustain by the issuing of the writ of replevin, if the now defendant should fail to recover judgment in the suit.

The now defendant did fail to recover judgment in the replevin suit as to these 175 pieces of timber, and this condition was therefore broken, and Batson and Currier by reason thereof became entitled to recover such damages as they sustained in respect of these pieces of timber by the issuing of the writ of replevin.

The words, "by the issuing of the writ of replevin," I take to mean by the taking of the proceedings in replevin, and by the taking of the proceedings in replevin

the now defendant was enabled to and did take these pieces of timber from Batson and Currier, and the damages Batson and Currier thereby sustained was the loss of these pieces of timber, the value of which, as assessed by the learned Judge, was $3,543; and for this sum, less $275 $\frac{27}{100}$, the amount he found due upon the plea of set-off, I think the plaintiffs are entitled to a verdict.

I do not think that the grant made by the Crown to the defendant of these pieces of timber, made as it was after this action was commenced, could in any way affect the rights of the parties as they then existed, and it could not deprive the plaintiffs of the right to recover their damages above assessed against the defendant.

The Court has, however, always had the power, and has frequently exercised the right of staying proceedings upon replevin bonds upon such equitable terms as seemed just; and I think, as I have already said, that this a case in which that power and right ought to be exercised.

I think that if the defendant desires, and so elects within ten days, an account should be taken (unless the parties can agree as to the amount) of the cost to Batson & Currier of cutting, making, skidding, drawing, and transporting the said pieces of timber, that is, the whole cost of the said timber to them up to the time it was replevied, together with interest on such cost from the time it was incurred up to the time of payment hereinafter mentioned: that from the amount of such cost so found should be deducted the amounts pleaded by way of set-off, together with interest thereon; and that upon payment by the defendant of the balance found after such deduction, together with the costs of this suit, and of taking such account, immediately after the finding of such balance, all proceedings herein should be stayed.

I refer to *Patterson et al* v. *Fuller*, 31 U. C. R. 323; *Mulvaney* v. *Hopkins*, 13 U. C. R. 174.

HAGARTY, C. J., and CAMERON, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. PIPE.

By-law regulating width of tires—Unfair discrimination—Conviction.

A by-law of a town provided that no one should use any waggon, &c., upon any of the streets of the town for drawing brick, stones, &c., when the weight of the load should exceed 1,500 pounds, unless the tires of the wheels were of a specified width; but the by-law was not to apply to any waggon conveying lumber or goods from the mill or manufactory thereof into the town if distant more than two miles from the town limits, nor to any person passing through the town with vehicles loaded with the said articles.

Held, bad, as discriminating as against residents of the town in favour of others.

Held, also, that a conviction under such by-law was bad, for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour.

January 31, 1882. *Rose*, Q. C., obtained a rule *nisi* to quash the conviction in this case—which was for using a waggon of heavy draft in the public streets of Guelph, containing more than 1,500 lbs. weight, the tires on the wheels of which were less than three inches wide; said waggon not being laden with or in use for carrying garden or farm produce, or laden with lumber or goods, or used to convey same from the mill or place of manufacture, or distant therefrom more than two miles from the limits of Guelph, contrary to the by-law of the corporation of Guelph—on the following grounds:

1. The conviction was not warranted by the by-law.
2. Defendant not guilty of any offence under the by-law.
3. Said by-law was *ultra vires*.
4. Defendant being resident outside the limits of Guelph, the corporation had no power to pass a by-law to regulate the width of tires and wheels of a vehicle belonging to him.
5. The by-law unjustly discriminated in favour of certain persons and classes as against defendant and others.
6. By-law void as being in restraint of trade.
7. No evidence of the by-law, which had not been filed with the magistrate before the conviction.

The by-law is sufficiently set out in the judgment.

Rose, Q. C., supported the rule, contending that the by-law was bad for discriminating between different classes in the community; and also that it was *ultra vires* the corporation. He referred to *Jonas* v. *Gilbert*, 5 S. C. 356.

Bethune, Q. C., contra.

March 14, 1882. OSLER, J.—The Municipal Act, R.S.O. ch. 174, sec. 466, sub-sec. 54, enables the corporation of any city, town, or incorporated village, to pass by-laws "for regulating the conveyance of traffic in the public streets, and the width of the tires and wheels of all vehicles used for the conveyance of articles of burden, goods, wares or merchandize."

This clause empowers the corporation to protect the streets from injury caused by carrying thereon loads of great weight, or by the use of narrow wheeled vehicles, and they may do so either by providing that loads above a certain weight shall not be carried thereon, or that the weight of the load which may be carried shall be regulated by the diameter of the wheel and the width of the tire.

The by-law under which the conviction in question is made, provides generally that no one shall use, &c., any waggon, cart, dray, or other vehicle of heavy draught, upon any of the public streets of the town of Guelph for the purpose of drawing brick, sand, stone, iron, wood, coal, lumber, grain, merchandize, or articles of burden, when the weight of the load exceeds 1,500 pounds, unless, if the wheels are not less than three feet six inches in diameter, the tires upon such wheels are at least three inches in width; and if the wheels are less than three feet six inches in diameter, then the tires thereon shall be four inches in width.

Such a by-law is unobjectionable if it is made to apply equally to all persons who use the public streets in the manner forbidden by it.

The third clause provides that it shall not apply to any waggon laden with lumber or goods, and used for the purpose of conveying the same from the mill or place of manufacture thereof into the town, provided the mill or place

of manufacture thereof is distant more than two miles from the limits of the said town; nor to any person or persons passing through the town with vehicles loaded with the articles aforesaid, or any of them.

These exceptions discriminate as against residents of the municipality in favour, in one case, of persons bringing in lumber or goods from a mill or manufactory distant more than two miles from the limits of the town, and in the other in favour of persons passing through the town with vehicles loaded with any of the articles mentioned in the by-law; in other words, the by-law confers a particular privilege on such persons and exempts them from its operation. One man, being just outside the limits, may pass through the town to another place also just outside the limits, with a load of any weight and in a vehicle of any description; while another man, whose business does not require him to travel beyond the limits, may be fined for contravention of the by-law. One man, whose manufactory is within the town limits, or within the two mile radius, is subject to its provisions; while another, who lives beyond that radius, is not. A by-law so unequal in its applications is *ultra vires* of the corporation. They had no more power, in my opinion, to create such exceptions as I have referred to than they would have had to confine the operation of the by-law to a particular ward.

The case of *Jonas* v. *Gilbert*, reported in vol 5. Supreme Court Rep., p. 356, cited by Mr. Rose, is very much in point. A by-law of the city of St. John, passed under the authority of an Act which empowered the corporation to require a license to be taken out by persons carrying on any business, trade, or profession in that city, discriminated between residents and non-residents as to the amount payable for the license fee. The Court held the by-lay invalid on that ground. The by-law before me is invalid on the same principle, and the conviction founded upon it cannot stand. See also *Re Nash and McCracken*, 33 U. C. R. 181; *Regina* v. *Johnston*, 38 U. C. R. 549.

The conviction is also bad on two other grounds: (1)

Even assuming that the by-law is valid, the conviction does not shew that the defendant was not a person passing through the town, and therefore not within the by-law; and (2) imprisonment with hard labour is imposed in default of payment of the fine, &c. This, as is shewn in the well-considered case of *Regina* v. *Frawley*, 45 U. C. R. p. 229, is *ultra vires* of the local Legislature, by which the Act was passed which conferred the authority to make the by-law in question

Conviction quashed.



[QUEEN'S BENCH DIVISION.]

MONTEITH V. THE MERCHANTS' DESPATCH AND TRANSPORTATION COMPANY.

Carriers—Delivery at wrong destination—Measure of damages—Fall in market.

The defendants contracted with the plaintiff to carry a car-load of clover seed to Liverpool, and gave him a bill of lading therefor. While it was on the way, by a new contract its destination was changed to London, for delivery to a supposed customer of the plaintiff's, and a new bill of lading was given to the plaintiff; but, by a mistake of the defendants, the seed went by a line of steamships to Liverpool, and as soon as the mistake was discovered the defendants notified plaintiff. After great delay, which the learned Judge at the trial found to have been caused by the defendants, the seed reached London, and, the plaintiff's supposed customer having refused it, was sold at a reduced price, the market having fallen between the day when the seed should have been delivered in London and the day of sale. The learned Judge found a verdict for the plaintiff, and assessed as damages, in addition to freight from Liverpool to London, the difference in market price between the date at which the seed should have arrived in London, if it had been shipped by the right line, and the day it arrived there.

Held (CAMERON, J., dissenting), that the damages were properly assessed, the finding of fact being that the delay was caused by the defendants.

Per CAMERON, J.—The damages, which were the material result of the breach of contract to carry to London, were what it cost the plaintiff to have the goods taken to London, and a reasonable sum to compensate him for the expense, trouble, and correspondence occasioned by the seed having been sent to a wrong destination; and damages resulting from a fall in the market were not incident to the breach of the contract.

THIS action was brought by the plaintiff to recover damages from the defendants, for not delivering to the plaintiff 170 bags, or 26,774 pounds, of clover seed, at London, England, according to the terms of a bill of lading, bearing date, Waterford, January the 22nd, 1880, signed by one John Barr, agent of the defendants, within a reasonable time.

The case was tried at Toronto, on the 5th day of January, 1882, before Osler, J., without a jury, the jury during the trial having been dispensed with by consent of parties.

The action was commenced and issue joined before the Judicature Act, 1881, came into force, and the plaintiff's declaration contained three counts, as follows:—

1. That, in consideration that the plaintiff would deliver to defendants, as and being carriers of goods for hire, cer-

tain goods to be by defendants carried from Waterford, in the county of Norfolk, Ontario, to London, England, and there deliver them to the plaintiff, or his order, for reward to defendants, defendants promised plaintiff to carry the same from Waterford to London, aforesaid, and there deliver the same for plaintiff, or his order; and the plaintiff delivered the same to defendants, and defendants received same for the purpose and on the terms aforesaid, yet defendants did not carry the same for plaintiff from Waterford to London, and deliver the same to him, or his order, as aforesaid, whereby the plaintiff was deprived of the same for a long time, and the same were diminished in value.

The second count was the same in effect, only alleging the promise of defendants to have been to deliver the same according to the directions of the plaintiff within a reasonable time, and the breach, non-delivery within such reasonable time.

The third count was the same as the second, only alleging that the goods were 170 bags of clover seed of the value of $3,000, and, as a breach, that defendants negligently refused and neglected to deliver the same to plaintiff in London pursuant to plaintiff's directions, whereby he sustained damage to the amount of $2,000.

Pleas.—1. That plaintiff did not deliver to the defendants, nor did they receive from plaintiff said goods for the purpose and on the terms alleged.

2. That defendants did not promise as alleged.

3. To the second count, that they did deliver the goods within a reasonable time.

4. That after delivery of the goods by plaintiff to defendants, and while in transit to their destination, and at the port of Liverpool, defendants delivered the goods to plaintiff, and the plaintiff accepted same at Liverpool as and for and instead of a delivery at London, the place of destination.

5. By way of defence on equitable grounds, that the goods were delivered to defendants at Waterford to be

carried to Liverpool for reward to them: that said goods were shipped from Waterford in pursuance of the purpose for which they were delivered, and after they were so shipped plaintiff requested defendants to change the destination of said goods from Liverpool to London, and to cancel the bill of lading, and sign another bill of lading, mentioning London instead of Liverpool as the destination of the said goods; and plaintiff and defendants, then believing that said goods were at such a stage of their transit that their destination could be readily changed, without any additional reward or consideration, did promise the plaintiff so to change the destination of said goods, and did cancel the bill of lading and signature shewing the destination of said goods to be London; and defendants did, by all means in their power, endeavour so to change their destination, but failed so to do for the sole reason that said goods had then reached a stage in their transit which rendered a change of their destination impossible until they should reach Liverpool, of which defendants gave plaintiff notice so soon as they became aware thereof. Averment, that such last mentioned promise and such last mentioned bill of lading, besides being made and signed without any consideration, were made and signed under a mistake mutual to plaintiff and defendants, they believing that said goods were then at a stage in their transit at which their destination could be readily changed by defendants, when the fact was otherwise; and other than aforesaid there never was any promise by defendants, or any agreement between plaintiff and defendants, respecting the carriage of the said goods; and defendants did, in accordance with the first mentioned promise, safely and securely carry the said goods to Liverpool aforesaid within a reasonable time, and then delivered the same to the plaintiff, and the plaintiff accepted and received said goods from defendants at Liverpool as aforesaid. Averment, that said promise so to change the destination of said goods should not, nor should said bill of lading shewing said destination to be London, under the circumstances, be held binding

upon defendants, and the last mentioned bill of lading should be ordered to be delivered up to be cancelled.

Issue.

At the trial the following appeared to be the undisputed and proved facts. The defendants were a Transportation Company, with their head office at Cleveland, in the State of Ohio, and carried on the business of carriers, not by meaus of conveyances or vessels of their own, but by means of the different railways in the Province of Ontario and the United States, and by different lines of steamships from the United States to Great Britain. Goods shipped from any point in said Province, through the United States, to any port or point in Great Britain or elsewhere beyond the United States, required to pass through the States in bond; and goods entering the States by the International Bridge, across the Niagara river, intended to pass through in bond, were put in bond at Black Rock, in the State of New York. Defendants had agents at various places in Ontario called foreign agents. On the 21st of January, 1880, the plaintiff caused to be delivered to one R. T. Randall, as an agent of the company at Waterford, in the county of Norfolk, in Ontario, 170 bags of clover seed, containing 26,774 pounds, to be shipped by defendants to Liverpool in England, and there to be delivered to the plaintiff or his assigns, he or they paying freight on landing of the seed. The said Randall delivered to plaintiff according to the usual custom two copies or duplicate bills of lading, dated 21st January, 1880, whereby defendants undertook to carry said seed to Liverpool, and there deliver the same to plaintiff or his assigns; the carriage from New York being by the Inman line of steamers. After the seed had been so delivered to defendants at Waterford, the plaintiff who resided in and carried on business at Toronto, applied to John Barr, described in the bills of lading, issued by the defendants, as "a foreign freight agent," to ascertain if the destination of the seed could then be changed to London; and Barr, after telegraphing to an agent of the defendants at Black Rock, to ascertain whether the seed had passed that point,

and learning that it had not, granted a fresh bill of lading, dated 22nd January, 1880, whereby defendants undertook to carry the seed to London, the carriage being by the Merchants' Despatch and Transportation Company, and the Anchor Line of Steamships; and the freight being stated to be 76¼ cents instead of 70½ cents per hundred pounds. These bills were in form identical with the previous bills, except in the particulars of place of destination, rate of freight, and date. At the time of the delivery to plaintiff of the new bills of lading, the former bills were surrendered and delivered up to the agent Barr, who at once informed the agent at Black Rock, and W. H. McIlhanny at New York, the latter being described on the bill of lading as defendants "General Foreign Freight Agent," New York, of the change. The agent at Black Rock, one J. J. Barton, intended to make the proper alteration to bond the seed to London, instead of Liverpool, but by inadvertence left the destination Liverpool, as it was under the former bill, but made the shipment to the care of W. Monteith, the plaintiff, London. It further appeared that the practice was for the shipper to send an invoice of the goods, shewing their value, along with the goods, which invoice, with a third copy of the bill of lading, the carrier of the goods held. The bond furnished to the United States custom authorities was based upon the invoice. Defendants appeared by their course of dealing to do all that was requisite to the passing of the goods delivered to them in bond through the States —the shipper not concerning himself with the bonding or the transit of the goods in any way after their delivery to defendants. The Anchor Line was the line employed in the shipment of goods to London, and the Inman Line to Liverpool. It appeared that goods once placed in bond had to be carried to the destination indicated—at least no change in this respect could be made withot delay and trouble. When the plaintiff received from Barr, defendants' agent, at Toronto, the second set of bills of lading he drew upon Messrs. Hearn & Brother, of Ipswich, for the value of 170 bags of seed, under the supposition that they

had become the purchasers of the seed, at forty-six shillings per 112 pounds, and it was to meet their request the destination of the consignment was changed to London. The plaintiff discounted the draft, so drawn by him, with the Merchants' Bank, endorsing the bill of lading to the bank as security for the acceptance and payment of the draft.

The agent of the company (McIlhanny) at New York, seeing that the seed came through bonded for shipment to Liverpool, sent it forward according to the terms of the first bills of lading, by the Inman Line, and it reached Liverpool in due time. He also immediately notified the agent Barr of the mistake and shipment to Liverpool, and requested him to notify the plaintiff; and about the 27th and 28th January, while the seed was still at sea, Barr called at the plaintiff's office to inform him of what had been done and to request him to accept delivery at Liverpool. Plaintiff was absent, and the matter was explained to his clerk. Sometime between 28th January and 4th February Barr saw the plaintiff, and plaintiff's evidence of what took place between them was: "I said to him, that is unfortunate, and I said if the seed can be sold in Liverpool without any loss I don't mind, but if there is any trouble or any loss in the matter, I shall certainly hold the company responsible." Barr's account did not substantially differ from the plaintiff's.

The draft of plaintiff on the supposed purchaser was returned about 13th February, protested for non-acceptance by the agents in London of the Merchants' Bank, the Clydesdale Bank; and up to this time the plaintiff had not informed the bank of the fact that the seed had been shipped to Liverpool, nor had he taken any steps to have the seed accepted at Liverpool, or to advise the holders of the bill of exchange and bill of lading of the change that had taken place in the destination of the seed. After being advised by the Merchants' Bank of the protest of the bill of exchange for non-acceptance he authorized the bank to send a cablegram to the Clydesdale Bank to have the

seed put in the hands of plaintiff's agents in London, Messrs. Taylor & Co. He then wrote to Barr, under date 22nd March, 1880, as follows: "In reference to the car of clover seed shipped on the 22nd January to Liverpool instead of London, although billed for London, my buyers refused to take delivery, in consequence of which the car (meaning seed) is still unsold, although my bankers have allowed me to put it into one of my own correspondents' hands for sale, that the very best may be done under the circumstances in disposing of it. At the same time, as intimated to you at the time, must hold you responsible for whatever loss there may be on the same."

This letter Barr communicated to McIlhanny, who replied on the 23rd March, 1880, and the reply was at once made known to the plaintiff, as follows: * * "This is the way we get served by trying to accommodate shippers in changing consignments. It is simply nonsense. There is no reason why the clover seed is not worth as much in Liverpool as in London, and no reason why the buyer should not have taken delivery there instead of throwing it on the hands of the shipper, more especially as it was sold in the first place and shipped as requested by buyer to Liverpool, and then to accommodate him changed to London. We also object to having property put into hands of other parties to sell for our account. We always get unmercifully stuck in such transactions. I have therefore written our agents ,Thomas Meadows & Co., to look after it for us. You might intimate this to Monteith, and request him to advise his Liverpool correspondents that they can confer with Meadows & Co., and turn property over to them, if not already sold." This reference to the purchaser, having in the first place requested the shipment to Liverpool, was by reason of the plaintiff having represented to the agent Barr, as a reason why he wished the change made, that the purchaser had requested it. Plaintiff's evidence as to this, was as follows: "I shipped nearly all my clover seed that season with the defendants, and this car load I arranged with Mr. Barr, the agent for the company in

Toronto, to ship from Waterford to Liverpool, England. Afterwards I gave Mr. Barr other instructions. On the 20th January I arranged with him to ship the clover seed to Liverpool. On the 1st of January, I received a telegram from Ipswich, from Hearn Brothers of Ipswich, to ship it to London."

The seed arrived in Liverpool by Steamer *Montreal*, of the Inman line, on the 9th February, 1880. If shipped in due course by the Anchor Line it would have arrived in London on the 12th February. No person claiming the seed on behalf of the consignee on its arrival, the Inman Steamship Company advertised for a consignee. Afterwards Messrs. Taylor & Co., on behalf of plaintiff, and with the consent of the Clydesdale bank, then holding the bill of lading on behalf of the Merchants bank, applied to the Inman Company for the seed, but that company declined to give it up on the bill of lading annexed to the bill of exchange, as that was a bill of lading by the Anchor Line, without the authority of the latter company. This was obtained through Meadows & Co., about the 15th day of March, which was prior in point of time to the letter of McIlhanny to Barr, communicated to plaintiff as above mentioned. A difficulty was then raised to the seed being removed by the officer of customs at Liverpool, on the ground that the bags containing the seed were branded "Cornwall," from which it was inferred there was an intention to commit a fraud in passing the seed off as grown in England. The objection to the removal was withdrawn in two or three days, but the seed did not reach London till the 23rd March. When Taylor & Co. accepted the seed on the 15th March, they did so without prejudice to any right or claim of plaintiff against defendants. After Taylor & Co. were advised by the plaintiff of the letter of McIlhanny of the 23rd March, above set out, they applied to Meadows & Co. to pay the bill of exchange held by the Clydesdale Bank, and to take the seed, but this Meadows & Co. refused to do. When the second set of bills of lading were given by Barr to plaintiff the seed had not in

fact been sold. Hearn, in his evidence taken under commission, swore that his firm had not bought or agreed to buy the 170 bags of clover seed in question, and had refused acceptance of the draft made by plaintiff on them because they had not bought, and by reason of the falling market. Plaintiff himself in his evidence also stated there was no actual sale.

There was a fall in the market price of clover in England from January, and the seed was not sold till the 2nd of July, when it sold for thirty-seven shillings per hundred weight of 112 pounds. The evidence was not very precise as to the actual fall in price of seed at any stated period.

Taylor, who was examined as a witness for the plaintiff, stated that the price ranged from forty-four to forty-six, between the 10th and end of February, and thirty-six to thirty-nine from the beginning of March to the middle of April; and Goodwin M. Shaw, a witness for defendants, put it from thirty-seven and six to forty-four during March. His firm had not imported any earlier than March, in 1880, and he could not give the prices ruling in February. In April they ruled from thirty-three shillings and six pence, to thirty-eight shillings and six pence. By the end of April the sowing trade is over. The agent of plaintiff, Taylor, in his evidence, in answer to the question, why he did not sell the seed sooner, said he had no chance, not being in a position to do so, without first submitting it, meaning any offer, to the bank.

At the close of plaintiff's case counsel for defendants objected that the plaintiff had not made out a case, on the ground that the goods having been shipped at Waterford by an agent of the defendants there, there was no authority in Barr, the agent at Toronto, to change a bill of lading given by another agent. From his position it would be implied that he had power to receive goods and issue bills of lading, but no other power could be inferred, and none was proved: that there was no proof of express authority to alter a bill of lading granted by the company; but if the defendants could be held liable there could be no

damages, because the mistake, if there was any, was at once communicated to the plaintiff while the seed was on the ocean in transit, and the plaintiff did not put defendants at arms length and insist upon a delivery at London, but said it was all the same to him if the consignee, the man to whom he had sold it, would take delivery at Liverpool: that he was his own consignee, had not made any sale, and had full power and authority over the seed, except so far as affected by the hypothecation to the bank.

The learned Judge decided to hear the defence, and the effect of the evidence on both sides was as given above. Neither party asked Barr or otherwise than as it might be inferred from his position and the correspondence of McIlhanny and Barton, the agent at Black Rock, what his actual authority was.

After consideration the learned Judge gave the following judgment:

There are three questions in the case :—First. Was there a contract? Second. Was it broken? Third. What damage has the plaintiff sustained by the breach?

As to the first, I think there is evidence on which I ought to find that Barr, the defendants' agent in Toronto, had authority to issue the substituted bill of lading, by which the destination of the goods was to be changed from Liverpool to London. The defendants are a corporation who carry on business here through agents at different points. The extent of the power of these agents has not been shewn; but Barr did agree with the plaintiff to change the destination of goods which had been shipped through another agent of the defendants, and received back the bills of lading which had been given by that agent. He advised the company's agent at Black Rock, near Buffalo, the point where the goods were to be bonded to New York, and that agent believed he had complied with his instructions, and had done all that was necessary to effect the change. There is no doubt that Barr believed that he had authority to do as he did, and that he believed and led the plaintiff to believe that the change of destination could be effectually accomplished. This was also the belief of the agent at Black Rock, who by some error or oversight—for which the plaintiff is not responsible—neglected fully to carry out his instructions, though he was under the impression that he had done so. It is not proved as a fact, if that would make any difference, that the goods had passed Black Rock on their way to New York, before the agent there, Barton, had received his instructions. Thereafter there was a good deal of correspondence between Barr and Barton, and between the former and the general agent of the defendants at New York. There is

no repudiation of Barr's action, or the least suggestion that he was not acting within the scope of his authority. I think after that correspondence the onus is on the defendants to shew that he had not authority, and they have not asked their witnesses a question on the subject. The defendants have, therefore, issued a bill of lading, by which they contracted to deliver the plaintiff's goods to him at London, and instead of doing so they caused them to be carried by the Inman Line, their agents for the purpose, to Liverpool. It appears to me that, having made this mistake, it was the defendants' duty to do what was necessary to enable them to have the goods conveyed to London. The plaintiff could not get them at Liverpool on the bill of lading he had received, and although much needless delay appears to have been caused by the omission of both parties to take the speediest course for getting possession in Liverpool, viz., by the defendants obtaining from the plaintiff and forwarding a fresh invoice or order for their delivery or transfer there, yet I think it lay upon the defendants to obtain whatever was necessary in that respect to relieve them from the consequences of their breach of contract. The plaintiff did not obtain possession of the goods until the 22nd of March, having been obliged to pay the freight or carriage from Liverpool to London, where they ought to have been delivered on the 12th February. He is entitled to damages, which I estimate as follows :—

The difference in market price, between February and March, was six shillings per 112 pounds.

2,677 pounds at 44 shillings per 112 pounds	$ 2559	50
Deduct from that the price at which the clover seed was sold—38 shillings per 112 pounds....	2210	44
Balance	$ 349	06
Freight from Liverpoal to London	$ 105	90
Interest on $2,559.50, from 12th February to 22nd March—one month and ten days	16	50
Interest on $454.96, from 22nd March, 1880, to 4th January, 1882, say.....	50	00
Total.....	$ 521	46

I direct judgment to be entered for the plaintiff for this amount, with costs of suit, after the fifth day of next Hilary Sittings.

I at first thought I might include in the sum to be awarded for damages $83.60, expended by the plaintiff for cablegrams, in respect of the goods, but, on reflection, I do not see on what principle he is entitled to it.

The defendant gave notice of motion to set aside the judgment directed to be entered by the learned Judge, and to enter judgment for the defendants, or to reduce the amount of damages, on the grounds taken at the trial.

February 17, 1882. *McMichael*, Q. C., and *McGregor* shewed cause. (1) As to the authority of the agent to change the bill of lading, *Erb* v. *Great Western R. W. Co.*, 42 U. C. R. 90, does not apply. In it there was no delivery to the company of the goods described in the bill of lading. Here there was. The goods had been delivered to the company, and a bill of lading given therefor. Plaintiff went to the Toronto agent and arranged with him; then sent his clerk to the station where the goods were, and delivered them to the station agent of the company, taking from him the bill of lading on behalf of defendants, which the station-agent was authorized to grant. The Toronto agent cancelled that bill of lading, substituting another exactly similar, except as to destination and amount of freight. The destination was changed from Liverpool to London, and the amount of freight was changed from the through rate to Liverpool to that of London. This bill the plaintiff received signed by the company's agent, and had it been delivered at London, the plaintiff would have been bound by the contract. By it the company contracted to deliver to the plaintiff at London the goods mentioned in the bill. There is no proof that Barr's agency was limited, or that he was acting beyond the scope of his powers, and the company never repudiated his act, but treated it as within his powers. That contract the company never fulfilled. They did not do so in either bill of lading, for they never delivered either in London or Liverpool. If the agent undertook more than he could perform, or if there were difficulties in the customs regulations on the other side, the plaintiff had nothing to do with them. In their contract they undertook to discharge all the duties of transfer and carriage of the goods and passing them through the customs. They are more in the capacity of express than of common carriers. The contract to deliver to the plaintiff was broken, for it was their duty when the goods arrived in England to deliver them to the plaintiff, and not merely leave them with the ship company, whom they had employed to carry across the sea; and it was not the plaintiff's duty to hunt up

that company and procure delivery from them. All the delay after the arrival in England, in consequence of plaintiff's inability to procure the goods, is chargeable to them; and none the less so, because the plaintiff did his utmost to lessen the damage by the efforts made by him to procure them. Their contract was to deliver within a reasonable, not merely at any, time, and all delay after a reasonable time had elapsed should be considered. The difference between the value of the goods in plaintiff's hands, had he received them in a reasonable time, and the time when they were received, is the measure of damage. The fact that they forbid the plaintiff employing his agent to sell the goods and insisted on delivery to their own agents, though they afterwards refused to take them, makes them liable for any delay caused by plaintiff's waiting and not taking active means to sell the goods till they had refused to receive them.

McCarthy, Q. C., contra. The Toronto agent had no authority to change the bill of lading, and if he had the liability is admitted, but the damage should only be the difference in the freight from Liverpool to London. He cited *Schroeder* v. *Hudson River R. W. Co.*, 5 Duer 55; *Thurman* v. *Wells et al*, 18 Barb. 500.

March 18th, 1882. CAMERON, J.—I am of opinion that, whether Barr had by virtue of his position authority to bind the defendants by changing the destination of the seed after it had been received and shipped by another agent upon an agreement fully entered into so as to bind the defendants or not, what he did was not disapproved of or repudiated by the general freight agent of the defendants, W. H. McIlhanny, in New York, who would, from his position, have authority to bind the defendants in a matter such as this, which would be within the ordinary powers of a general agent; but, on the contrary, the said McIlhanny, having been advised of the change, would have carried it into effect if the seed had not reached New York bonded to Liverpool. His letter to Barr on the subject,

of the 23rd March, fully adopts what Barr had done, as therein he says, "This is the way we get served by trying to accommodate shippers in changing consignments." And in the same letter he further shews that the company were not alleging that they had performed their contract, by requesting the plaintiff "to advise his Liverpool correspondents that they confer with Meadows & Co., and turn the property over to them if not already sold;" whereas, if he had been repudiating Barr's authority, he would simply have asserted that the defendants had performed their contract by carrying the seed to Liverpool. The question of the authority of an agent, where such authority is not contained in some written document or appointment, is clearly one of fact, and there was ample evidence in this case to warrant the finding of the learned Judge.

Technically, on the pleadings, the defendants may be entitled to succeed, as the plaintiff has alleged that the seed was delivered to the defendants at Waterford, to be carried from there to London, and the defendants have in terms denied this by their pleading. The evidence shows that the seed was *delivered at Waterford to be carried to Liverpool, and no seed was actually delivered to the defendants to be carried to London*; so had there been no ratification of Barr's act by McIlhanny, Barr would not, by virtue of any authority shown to have been vested in him, have had power to bind the company by any contract when he himself did not receive the goods, an agent of a carrier not having merely by his employment authority to contract for the carriage of goods by his employer, unless the goods are actually delivered to him: *Hubbersty* v. *Ward*, 8 8 Ex. 330; *Oliver* v. *Great Western R. W. Co.*, 28 C. P. 143; *Erb* v. *Great Western R. W. Co.*, 42 U. C. R. 90, affirmed on appeal to the Supreme Court, 6 S. C. 179. The plaintiff's cause of action is rather that, having delivered the seed to the defendants at Waterford, to be carried to Liverpool, while in transit, and in consideration of an increased rate of freight, the defendants undertook to carry it to London, instead of Liverpool, and it is this contract that McIlhanny,

the general freight agent of the company, ratified. Under the Judicature Act it is not the form in which the case is presented that should be considered, but the substantial question in dispute between the parties; and so although the defendants may, on the issue raised by the first plea, be entitled to succeed, the real question is, have they performed the contract they really entered into, to carry the seed of the plaintiff in their possession to London, and if not, what is the damage that has actually flowed to the plaintiff from their neglect to do so? Any amendment necessary to present this question in pleading should be made. It is clear the defendants did not carry the seed to London, and the plaintiff is entitled to judgment for the breach of their contract for such amount of damages as naturally flow from the breach, or which may be said to have been in the actual contemplation of the parties.

The authorities on the measure of damages are not all reconcilable. In *The Great Western Railway Co.*, appellants, and *Redmayne*, respondent, L. R. 1 C P. 329, it was held, in the absence of notice to the defendants of the object for which the goods were sent, where the plaintiff had sent goods by the defendants' railway from Manchester to his traveller at Cardiff, the delivery of which was delayed until after the traveller had left Cardiff, and plaintiff lost the profits that he would have derived from a sale at Cardiff, the plaintiff could not recover such loss of profits as damages for the delay. In *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 583, and in Appeal, 8 C. P. 131, with a good deal of diversity of opinion among the Judges upon the effect of the notice in that case to the defendants, it was held the plaintiff was not entitled to recover for delay in delivery of goods, the difference between the price a purchaser agreed to pay, and what they had to be sold at by reason of the purchaser's refusal to accept them owing to the carrier's delay. Kelly, C. B., Blackburn, J., Mellor, J., Martin, B., and Cleasby, B., held—Lush, J., and Pigott, B., dissenting—that the damage was not such as might reasonably be considered as arising naturally from the

defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of the parties at the time when they made the contract. The plaintiffs had entered into a contract to supply a firm in London with military shoes at 4s. per pair, to be delivered by the 3rd February. The shoes were delivered to the defendants in time for their delivery in London in the usual course in the evening of that day. The defendants were notified that the plaintiffs were under contract to deliver the shoes on the 3rd February, and if not so delivered they would be thrown on their hands, but they were not informed there was anything exceptional in the character of the contract. The shoes were not delivered in London until the 4th February, and were in consequence not accepted by the consignees. The plaintiffs were obliged to sell them at 2s. 9d., per pair, which, owing to the cessation of the French and Prussian war, was the best price apart from the contract that could have been obtained for them; that is, that was the full market value. The rule as to the measure of damages was nevertheless assumed to be the difference between the market price at the time of actual delivery, and the time at which delivery should have been made, and this seems in several cases to be taken as the legal and ordinary measure of damages where a carrier, at all events a carrier by land, fails to deliver the goods in due time. It was so laid down in *Wilson* v. *Lancashire and Yorkshire Railway Co.*, 9 C. B. N. S. 632, and in the case referred to of the *Great Western Railway Co.* v. *Redmayne*. I confess to a difficulty in understanding why, on principle, if I employ a carrier to deliver for me at a particular place at a particular time an article, which, if so, delivered, is worth to me $1000, and by reason of its not reaching the place of delivery till a day or ten days later, it is only worth to me $500, my right to recover the difference in value exists if the decrease in value is the result of a sudden fall in the market value of the article; but I am not so entitled where the loss to me arises from the refusal of the buyer at the agreed price of $1000 to take it by reason of its non-delivery at the appointed time.

Byles, J., in the case of *Wilson* v. *The Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 646, thus presents his view of the principle: "The difficulty, however, is to distinguish between loss of profits and the difference between the exchangeable value of the goods when received by the carriers, or rather when they ought to have been delivered by them, and where they were actually delivered. Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods, whereas diminution in exchangeable value is only something subtracted from the inherent value of the articles themselves. When thoroughly considered, this, I think, will be found to be a sound distinction. It is admitted that deterioration in quality is to be taken into account in estimating the damage the plaintiff has sustained: it is admitted also that loss or diminution in the quantity is to be taken into account; and I do not see why a loss in the exchangeable value of the goods should not also be taken into account." Mr. Justice Willes said, "It appears to me that the damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand, and less capable of being applied usefully by the plaintiff, is the ordinary, natural, and immediate consequence of the delay, for which the carrier is answerable."

The goods in that case were cloth, which the plaintiff, a cap manufacturer, made up into caps, and owing to the carriers' delay the season for disposing of such caps by the travellers had passed. The delay was a month. I can fully realize the force of the reasoning with reference to depreciation in the quality of the thing carried, where the delay acts as a deteriorater of the thing itself; but I do not see how the thing itself is hurt or improved by a fall or rise in the market—that is a matter depending upon circumstances over which neither the shipper nor the carrier has any control. The delay instead of being prejudicial might be highly beneficial; as, for instance, when the price has gone up. Since the decision in *Wilson* v. *The Lancashire and Yorkshire Railway Co.* the law has been assumed to

be well settled, that the carrier of goods by land is liable for a fall in the market, and his contract must be taken to be, "I will carry the goods and deliver them by a certain time, or within a reasonable time, and if I do not I will pay you the difference between the market price of the goods on the day they should be delivered, and the day they are delivered, if the latter is less than the former." But whether the law has been actually so settled in the broad way stated will, on examination of the cases, by no means appear free from doubt. There would, at all events, seem to be a distinction in this respect between carriage by land and carriage by a long sea voyage, as this was the decision of the Court of Appeal in "The Parana," L. R. 2 P. D. 118, overruling the judgment of Sir Robert Phillimore in the Admiralty Court, L. R. 1 P. D. 452. Mellish, L. J., in delivering the judgment of the Court said, page 121: "But besides the cases of consignment of goods to be sold at a particular market, cases were cited—and it was on them that the Court below proceeded—of the carriage of goods by railway, where damages for loss on account of a fall in the market have been recovered. It was said that there can be no difference between the carriage of goods by railway and the carriage of goods by sea, but it appears to me there may be a very material difference between the two cases. When goods are conveyed by railway, if they are conveyed for the purpose of sale, it is usually for the purpose of immediate sale; and if the cases are examined, I think it will be found that the Courts treated them as if the goods were consigned for the purpose of immediate sale." And after reviewing the cases he adds, at page 123: "The difference between cases of that kind and cases of the carriage of good for a long distance by sea seems to me to be very obvious. In order that damages may be recovered, we must come to two conclusions—first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and

that that was known to the carrier at the time when the bills of lading were signed." The learned Judge then proceeds to give reasons why either of those conclusions would be improbable in that case.

The present case is one of mixed carriage, part being by land and part by sea, and I assume a voyage across the Atlantic may in one sense be deemed a long sea voyage, though with the steamers now in use it is really not a longer voyage than one by rail across this continent from ocean to ocean. The uncertainty of a sea voyage, however, is so much greater than one by rail, that the distinction laid down by Sir George Mellish may very properly, and without detriment to commercial interests, be held to apply to the contract in this case. I shall refer to several authorities to see whether or not the fall in the market value of an article is in fact a measure of damage, where a carrier has failed to perform his contract to carry by a specified time, or in due course, or, which is the same thing, within a reasonable time, no matter what may be the article carried.

In the case of the "Parana," Lord Justice Mellish, in reference to the cases in which it has been so decided, said, p. 121: "If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, and by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season, when they are sold at a higher price than they are at other times; and if, by reason of breach of contract, they do not arrive in time, damages for loss of market may be recovered. Or, if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum."

He adopts the view of the principle on which damages are awarded, stated by Cockburn, L. C. J., in *Simpson* v. *London and North Western R. W. Co.*, 1 Q. B. D. 277, thus:

"The law, as it is found in the reported cases, has fluctuated; but the principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." But, while adopting it, he held it was not applicable to the case of a contract to carry goods for a long distance by sea; and, taken in connection with the cases put by him, in which loss of value from a fall in market may be recovered, it seems clear to me in his opinion such damages would not be applicable to the breach of the contract that occurred in the present case. The parties had not in contemplation a sale in future, a sale to be made, but a sale actually made; and that sale, the object in contemplation of the parties, failed through the neglect of the defendants to perform their contract. The consequences in contemplation of the parties ought to be assumed to be the loss of the benefit of the sale that had been made; but, as the terms of that sale had not been specially notified to the defendants, according to the decision in *Horne* v. *Midland Railway Co.*, L. R. 8 C. P. 131, that loss does not form a proper measure of the damages. In *Simpson* v. *London and North-Western Railway Co.*, in which Chief Justice Cockburn stated the law as I have above quoted it, no measure of damages was laid down. It was merely held, under the circumstances of that case, the plaintiff was not confined to the actual expenses he was out of pocket. It cannot be regarded as an authority that profits *qua* profits are recoverable against a carrier for failure to carry goods, and as overruling the decisions to the contrary.

In *Wilson* v. *The Lancashire and Yorkshire Railway Co.*, already quoted from 9 C. B. N. S. 641, Williams, J., expresses himself to the following effect: "As I collect from the report of the learned Judge in this case, the jury appealed to him for information as to how they were to assess the damages,

and were informed by him that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time. Acting upon that information, the jury found a verdict for the plaintiff, with £80 damages. Now, if by the expression "loss of the season," the jury were induced, in assessing the damages, to take into their consideration the profits which the plaintiff might have made by the manufacture and sale of caps if the material had reached his hands in due time, we are all of opinion that they would have misconceived the proper principle on which the damages were to be estimated, and that there would be a failure of justice if the verdict were allowed to stand. But if we are to assume the meaning of loss of the season to be that the goods, by reason of their not having been delivered in due time, had become lessened in value; that is, if in consequence of the delay they had become of less value to the plaintiff, because the articles to be made up would be less marketable, as the time for finding customers for them had gone by, and so the goods were left in the plaintiff's hands deteriorated or diminished in value, then we do not think there was any mistake in point of law in the direction of the learned Judge. Two questions of law were raised during the argument on the part of the defendants. The first was, whether in a case like this, of an action against a common carrier for negligence in not delivering goods intrusted to him within a reasonable time, the consignee has a right to claim, in the shape of damages, the profit he would have made upon the sale of them if they had been delivered in proper time. We are all of opinion that he is not. Then comes the other question, whether he is entitled to recover the difference between the value of the goods to him if they had been delivered in proper time, and their value at the time when they were actually delivered. I am of opinion that the consignee is entitled to recover such difference in value. If it were otherwise, great injustice would be done. For instance, to put a familiar case, sup-

pose a tradesman at a fashionable watering place sends an order to a warehouseman in London for a quantity of ribbons, or other fancy goods, and they are delivered to a carrier so that they ought to reach him at the beginning of the season, and, through the negligence of the carrier, their delivery is delayed until the season is over, so that the opportunity of offering them for sale is lost, and, as their novelty or fashion are gone, they remain on hand materially diminished in value, would it not be unjust if the carrier were not made liable in damages for the loss which thus resulted from his negligence? Applying that to the present case, it appears from the plaintiff's evidence that if the cloth in question had been delivered in due course, so as to enable him to make it up into caps for the season, its value to him would have been about £230; but that, by reason of the time which had been suffered to elapse before the cloth was delivered, it was worth only £130. That evidence was left to the jury, and they must have taken it into their consideration. It was evidence for the jury that the defendants, by reason of their negligence, delivered the cloth to the plaintiff at a time when its value was less by £100 than it would have been if they had been guilty of no negligence. But it is contended on the part of the defendants that, whatever may be the dictates of justice in the matter, such damages cannot be awarded to the plaintiff without violating the rule laid down by the Court of Exchequer, in *Hudley* v. *Baxendale*, 9 Ex. 341. It seems to me, however, we shall not violate that rule if we hold that the plaintiff is entitled to recover damages in respect of such deterioration in value. It is a damage which fairly and naturally, in the usual course of things, may be said to arise from the defendants' negligence; for if the goods are not delivered at the time they are expected the delay must necessarily superinduce a considerable diminution in their value in the plaintiff's hands."

In the same case, Willes, J., said: "It appears to me that the damage in respect of the goods being depreciated in value

in consequence of theirarrival at a time when they were less in demand and less capableof being applied usefully by the plaintiff, is the ordinary, natural, and immediate consequence of the delay, for which the carrier is answerable. I think it may be put as matter of ordinary experience that amongst the causes of the fluctuations in price to which merchandise is subject is the fact that certain goods are more in demand at one time than at another, in consequence of their being more capable of being disposed of upon advantageous terms. It appears to me that that is matter of ordinary experience and knowledge, and that a loss thus arising may well be said to be the direct and immediate consequence of an unreasonable delay in the carriage and delivery of goods."

Mr. Justice Byles concurred, and I have given above an extract from his judgment. Keating, J., said: "There is undoubtedly some difficulty in applying the rule in *Hadley* v. *Baxendale* to each particular case. It is agreed the plaintiff cannot recover any damages for loss of profits. But it was contended by Mr. James that the jury could not give more than nominal damages without giving profits. I must confess I at first felt some difficulty in excluding the loss of profits from the calculation when considering the deterioration in value. But that difficulty has been removed by what has fallen from the other members of the Court; and I agree with them that, in estimating the damages the plaintiff has sustained from the delay in delivering the goods, the jury were justified and indeed bound to take into their consideration the difference between their exchangeable value at the time they arrived, and their value at the time they ought to have arrived. In truth, to come to the conclusion to which Mr. James's argument would lead us, viz., that the plaintiff was only entitled to nominal damages, would be applying the rule in *Hadley* v. *Baxendale* to establish an absurdity. It would in effect come to this, that a carrier would be liable for the consequences of his negligence where the result was a deterioration in the quality or quantity of the

article, and yet would be liable only to nominal damages for any other description of injury. It seems to me the rule in *Hadley Baxendale* never was intended to lead to any such practical absurdity and injustice, and that according to that rule the true measure of damages in a case like the present is the difference in the exchangeable value of the article."

I have made these long extracts from the judgments delivered in the case by the several Judges, with the view of presenting the reasoning on which the principle is said to have been established, that the fall in the market value of the article to be carried between the day or time it should have been delivered and the time of actual delivery, is at all events one of the elements of the measure of damages. This is not a case where, as put by Lord Justice Mellish, *the season has been lost.*

In *Smeed* v. *Ford*, 1 E. & E. 602, it was held damages for loss of market were not recoverable where the defendant failed in his contract to deliver to the plaintiff, a farmer, a threshing machine within three weeks, he having knowledge that the plaintiff threshed his wheat in the field, and sent it thence direct to market. At the end of the three weeks the wheat was ready in the field for threshing, but the machine had not been delivered. The plaintiff remonstrated with the defendant at his delay, and the defendant assured him it (the machine) should be sent forthwith. The plaintiff having tried unsuccessfully to hire another machine, was obliged to carry home and stack the wheat, which, while so stacked, was damaged by the rain. The machine was afterwards delivered, and the plaintiff paid to the defendant the price.

The wheat was then threshed, and it was found necessary, owing to its deterioration by rain, to kiln dry it. When dried and sent to market it sold for a less price than it would have brought had it been threshed at the time fixed by the contract for the delivery of the machine and then sold, the market price of wheat having meanwhile fallen. The plaintiff's contention was, that he was entitled, among other

damages, to the loss by reason of the fall in the market. Lord Campbell, C. J., in giving judgment, said, page 614: "The plaintiff therefore being in no default, I think that he is entitled to substantial damages in respect of all those items of loss which resulted from the fall of rain. He is not however in my opinion entitled to any damages in respect of the fall in the market price of the wheat; for that could not have been in the contemplation of the parties when the contract was made, nor can it be said to have been in any way the natural result of the defendant's breach of contract. For aught that the parties knew, or that might naturally have happened, the price might have risen instead of fallen." In the same case Crompton, J., made a distinction between the case of a carrier and the seller of an article favourable to the carrier. He said: "We must not in my opinion extend the doctrine in *Hadley* v. *Baxendale*, which was the case of a carrier intrusted as such by one party with goods to be delivered to another, to a case like the present, in which the contract was for the delivery by one of the contracting parties to the other of a specific article intended for a particular purpose known to both of them. With that decision, however, as far as it goes, I agree." Hill, J., said: "I agree in the distinction which my brother Crompton has drawn between the liability of a party to a contract, who has full knowledge of all the probable consequences of a breach of it, and of one who, like a carrier, cannot have that full knowledge."

Of this decision Mellish, L. J., in the case of the "Parana," approved, and had the machine been delivered to a carrier to be carried and delivered to the purchaser in three weeks, the carrier would not have been responsible for loss of market if not so delivered. It would seem, therefore, impossible to say, if the law in *Smeed* v. *Ford* is well laid down, that the law is fully settled that a fall in the market furnishes an item in the estimate of the damages arising from a breach of every contract with a carrier to carry goods within a special or reasonable time.

In *O'Hanlan* v. *The Great Western Railway Co.*, 6 B. & S. 484, which was an action against a carrier for the loss, not the delay of goods, it was held that to the value paid at the place of purchase might be added, not only the cost of transport, but also a reason able importation profit as damages. The Court was not laying down the true legal measure of damages in such a case, but was determining merely that the measure was not limited by the cost at the place of delivery to the carrier, with cost of conveyance and interest added. They held the plaintiff was entitled to supply himself with goods of the kind delivered to the carrier at the place of destination, if they could be got there, and such price would necessarily include some profit to the importer, otherwise goods never would be imported. This is not an authority for holding that for delay in delivery at a particular time, the fall in the market price between that time and the time of actual delivery is the measure of the carrier's liability, and that the plaintiff is entitled to recover that difference. In the course of his judgment Blackburn, J., said: "It was agreed in the course of the argument that the rule laid down in *Rice* v. *Baxendale*, 7 H. & N. 96, applies to the present case, viz., that, setting aside all special damage, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price, if there is a market there for such goods: if there is not, either from the smallness of the place or the scarceness of the particular goods, the value at the place and time of delivery would have to be ascertained as a fact by the jury, taking into consideration various matters, including, in addition to the cost prices and expenses of transit, the reasonable profits of the importer, which are adjusted by what is called the higgling and bargaining of the market."

The case of *Rice* v. *Baxendale* was a case of total loss of the goods, and the damages were only the ordinary damages which would have been chargeable

against the seller of the goods if he had failed to carry out the contract, and would in no manner have been an allowance of profit or damages for a fall in the market. Judged by this decision, a fall in the market would have been for the carrier rather than the owner's benefit where the shipper accepted the goods. But where there is mere delay in the delivery—the goods are actually carried and received—the plaintiff, if paid the difference between their value in the market on the day they should have been delivered and the day of actual delivery, would be getting the rise in the market, which would be in the nature of profit. Take this supposed case: A., a merchant, buys goods in Toronto on the 1st May, of the value in Toronto on that day of $1,000, and in Winnipeg of $1,250, and delivers them to B., a carrier, to be carried in ten days to and delivered at Winnipeg. On the 10th May, the day on which the goods should be delivered, owing to a combination of speculators to buy up all that kind of goods, the price has gone up to $1,500. The goods arrive five days afterwards, and are accepted by the merchant; but then they had gone down in price to $1,100. What would be the measure of damage? The $400, the difference between their value on the day they should have been delivered and the day of actual delivery, or $150, the difference between their ordinary value in Winnipeg and the value on the day of their arrival? In the former case it would be a case of clear profit of $250, for the shipper would have the goods, the thing the carrier agreed to carry for him, and the chance great rise in the market value by reason of circumstances over which neither the carrier nor he had any control, and neither contemplated. I do not think the Judges who speak of loss of market or exchangeable value in their judgments, in the cases to which I refer above, had such a case in view, or that they were laying down a rule that would warrant such a measure of damages, or that such damages could be recovered any more than loss of profits in the ordinary sense, in a case like the present or that supposed.

If I possess an article obtained at the manufacturer's price, which by some sudden or large demand goes up in value a hundred per cent, it appears to me that increased value is clear profit to me, and may be so properly called.

As a matter of actual justice in the present case, I have no manner of doubt the plaintiff is not entitled to recover any damages on account of the fall in the market price of the seed in London. From the peculiar way in which the contract to carry the seed to London was induced or brought about, and the neglect of the plaintiff to inform his agents in England of the change in the destination of the seed, and his not requiring or insisting, when informed thereof, while the seed was at sea, that it should be carried to London, the plaintiff should be held to have caused the loss to himself, as far as fall in the market is concerned, as much as the original error of the defendants. It is quite clear there was no person empowered by the plaintiff in England to sell the seed until the 17th February, 1880, and not then below the price fixed by his draft on the supposed purchasers. It was sent home, not with instructions to any one to sell, but with a lien upon it for an amount greater than its value. The plaintiff in his evidence, as above mentioned, said he thought he had sold the seed to Hearn Brothers, at forty-six shillings per hundred weight, and drew upon that. The seed was therefore held, by reason of the assignment of the bill of lading to the bank, subject to the bank's claim; and when Taylor asked Meadows & Co., defendants' agents, to take over the seed, it was coupled with the request that they should pay the amount of the bill of exchange. It cannot, therefore, be said the plaintiff was in a position to sell the seed as soon as it arrived in England, and he does not appear to have authorized the bank to sell for less than their demand. It was not, therefore, in the contemplation of the parties that it should be put upon the market at once when it arrived in England, nor does it appear that the loss by the fall in the market was the natural result of the detention of the goods in Liverpool.

When Taylor received instructions from the Clydesdale Bank, after the cablegram from the Merchants' Bank of the 17th February, to get the seed, he was under the impression the seed was in London and had been carried by the Anchor Line, not having been informed to the contrary, although the plaintiff had notice through the clerk in his office two weeks before of the change in the destination of the seed, and he himself was directly informed of the fact by Barr at least ten days before that, and had been requested by the defendants to accept delivery in Liverpool which he had not declined to do. The defendants, till applied to by Taylor & Co., did not know who was the holder of their bill of lading in England, and could not therefore be reasonably expected to take the seed on from Liverpool to London till they heard from the party entitled to the seed, as evidenced by his holding the bill of lading, whether he would accept delivery at Liverpool or not. Surely it was the plaintiff's duty under the circumstances to have informed his agents of the change in the destination of the seed, when he told the defendants' agent (Barr) that though it was a misfortune the seed had gone to Liverpool, it would make no difference to him if his buyer would accept delivery in Liverpool.

In *Horne* v. *The Midland R. W. Co.*, L. R. 8 C. P. 139, Martin, B., said, "I think these questions of damages must necessarily be considered very much upon the circumstances of each individual case." In which view Pigott, B., agreed, while he differed from the conclusion arrived at by the other Judges in that case.

Under the circumstances in this case, it appears to me, as I have already said, unjust that the defendants should be held responsible for any other damages than the amount the plaintiff had to pay to take the seed from Liverpool to London, and a reasonable sum to compensate him for expense, trouble and correspondence occasioned by the detention of the seed in Liverpool. It should not be overlooked in this connection, in the consideration of the question of damages, that the plaintiff really intended to send the seed in the first

place to Liverpool, and the change was only made because he supposed he had a purchaser at Ipswich, which makes it difficult to see how in truth he was damnified seriously by having his original intention carried into effect. There was a contract, however, on the part of the defendants to carry the seed to London, which was broken, and they are liable for some damages, the natural result of the breach; and, in my opinion, those damages are what it cost him to get the goods taken to London and a reasonable sum to compensate him for the expense, trouble and correspondence occasioned by the seed having been mis-sent to Liverpool. I make the amount of expense incurred in taking the seed from Liverpool to London $89.44. The whole freight paid was $293.60, and the freight from Waterford to London, at seventy-six and a quarter cents per 100 pounds, would be $204.16, which, taken from the amount paid, leaves $89.44, the additional cost to the plaintiff, to which interest should be added from the 23rd March, 1880. The other expenses incurred cannot, upon the evidence, be arrived at with accuracy. The charge for cable-grams was incurred in connection with the protest of the draft to a great extent, and not on account of the defendants' breach of contract. Thirty dollars should cover the other expenses, which I would allow. This makes, with the amount for freight from Liverpool to London, the expense and outlay incurred by plaintiff by the defendants' neglect $119.44; to which must be added two years interest from 23rd March, 1880, $14.32—in all. $133.76. The judgment directed to be entered for the plaintiff should therefore be reduced to that amount.

I have arrived at this conclusion from the opinion that the case is governed by the decision of the Court of Appeal in the case of the "Parana," that damages resulting from a fall in the market was not an incident attaching as matter of law to a breach of the contract of the defendants when it was entered into, and not being such an incident, then nothing that occurred afterwards made it one. The delay at Liverpool did not create

a new contract any more than a stoppage at Halifax would have done, or in mid-ocean. The contract and the incidents attached to it remained unaffected by what took place at Liverpool; but were it otherwise, sitting as I am, not merely as a Judge of the law but as a juror, I am bound to express my opinion and award judgment as I would have done had I been trying the case in the first instance; and from the facts prevented in evidence, in my opinion it would not only be illegal but unjust to allow the plaintiff to recover the damages that have been awarded him. The learned Judge who tried the case is a most careful and able Judge, whose decisions on questions of both law and fact claim the highest respect and consideration; and had he determined the measure of damages to be the difference in the price of the seed between the time at which the seed should have arrived in due course and the time of its arrival, after a consideration of the view of Mellish, L. J., in the Parana case, which was not brought to his notice, I should have had much less confidence in the soundness of my own view of the law and the facts; but I understand from him that there was very little discussion before him at the trial as to the true measure of damages, the contest being chiefly as to the liability of the defendants for the act of Barr, the agent, in granting the second bill of lading. It is matter of regret that, in a commercial transaction of this nature, there should be any room for difference of opinion; but I presume there never can be finality of decision, in the sense of uniformity, while the expansion of the channels and subjects of commerce is always going on, attended by ever varying circumstances which present themselves in relation to those subjects, and the vehicles or mediums of conveyance required to meet such expansion. It may well be that the same rules of law that were applicable at the time when it took sailing vessels from one to three months to make a voyage between Quebec and Liverpool or London, would not do justice now, when with very great certainity by steam vessels the voyage is made in ten days. But the law relating to the liability of

carriers was always in my opinion exceedingly harsh, and there would not seem, for the very small compensation they receive for the risks assumed, to be any valid argument in favor of extending their liability, in the case of sea voyages, by adding to the ordinary measure of damage the risk of loss without the benefit of gain from a fluctuating market.

HAGARTY, C. J.—I agree that we must consider the contract proved to carry to London, substituted for Liverpool on good consideration.

I do not think the general rule as as to loss of market not being recoverable in a contract for carriage in a sea voyage can govern this case.

If the bargain were to carry in a named vessel to London, and the vessel became disabled, or detained long beyond the usual period by adverse winds, &c., I think loss of market could not be recovered. The breach of contract here was in not shipping to London. But for defendants' mistake the goods would have gone in the Anchor steamer, which arrived in good time. By their error they were sent the same week in the Inman steamer to Liverpool.

The loss of market complained of was not for delay in an ocean transit, but for transmission to a wrong point The loss of market arose from the delay in the plaintiff having his goods available to his use after the sea passage was ended.

It was, in my opinion, a mere question of fact as to where the blame lay for the delay in obtaining delivery of the goods until the 23rd of March.

If this be properly the fault of defendants I cannot say that the damages awarded are excessive.

All that took place in England seems to have been a series of mistakes and misapprehensions, in which it is not easy to apportion with any accuracy the share of blame attributable to either party.

I assume it to be law that damages for the fall in the

market value are recoverable as between parties generally dealing in the buying and selling of the article, where the vendee by the vendor's default is unable to obtain possession or control of the article purchased. I also think the carrier is liable for loss by fall in market value where the damage is caused not by delay in ocean or other transit, but by wrongful delivery at a wrong point and detention arising therefrom. I therefore do not follow my learned brother in his very instructive review of the authorities.

The absence of a bill of lading for the goods by the Liverpool route appears to have caused much of the detention. Neither party seems, in my view, to be free from blame in supplying what was necessary to obtain delivery.

My brother Cameron has fully stated the evidence, and I need not repeat it.

The result as to damage must depend on the view which a jury, or a Court acting in their stead, would adopt on this question of fact.

The learned Judge, who saw the witnesses, found this in the plaintiff's favour. My brother Armour agrees in the same result. I confess the evidence would hardly lead my mind to a like conclusion in favour of so large a sum.

I would, of course, allow for the freight from Liverpool to London, and a moderate sum for any proved expense to which the plaintiff may have been put consequent on defendants' mistake. But as the jury, (as it were,) have found the delay till March to be the fault of the defendants, I cannot set aside their assessment of damages unless on the ground of their having found the facts wrongly. If the finding of facts be right, the damages may be not too large. I am not prepared to say that this finding of facts is so clearly wrong that I am bound to interfere.

I should have preferred a finding for the plaintiff less, at least, by one half than the amount actually awarded; but I hardly feel warranted in interfering. If I did so, it would leave the case in a most unsatisfactory state—viz., that I and my brother Cameron would reduce the verdict

by one half against the view—entitled to great respect—of the Judge at the trial, and also of Mr. Justice Armour, who fully agrees with that Judge.

ARMOUR, C. J., concurred with HAGARTY, C. J.

Rule discharged.

[QUEEN'S BENCH DIVISION.]

TRERICE v. BURKETT.

Co-sureties—Right to securities—Interpleader—Shares in a ship—Seizure of.

The plaintiff sold 24 shares in a vessel to B. & Co., who, not being able to pay cash, procured O. to make a note in the plaintiff's favour, which was endorsed by him and B. In order to secure himself, O. took a bill of sale to himself of the shares. The plaintiff discounted the note at a bank, and after several renewals was obliged to pay it. In an interpleader issue between the plaintiff and the execution creditor of O., to try the right to the shares,

Held, ARMOUR, J., dissenting, that the effect of this arrangment, which is more fully stated below, was properly held at the trial to be to make B. the principal debtor to the bank for the amount of the note, and the plaintiff and O. his co-sureties therefor; and upon payment thereof, that the plaintiff was equitably entitled to the twenty-four shares held by O., his co-surety, as security against his liability on the note.

Quære, whether interpleader is a proper remedy in such a case, and whether the shares could be seized and sold by the sheriff. *Per* HAGARTY, C. J.—Some proceeding to which O. & B. were parties, in which the title to the shares could be cleared up, would be a better remedy.

Per ARMOUR, J.—The question raised could not be properly adjudicated upon without O. & B. being parties; the plaintiff and O. were not sureties, but the plaintiff was the creditor, B. the principal debtor, and O. the surety; and on default the plaintiff was entitled to compel O. to realize the security which he held, and apply it towards payment of the debt.

THIS was an interpleader issue, directed to try whether certain goods and chattels seized by the sheriff of Kent on executions, at the suit of defendant and several others, against one James Oke, were at the time of the seizure the property of the plaintiff as against the execution plaintiff.

The property in question was twenty-four sixty-fourth shares of a vessel. Plaintiff was sole owner, and transferred them by bill of sale to Oke, the execution debtor.

The facts fully appear in the following judgment of Patterson, J. A., by whom the case was tried without a jury, at Chatham, in May last:—

The facts lie within a small compass. The vessel was registered under the M. S. Act on 11th July, 1878, by Andrews, who conveyed to Allen by bill of sale, on the 10th December, 1878, and Allen conveyed to the plaintiff the whole sixty-four shares on 29th January, 1880. On or about the last mentioned day the plaintiff verbally agreed with Blake to sell him twenty-four shares for $1,500 cash. I believe the sale was to be to a firm of Blake & Co., but I do not know that there was more than one person concerned. Only one Blake is spoken of, and it is not important to preserve any distinction between Blake and Blake & Co. Blake was not able to pay the cash, and after some weeks' delay he proposed to give the plaintiff a note, with James Oke as surety, and that was the shape ultimately taken by the transaction. The plaintiff and Oke have both given their accounts of the arrangement. I do not think they differ in effect; but as each tells what took place between Blake and himself, and only part of their evidence touches common ground, I shall state each version. The plaintiff, besides the facts already stated, said that when Oke was asked to join in the note as surety for Blake, Oke required as a condition of his consent that the conveyance of the twenty-four shares should be made to himself, which was accordingly done; and further, that the plaintiff agreed to accept the note in order to procure the discount of it as a means of raising the money for Blake. I state these facts, not from reference to the reporter's notes of the evidence, but as my own understanding of what was intended to be conveyed. I understood the plaintiff to treat the matter and to speak of it as a carrying out of the original bargain to sell for cash, and not as changing that bargain into one to sell on credit and accept an indorsed note in payment. According to his understanding, as I apprehend it, he did not consider that Blake was to become debtor to him for the vessel: his idea was that he was to be paid cash for the vessel, and Blake was to be debtor to the bank where the note was discounted. The form of the note was consistent with this. It bore date 13th March, 1880, and was made by Oke for $1,561, payable to the order of the plaintiff, and was indorsed by the plaintiff and by Blake.

Oke says that he had for some time been indorsing for Blake, and that he was involved for him for a considerable amount: that in January Blake told him he was buying the shares in the vessel, and that he was thinking of giving him a deed of them, saying to him,—'Jim, you have been helping me a good deal, and I want to make you feel easy, and I will give you a deed of the boat:' that in March Oke discovered that a note had to be given, and he was asked to join in it: that he was told

he was to be maker of the note, because the deed was made direct to him from the plaintiff; and that he made it accordingly. The deed was made by the plaintiff to Oke. The note was discounted for the plaintiff, or at his request, in the bank where he did his business. It was renewed, in whole or in part, several times, the same three persons being always parties, though not always in the same order; and was ultimately paid by the plaintiff. Both Blake and Oke became insolvent, and neither of them paid anything on account of the note. The defendants, judgment creditors of Oke, placed *fi. fas.* against Oke in the hands of the sheriff, who is said to have seized the twenty-four shares. This interpleader is directed for the purpose of trying whether those shares are properly liable to satisfy the defendants' executions.

The plaintiff, who is master as well as principal owner of the vessel, has retained actual possession of her. He says there were no profits made by her last season, and he has not been asked to account by Blake or Oke, nor have they interfered in any way with the vessel.

The contention for the plaintiff is, that he and Oke were co-sureties for Blake for the payment of the note: that the conveyance to Oke was by way of security, or to indemnify him in respect of his obligation as such surety; and that the plaintiff, having paid the debt, is entitled to the property as his security.

The argument for the defendants is, that the plaintiff and Oke were co-sureties: that the property was pledged to Oke, not as security for this liability specifically, but generally on account of all his undertakings on behalf of Blake: that the transaction was not of the character represented by the plaintiff, but was essentially a sale of the property on credit, just as any wholesale merchant sells to his customer and takes his note with an indorser for the price; and that there was no such relation between the plaintiff and Oke as to entitle the plaintiff to the security when he retired the note, or when the note was unpaid at maturity, if he had not thought proper to discount it.

It is contended also that the deed to Oke is conclusive evidence of his ownership.

The last mentioned objection would, I apprehend, have been fatal to the plaintiff's claim in case of a vessel registered under our Provincial statute, C. S. C. ch. 41: *Hughes* v. *Morris*, 2 DeG. & McG. 349. But under the Merchant Shipping Acts the rule is different. We find in the Act of 1854 the recognition of a 'beneficial interest'—as, *e. g.*, in sec. 100—and that expression is defined by sec. 3 of the Merchants' Shipping Act, 1862, as including interests arising under contract and other equities; and the intention of the Act is declared by that section to be that, without prejudice to certain specified provisions, equities may be enforced against owners and mortgagees of ships, in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property.

I have therefore to consider whether the plaintiff has the equity he asserts, and first to decide the questions of fact.

If Oke's evidence had seemed to me to shew that the property was

pledged to him in the general manner he spoke of, I should probably have required more definite information respecting his alleged liabilities on behalf of Blake. But it seemed to me quite plain that, if Blake used the language which Oke says he used in January, he must have spoken with reference to what he then expected to do—viz., to pay cash to the plaintiff and get a deed from the plaintiff to himself, and his proposal must have been to convey to Oke under that title. But in March it was apparent to Oke, as well as to the others, that Blake had not got the shares and could not get them without Oke's assistance. From Oke's own account of the reason why he became maker of the note, it is manifest that the conveyance to him had a different kind of connection with this liability from that which existed with reference to any others. I do not accept Oke's account of the haphazard and unenquiring way he happened to take the deed and give the note. I have no doubt the deed was made to him for the reason given by the plaintiff, because Oke required it to be so in order to secure him from this very obligation. This view has the concurrent support of the express evidence of the plaintiff, the form of the transaction, and the more business-like and probable character which, on this understanding of it, it bears. There is nothing in Oke's evidence to affect very directly the question of the plaintiff's position with regard to Blake. If my memory serves me, it amounted to no more than that he heard nothing said of the plaintiff indorsing the note. But, in the form in which the note was made, it could not be used, nor could Blake, the principal debtor, be a party to it unless the plaintiff indorsed it. In this respect, the purport of it being that the plaintiff owed Blake, and not that Blake owed the plaintiff, it was very unlike a note taken by a merchant from his customer. I think the proper conclusion is, that the note was given and accepted for the purpose and on the understanding stated by the plaintiff: that the understanding of all three was that a debt was to be contracted to the bank in which the plaintiff was, to procure the note to be discounted, Blake being the principal debtor and the others his sureties, and that the creation of a debt from Blake to the plaintiff was not in their contemplation. I do not know that the circumstance that Oke understood the whole matter, or that he understood anything more than that he was making the note as surety for Blake, is important; but I do not doubt that he understood it all.

What, then, is the plaintiff's right under the facts established?

Mr. Ferguson argued that the Mercantile Amendment Act, R. S. O. ch. 116, entitled the plaintiff to the security when he paid the debt. That Act entitles a surety who pays the debt for which he is surety to the securities held by the creditor, but I do not see that it covers this case.

The case of *Ex parte Waring*, 19 Ves. 345, was referred to, and I am indebted to Mr. Ferguson for a reference to a very instructive article on the subject of the law settled in England by that case, in the *American Law Review* for December, 1880, vol. i., N. S. p. 839. The rule in *Waring's Case*, under which a bill holder becomes in certain

circumstances entitled to the benefit of securities held by a prior party, is succinctly explained in *Banner* v. *Johnston*, L. R. 5 H. L. 157, by Lord Hatherley, at p. 168, and by Lord Cairns, at p. 174. The words of Lord Cairns are: 'Upon the principle of *Waring's Case*, if both the drawer and acceptor of the bills under those circumstances become bankrupt, then the holders of the bills are entitled to stand upon what is called the equity of the drawer, with reference to any security which may have passed between the other parties to the transaction. But it has always been most carefully said that that right is not a right founded on contract; it does not spring out of the contract, but it springs out of the necessities connected with the administration of the two insolvent estates.' The reason of this is stated by Lord Hatherley to be, "in order that the one firm whose estate is being administered in bankruptcy may not be injured by another bankrupt firm getting the benefit of the securities, whilst at the same time it cannot discharge the obligation it has incurred to pay the bills." These doctrines do not aid the plaintiff here, because the relation of the parties is different, and the element of bankruptcy is wanting. I refer to them, however, for the purpose of saying that while the limits of the rule are in England so well defined, the able writer of the article in the *Law Review* shews that in all or most of the States of the Union it is held that the creditor is entitled to all the securities taken by the surety of his debtor, either for the purpose of securing the payment of the debt to the creditor, or for the purpose of indemnifying the surety; this rule being held with some modifications in different States. I find this doctrine, which from the discussion in the article in question I take to be American and not English, though rested, I believe, on English decisions of earlier date than *Waring's Case*, placed in the hands of English students as the law in *Smith's* Manual of Equity Jurisprudence, at p. 353, 10th ed., upon the authority of *Story's* Equity Jurisprudence, secs. 502, 638. This makes me feel uncertain whether another statement, given in the same manual, and which is expressly in favour of the plaintiff, may not also be open to question. At p. 351 it is said: 'Sureties are entitled to the benefit of all securities which have been taken by any of their co-sureties to indemnify themselves against their liability.' The authority given for this is *Story*, sec. 499. The decisions cited in *Story* and in other American treatises, in support of the doctrine, are all those of American Courts. See *Theobald* on Principal and Surety, sec. 283; *Brandt* on Suretyship, sec. 233. I have not been able to lay my hand on any English case on the subject, though I cannot take credit for having searched very thoroughly, as my engagements have not permitted it. But I find the same doctrine stated in another English treatise, *DeColyar's* Law of Guarantee, p. 279, where however, the only reference is to *Story*, sec. 497; and I observe that Mr. Story seems to treat the right of the surety to the benefit of the securities held by his co-surety as a more obvious equity than the right now affirmed by the Mercantile Amendment Act, to which I have adverted; for, in sec. 499, after laying down the rule I have quoted from *Smith*, he proceeds to say, "Courts of Equity have gone farther in their favour,

and held them entitled, upon payment of the debt due by their principal, to have the full benefit of all collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt."

I shall act upon the rule, and hold the plaintiff entitled, as against these defendants, to the twenty-four shares in the vessel.

If I had been compelled to adopt the defendants' view of the transaction of the note, and to hold that the sale was on credit, the plaintiff's only dependence would have been, as it strikes me, upon maintaining some right to a lien or right analogous to the right to stop in transitu. I do not discuss this right or attempt to form any opinion respecting the plaintiff's power to maintain it. The material facts affecting it would be that the note was dishonoured both by Blake and Oke, and that although Oke had a deed of the property, the plaintiff had not parted with the actual possession of it; and something might perhaps turn, as against the plaintiff, on the circumstance or inference that his possession ought to be taken to have been in his character of master acting for the purchaser as well as for himself."

Nov. 24, 1881. *Robinson*, Q. C., moved to enter a verdict for the defendant.

Feb. 16, 1882. *Robinson*, Q. C., supported the rule, and contended that in the absence of any agreement between Trerice and Oke that the former should have a lien or mortgage on the shares in question, the right to assert such lien did not exist: that there was no such agreement: that Trerice relied upon the personal security of Oke and the Blakes: that the learned Judge erred in finding that Trerice and Oke were co-sureties; and even if they were co-sureties, that, as a matter of law, one co-surety, having paid a debt, is not entitled to the securities held by his co-surety; therefore, the shares in question were the property of Oke and available to pay his execution creditors, including the defendants in the issue. He cited *Story's* Equity Jurisprudence, sec. 499; *Theobald* on Principal and Surety, sec. 282.

McCarthy, Q. C., and *Creelman*, contra, contended that the finding of the learned Judge, that the position of Trerice and Oke was that of co-sureties, was correct, inasmuch as the evidence was clear that the sale of the shares in question was to have been for cash, and when it was found that Blake & Co., could not get the cash, Trerice insisted upon getting

such a note as he could turn into cash; in other words, as it was understood that the object of giving the note was to enable Blake & Co. to get the cash, and so pay Trerice the purchase money for the shares, therefore the bank was the principal debtor, and Trerice and Oke were joint sureties to the bank for the note. This being so, and it being clearly proved that Oke never claimed to be the real owner, but admitted that the shares were merely held by him as a security for his endorsement, therefore, Trerice, having paid the whole, and neither Blake nor Oke having paid anything, was entitled, according to the doctrine of equity, to an assignment of the security held by Oke, viz., the shares in question: that even if they were not co-sureties, and if Trerice was simply a creditor of Blake and Oke, then he was, as such, entitled to the assignment of the shares to him: that any other view of the case would be inequitable and contrary to natural justice; and that if none of the other propositions prevailed, the Court must hold in favour of the claimant, because the property in question was not an asset which is liable for the payment of the debts of Oke, the question at issue being simply whether the shares were the property of the execution debtor (Oke) as against the defendants (the execution creditors.) They cited the Merchant Shipping Act of 1854, sec. 100; The Merchant Shipping Act, 25 & 26 Vic. ch. 63, sec. 3; *Story's* Eq. Jur. sec. 499; *Smith's* Equity, 10th ed., pp. 350, 351; *De Colyar* on Guarantees, Am. ed., 336; American Law Review vol. I., N. S., p. 839.

March, 8th 1882. HAGARTY, C. J.—I fully agree with the conclusions of fact drawn by the learned Judge.

It stands thus: The sale to Blake was to be for cash. As a means of raising cash a note for discount is decided on. Oke will not lend his name as security for Blake unless the property to be sold to Blake be assigned to him.

The cash is thus obtained, and as far as the note is concerned the plaintiff and Oke are co-sureties for Blake. The plaintiff has to pay the note. It would certainly be

consonant with justice that he should have the benefit of the security held by Oke for his indemnity. Oke, on the evidence, held it merely for indemnity, and not as absolute owner, and if Blake had paid the note the latter could have compelled a transfer to himself.

The learned Judge has cited a number of authorities in plaintiff's favour.

In addition to them may be cited a very clear decision pronounced last year by Mr. Justice Fry, *Steel* v. *Dixon*, L. R. 17 Ch. D. 825. The head note is: "A surety, who has obtained from the principal debtor a counter security for the liability which he has undertaken, is bound to bring into hotchpot for the benefit of his co-sureties whatever he receives from that source, even though he consented to be a surety only upon the terms of having the securities, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security."

There is a very full review of the state of the authorities. The learned Judge says, speaking of *Dering* v. *Lord Winchelsea*, "The short effect of which I take to be that, as between co-sureties, there is to be equality of the burden and of the benefit." He then cites the opinion of Alderson, B., in *Pendlebury* v. *Walker*, 4 Y. & C. Ex. 441, also several American decisions in point, and proceeds: "It follows that each surety must bring into hotchpot every benefit that he has received in respect of the suretyship which he undertook; and if he has received a benefit by way of indemnity from the principal debtor, it appears to me that he is bound, as between himself and his co-sureties, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that that ultimate burden may be distributed between them equally or proportionably as the case may require. * * * I think it does not affect the principle of equity to which I have referred, whether the security is the result of a contract with the debtor at the time when the co-surety becomes a surety, or is

voluntarily given subsequently, or arises in any other manner whatever,"

We may also refer to *Duncan, Fox & Co.* v. *North and South Wales Bank*, L. R. 6 App. Cas. 1, an important decision of the House of Lords. Lord Blackburn comments on *Deering* v. *Winchelsea* and other cases as to the equities not depending on or arising from contract between sureties.

We may assume the law to be as clearly stated by Fry, J. On the facts we also hold the conclusions of the learned Judge to be correct, and not, as contended by defendants, that it was an ordinary sale to a person on credit secured by a note endorsed by others.

It seems just in this way. Blake is trying to find cash to pay the plaintiff. A third person finds that cash, and enables the plaintiff to receive his price, the plaintiff and Oke becoming sureties to them for Blake repaying the advance. When the time of payment arrives both Blake and Oke make default, and plaintiff has to pay.

We are bound to hold that (1st) plaintiff could sue Oke for contribution, and (2nd) that he can compel Oke to bring in for the common benefit the security on Blake's property which he had obtained for his indemnity.

We must look at the substance, not the form of the dealing.

The peculiarity of this case is, that the security sought to be applied by plaintiff for his protection is a transfer of property by himself to his co-surety.

We must, I think, take it as if the plaintiff had transferred the shares to Blake directly, and then Blake had executed a mortgage thereon to Oke expressly to indemnify him for endorsing or making the note to enable him to raise the money.

We think that the amended Ship Registry Law (25 & 26 Vic. ch. 63) leave it clear that "interests arising under contract and other equitable interests" may be shewn;" and "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property."

See *Maclachlan* on Shipping, p. 40, 2nd ed., citing the Act of 1862.

This case comes before us in a very unsatisfactory state. It may well be doubted whether interpleader is a proper remedy in such a case, as there could hardly have been any manual seizure or taking of the ship from the plaintiff, who held nearly two-thirds of the whole.

An interpleader issue merely between the plaintiff and the execution creditors does not seem adapted to do complete or final justice. The decision here leaves the ship's register unaffected, and the title obscured. A proceeding to which Oke and Blake would be parties, would appear a better remedy. Final justice and clearing up of the title could then be done.

We confirm the judgment of the learned Judge in favour of the plaintiff.

It appears by the interpleader order, that the appraised value of the goods seized was to be paid into Court.

It was suggested or said that the purchase money of the shares had been paid in. If so, this should be paid out to the purchaser, as in our view the sale was abortive.

We must not be understood as holding that interpleader as here ordered was a proper mode for the trial of this question. The effect of our judgment is merely that we refuse to set aside the finding of the learned Judge who tried it, and discharge the application so to do. The parties chose to go to trial on the issue directed, and the objection to the mode of trial does not seem to have been pressed.

ARMOUR, J.—I do not think that we can properly adjudicate upon the questions raised in this case, without Oke and Blake & Co. being made parties to this litigation.

It cannot be successfully contended that this Court has not the right upon an interpleader issue to settle the equitable rights of the parties to the goods seized; but I very much doubt if the plaintiff has such an equitable right to the goods seized in this case as will authorize us to find this issue in his favour, and I certainly think that

we cannot do so without the presence of the parties named. See *Rusden* v. *Pope*, L. R. 9 Ex. 269; *Bank of Ireland* v. *Perry*, L. R. 7 Ex. 14; *Duncan* v. *Cashin*, L. R. 10 C. P. 554, and *Engelback* v. *Nixon*, L. R. 10 C. P. 645.

The question in this case is somewhat like the case of the *Bank of Ireland* v. *Perry*, and the Court in that case thought that they could not properly deal with it without the presence of all the parties interested in the subject matter of it.

The subject matter of this issue is twenty-four sixty-fourth parts or shares in a ship, which we understand to have been sold in pursuance of the interpleader order, and the proceeds thereof to have been paid into Court.

It is a matter of grave doubt whether the sheriff could seize and sell these shares under the circumstances under which they were held by Oke, or even under any circumstances, and we ought to see that the purchaser of these shares gets either a good title to them, or his money back.

I do not think it a fair conclusion to be drawn from the evidence that the claimant and Oke occupied the position of co-sureties; but I think that the claimant was the creditor, Blake & Co. the principal debtors, and Oke the surety for the payment of the debt; and that the claimant was entitled in equity, default having been made in the payment of the debt, and Oke and Blake & Co. being practically insolvent, to compel Oke to realize the security he held to secure him against the payment of this debt, and to apply the proceeds of it towards payment of the debt.

But neither as having this equity, nor as being a co-surety, do I think that he has such an equitable right to the good seized as will justify our finding the issue in his favour.

See *Story's* Eq. Jur. 12th ed. sec. 499; *Powles* v. *Hargreaves*, 3 De. G. McN. & G. 430; *Banner* v. *Johnston*, L. R. 5 per Lord Cairns, at p. 174; *Duncan, Fox & Co.* v. *North and South Wales Bank*, L. R. 6 App. Cas. 1.

CAMERON, J.—In my opinion the finding of the learned Judge, that the plaintiff and Oke were co-sureties for Blake & Co. for the amount of the note given by the former for the purchase by Blake of twenty-four sixty-fourth shares of the vessel, was fully warranted by the evidence, and that being so the plaintiff, under the decision of Mr. Justice Fry, in *Steel* v. *Dixon*, L. R. 17 Chy. D. 825, is clearly entitled to the benefit of the security held by his co-surety, and to resist the claims of the execution creditors of Oke against the shares assigned as such security. But apart from the question of agreement that the plaintiff was to raise money by his endorsement of Oke's note, whereby the plaintiff and Oke became co-sureties for Blake, it was laid down in *Duncan Fox & Co.* v. *The North and South Wales Bank*, L. R. 6 App. Cas. 1, that an indorser of a bill of exchange *after maturity*, if not in all respects a surety for the acceptor, is entitled to the equity a surety would have to the benefit of securities deposited by the acceptor with the holder of the bill, though such deposit were not made in respect of the particular bill, but on account of bills discounted generally by the holders for the acceptor, although the indorser endorsed in ignorance of the security. While in the present case the holder of the security, the acceptor, is not the creditor, and except by virtue of the agreement established by the plaintiff in evidence not a co-surety, it cannot be contended on principle I think, if the decisions in *Duncan Fox & Co.* v. *The North and South Wales Bank* and *Steel* v. *Dixon* are good law, that the plaintiff has not the right to the benefit of the security held by Oke, the accommodation acceptor, to the same extent that he would have had if the shares had been deposited with the bank instead of Oke. In both cases the person previously liable to pay the debt appropriates the security to its payment if he fails, and any party to the note, having a right to be indemnified or paid, it matters not which, by the holders of the security, must have the right in equity to have the security applied to the purpose intended.

Lord Selborne, in his judgment in the former case, thus

refers to the position of an acceptor, p. 14: "The acceptor, though he may know nothing of any particular indorser, knows that by his acceptance he does an act which will make him liable to indemnify any person who may endorse, and may afterwards pay the bills; and he knowingly and intentionally undertakes that liability as much as if the endorsement were the result of direct communication between himself and that person." If Oke had been the primary debtor and Blake the surety, and Oke had assigned the shares to him as security, the moment the plaintiff had put his name upon the note and transferred it to the bank Blake and he would have been in equity co-sureties to the extent of being able to invoke the equitable doctrine that the securities held by each at the maturity of the note should be brought into hotchpot, as stated by Fry, J., in *Steel* v. *Dixon*, for their joint relief. And it would seem where, as in this case, the maker is not the principal debtor, as his position on the note would indicate, but in fact a surety, there is nothing to distinguish the equitable right of the plaintiff in respect to these securities, from what it would have been had the position of Blake and Oke been transposed. This equitable doctrine is strange to one looking at the rights and position of the parties from a common law point of view. The transaction from that stand point would be exceedingly simple. The plaintiff sold the twenty-four shares of the vessel to Oke, and took in payment the note of the former. With the reason why Oke made the note or took the security, the plaintiff would have nothing to do. He would look to Oke and Blake for payment, by reason of their making and endorsing the note respectively, and would enforce it by judgment and execution against the general goods of each, making no claim to withdraw from the general creditors the shares in question as specially applicable to payment of the debt. But undoubtedly it partakes of substantial and natural justice to hold that, when by arrangement between Oke and Blake these shares were specially designed to protect the former against this particular debt, they should be so applied

rather than left to meet the general liabilities of either Oke or Blake.

I think it quite probable that the plaintiff is also entitled to retain the judgment or verdict in his favour, on the ground that Oke's interest in the shares being only that of mortgagee in fact, they were not liable to be taken in execution against him; but as that was not a ground taken on behalf of the plaintiff, I do not base the conclusion I have come to on a determination of that question.

I do not think the rights of the parties would be materially affected by accepting the evidence of Oke as true, that the shares were to be held by him not merely as security for the debt contracted by him in making the note for the purchase money of the shares, but also for other liabilities incurred by him on account of Blake; for from the very nature of the transaction it is manifest the liability he incurred in making the note was intended to be the first protected by the appropriation of these shares to its discharge if Blake failed to pay. The weight of evidence is in favour of the view of the learned Judge, that the assignment of the shares was made solely for Oke's protection against loss in respect of this note, and not against other liabilities.

Rule discharged.

[CHANCERY DIVISION.]

RE THOMAS MACNABB.

Vendor and Purchaser's Act—R. S. O. ch. 109—Will, construction of—Power of sale with executor's consent—Practice—Parties.

A testator devised to his wife for life a parcel of land, "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient.

Held, that in the conflicting state of the authorities upon the question, the title was not one which the Court would force upon a purchaser.

Held, also, that under such a power the land could be sold in parcels.

On a petition under the Vendor and Purchaser's Act the question of the existence or validity of the contract for sale cannot be tried, but only those matters which would be entertained upon a reference as to title under a decree for specific performance.

The only parties necessary on such a petition are those who would be parties to a suit for specific performance, and therefore mortgagees who had been joined were dismissed with their costs.

THIS was a petition filed by Mary MacNabb, of the township of Fenelon, in the county of Victoria, widow of Thomas MacNabb, setting forth the will of Thomas MacNabb, which contained the following, amongst other clauses:

"To my well beloved wife I bequeath during the term of her natural life the east half of lot No. 20, in the second concession of the township of Ops, in the aforesaid county, with the power of sale at any time during her life, subject to the consent of my executors; the price of the land if sold to be divided in the following manner: My wife Mary reserves to herself one-third of the full price, and one-third to be given to my son John, and the other one-third to be given to my son Joseph. And in the event of a sale as above described not having been effected during the lifetime of my wife Mary, the above mentioned lot No. 20, (east half), I bequeath in the following manner, that is to say, to my well beloved son John the north half of the

east half of lot No. 20, in the second concession of the aforesaid township of Ops, together with a joint privilege of the present watering field with my son Joseph, to whom I bequeath the remaining half of said half lot, with a joint privilege with my son John of the wood upon the north half of said lot."

The petition also set forth—

1. That the said Mary MacNabb, on the 3rd day of January, 1863, (with consent of the executors) sold to John MacNabb, mentioned in the said will, for the price of $400, the north-east quarter of lot No. 20, in the second concession of Ops, and received a mortgage back from John MacNabb for the amount, which mortgage had since been discharged without any money having been paid, the said John MacNabb accepting the conveyance of the said parcel of land in satisfaction of the devise contained in the will.

2. That Patrick McHugh, one of the executors of Thomas MacNabb, deceased, departed this life since the death of the testator, and George MacNabb and James MacNabb, are the surviving and only executors of the said testator Thomas MacNabb.

3. That the petitioners had, with the consent of the surviving executors of the testator, Thomas MacNabb, deceased, sold the south-east quarter of lot No. 20, in the second concession of said township of Ops, to Daniel O'Connell of the said township of Ops, yeoman, for the price or sum of $2,910.

4. The said Daniel O'Connell, the purchaser of the said last-mentioned parcel of land, had signed an agreement in writing for the purchase thereof at the price or sum aforesaid, but objected to the title upon the ground that the petitioner had no power, even with the consent of the surviving executors, to convey a good and sufficient title in fee simple to him.

The petitioner desired the opinion of the Court upon the questions (1) as to whether the petitioner, with the consent of the surviving executors, could convey the said lands to

the purchaser so as to vest the same in him in fee simple; (2) as to the costs of application.

January 16, 1882. *H. Cassels*, for the petitioner. The consent required by the testator was not that of the individuals named in the will, but of those persons who at any time might occupy the office of executor: *Earl Granville* v. *McNeille*, 7 Hare 156; *Brassey* v. *Chalmers*, 16 Beav. 231; *Dawson* v. *Oliver-Massey*, L. R. 2 Chy. D. 753. The objection that the mortgagees should not have been joined cannot be taken at the hearing, they should have moved against the petition: *Henderson* v. *Spencer*, 8 P. R. 402.

J. Pearson, for the purchaser.

Moss, Q. C., who appeared for a mortgagee of the property, who had been served with notice. The mortgagees should not have been made parties to this application, and are entitled to be dismissed with their costs: *Re Burroughs, Lynn, and Sexton*, L. R. 5 Chy. D. 601; *Re Eaton Estate*, 7 P. R. 396. It was not necessary for the mortgagees to move against the petition, and the objection can now be properly taken: *Henderson* v. *Spencer*, *supra*, is no authority to the contrary.

As to the construction of the will. The power of sale does not authorize a sale of the land in parcels; it only permitted a sale of the whole. Moreover, one of the executors having died, the power of sale cannot be executed. It is not sufficient that the consent of the survivors be obtained; *Farwell* on Powers, p. 117; *Kerr* v. *Leishman*, 8 Gr. 435; *Dawson* v. *Oliver-Massey*, *supra*; *In re Brown's* Will, L. R. 18 Chy. D. 61. The present is not the case of a trust but of a power, and there is a clear distinction between the two cases. If a power be conferred on certain persons it must be exercised by those to whom it is given: *Earl Granville* v. *McNeille*, *supra*; *Knight* v. *Cameron*, 14 Ves. 389.

J. Crickmore, for another mortgagee.

H. Cassels, in reply. There is nothing to prevent a sale of the land in parcels: *Theobald*, 2nd ed., p. 355. The consent is sufficient, as all that is required is the consent of those filling the office of executor. Upon the question of costs he referred to *Givins* v. *Darvill*, 27 Gr. 502.

February 22, 1882. PROUDFOOT, J.—The effect of the English Vendor and Purchaser Act of 1874—our R. S. O. ch. 109—is stated in the case of *Re Burroughs, Lynn, and Sexton*, L. R. 5 Chy. D. 601, to be, that "whatever could be done in Chambers upon a reference as to title under a decree where the contract was established, can be done upon proceedings under this Act, and that what this Act has done is this: it has enabled the parties to dispense with the form of a bill and answer, and at once to put themselves in Chambers in exactly the same position in which they would have been, and with all the rights which they would have had under the old form of decree."

The question of the existence of the contract cannot be tried in this proceeding, nor its validity, both of these being expressly excluded by the statute: *Henderson* v. *Spencer*, 8 P. R. 402. Affidavits may be received on any question that could have been tried in that way in the Master's Office on an investigation of title under decree—as, for instance, whether a good title had been shewn to a portion of the land, as in *Re Burroughs*, &c. *supra*.

The only parties who need be represented are those who would be parties to a suit for specific performance with a reference as to title: In *Re Eaton Estate*, 7 P. R. 396; and the general rule is, that all the parties to the contract should be parties to the suit, and no one else: *Fry*, 2nd ed., p. 62. The mortgagee may be a necessary party to the conveyance, but that is not a question of title: *Ib.* 63. The mortgagees in this case should not therefore have been served, and they will be dismissed with their costs. I do not find anything in *Henderson* v. *Spencer*, *supra*, to shew that the mortgagees should have moved against the petition. I think they have a right to take the objection at the hearing.

The question of title arises on the will of Thomas MacNabb, made in 1859. He first appointed his sons, George and James, and one P. McHugh, his executors. He then devised to George a parcel of land; and to his wife he devised, during the term of her natural life, the east half of lot 20 in the 2nd concession of the township of Ops, with the power of sale at any time during her life, subject to the consent of his executors; the price of the land, if sold, to be divided in this manner: his wife receiving to herself one-third of the full price; one-third to be given to his son John, and the other one-third to be given to his son Joseph; and, in the event of a sale as above described not having been effected during the lifetime of his wife, he devised the said east half of 20 as follows: to John the north half of the east half, with a joint privilege of a watering field with Joseph, to whom he devised the remaining half of said lot, with a joint privilege with John of the wood upon the north half of said lot.

In 1863 the widow, with the consent of the executors, sold and conveyed to John MacNabb the north-east quarter of lot 20 for $400, to secure which John gave a mortgage, and which the widow soon afterwards discharged, without receiving any money, John accepting the land in satisfaction of his interest under the will. He afterwards mortgaged it, and it was sold under the mortgage to Leddy, who is now owner.

P. McHugh, one of the executors, has since died, and his consent cannot be had to the sale of the remainder.

The widow, with the consent of the surving executors. has sold the south-east quarter of lot 20 to Daniel O'Connell for $2,910.

The purchaser objects to the title because the power of sale only authorizes the sale of the whole, not a sale of the land in parcels; and also that a sale with the consent of the surviving executors is not valid.

I do not think the first objection good. Powers need not be exercised generally *uno flatu*, but may be executed by different appointments made at various times: *Farwell*

on Powers, p. 135. And if this be so with regard to the nature of the estate conveyed, I see no reason why it should not apply to the quantity of property conveyed. There is nothing in this will from which any intention can be inferred that the testator meant to limit the power, to be executed in whole, by one sale, at one time; nor does the direction as to the division of the proceeds of the sale interpose an obstacle. John's interest has been got rid of, and, whatever it might have been, it now passes to the widow and Joseph, or his representatives; it is not necessary to determine in what proportions, at present, for with that the purchaser has nothing to do; it is a matter to be settled between the widow and Joseph, or his representative

The other question is much more difficult, and upon which great diversity of opinion exists. In *Dawson* v. *Oliver-Massey*, 2 Chy. D. 753, legacies were given by a testator to the female children of his sister on their attaining the age of twenty-one years or marrying with the consent of their parents. One parent died. The Master of the Rolls decided that a marriage with the consent of the survivor was not enough, that the consent was a condition precedent; and not having been performed, a claim to the legacy could not be enforced. The Lords Justices overruled him, saying that at least from the year 1828, down to the present time, "wherever the English language is spoken, wherever the English law prevails, and the English legal literature has been studied, it has been taught and accepted as the unquestioned doctrine of this Court that the death of one of two persons whose consent is required does not destroy the gift, and that the consent of the survivor is sufficient"; and by that decision the Court no doubt intimated an opinion that if both parents had been dead the same result would have followed. Notwithstanding this decision of the Court of Appeal, the Master of the Rolls considered their decision as a direct violation of one of the first principles of English law.

A similar case (*In re Brown's Will*, L. R. 18 Chy. D. 61), came before Mr. Justice Fry, and afterwards before the

Court of Appeal, in which the marriage was required to be with the consent of the young lady's guardian or guardians. The mother was appointed testamentary guardian, and died; and after her death, and while there was no guardian, the marriage took place, and it was held that the condition was not complied with. The former case (*Dawson* v. *Oliver-Massey*, L. R. 2 Chy. D. 753,) was limited to the case of parents; and, as guardians might have been appointed by the Court, the marriage without their consent was not a performance of the condition. In this last case there was no consent at all by any guardians, and it does not help to solve the question as to the effect of consent of survivors.

There is a general rule, however, that where the power to sell, or to consent, or do any act, is attached to the office of executor, trustee, guardian, &c., and not to particular persons, it may be exercised by any persons who fill the office. Thus, where a power of appointment was given to a deceased person, his executors, administrators or assigns, it was held to be well executed by the two acting executors appointed by the will of the deceased, where three executors had been named in his will, and one of them had declined to act—Wigram, V. C., saying: "The question in all such cases is, whether the confidence is reposed in the individuals named or in the persons who *de facto* fill the given office:" *Earl Granville* v. *McNeille*, 7 Hare 156.

In a later case (*Lane* v. *Debenham*, 11 Hare 188) the same learned Judge pointed out the distinction between trusts and powers, that where a naked power is given to two persons it will not survive to one of them, unless there be express words or a necessary implication shewing it to be the intention that it should survive. But, when a testator gives his property to trustees in trust to sell, it is a novel doctrine that, after the death of one of two trustees, the other cannot sell and execute the trust.

The present is a mixed case of power and trust. The land is devised to the wife for life, with a power of sale of the fee at any time during her life with consent of the executors. So far as her life estate is concerned it would seem

to be a trust to sell with consent, and a power over the remainder. She has, with consent of all, sold to John, one of those entitled in default of appointment, the part that would have devolved upon him in case of such default, and he has received it in full of his claims under the will; so that there need be no difficulty in dividing the proceeds of the sale now in question, one-third to the widow and two-thirds to Joseph.

The consent is not by this will required to be given by persons by name, but by his executors, and would seem to be attached to the office, so long at least as the plural number remains: *Sugden* Pow., 8th ed., p. 128; citing *Vincent* v. *Lee*, Co. Lit. 113*a*. A number of cases to the same effect are collected in *Lewin* on Trusts, 7th ed., p. 523 *et seq.*

But in *Sykes* v. *Sheard*, 2 DeG. J. & S. 6, where real estate was devised to trustees upon trust to sell, but no sale to be made without the consent of his sons and daughters, the testator left seven children, one of whom, a daughter, afterwards died, and her husband had become absolutely entitled to her share; the surving children and the husband of the deceased daughter consented to a sale; the Lord Justice thought the title much too doubtful, notwithstanding *Vincent* v. *Lee*, to be forced upon a purchaser.

A different conclusion has been arrived at in several American cases: *Leeds* v. *Wakefield*, 10 Gray 514; *Sohier* v. *Williams*, 1 Curtis, C. C. 479, and others.

In this state of the authorities I do not think the title such as can be forced on a purchaser.

The petition is therefore dismissed, with costs.

[CHANCERY DIVISION.]

SNARR v. THE GRANITE CURLING AND SKATING COMPANY.

Excavation for building—Right to lateral support—Damages by removal of —Future damages—Costs.

The defendant was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged.

Held, that in substituting artificial support for the natural support of the soil which had been removed, the defendants might construct it of any material, provided it was a sufficient support for the purpose, and that they continued to maintain the plaintiff's land in its proper position.

Held, also, that in estimating the plaintiff's damages, no sum should be allowed for damages to arise in future.

The damages were assessed at $40, but judgment was given for the restoration of the plaintiff's land. *Held*, that the plaintiff was entitled to full costs.

The cause was heard at the Toronto Sittings, on the 13th December, 1881.

The plaintiff was the owner of a dwelling house, a lot of land, and garden thereon, on the east side of Church street, in the city of Toronto.

The defendants, a Rink Company, were the owners of the lot adjoining that of the plaintiff, on the south side thereof.

It was apparently necessary for the defendants in making or forming their rink to excavate the land to the depth of several feet. This excavation was not so deep at and near Church street as it was at and towards the rear of the lots. The excavation was done along the dividing line between the lands of the plaintiff and those of the defendants. The plaintiff alleged that she was entitled to the lateral support of the defendants' land, so that her land might not fall away or be injured; or that, upon the removal by the defendants of that support, she was entitled to have a support substituted for it which would preserve her land

from injury by reason of such removal. This alleged right of the plaintiff was not, on the argument, disputed by the defendants. The plaintiff further contended that the support substituted by the defendants was utterly insufficient, that it had failed to support her land properly, and that she had sustained injury by reason thereof. The additional facts sufficiently appear in the judgment.

W. Cassels and *Brough*, for the defendants. There was no law requiring the defendants to construct a stone wall to the north of their premises. All the plaintiff was entitled to ask was reasonable support. The defendants had offered to pay $40 before suit, a sum in excess of the damage sustained, and the defendants also offered to mend the supporting wall in places where it had sagged. To do this required work to be done on plaintiff's property, and she had refused to allow this. There is no evidence of any loss from plaintiff's land being drained by the defendants, and this claim is without legal foundation. The defendants offered what was reasonable, and the plaintiff should be ordered to pay the costs.

Beaty, Q. C., and *J. M. Hamilton*, contra. The evidence clearly shews that there has been a trespass as to five and a half inches of land. A person is not allowed to excavate his land so near to that of his neighbour as to occasion the soil to fall in: *Backus* v. *Smith*, 5 App. R. 341; *Rowbottom* v. *Wilson*, 8 E. & B. 139. They also referred to the case of *Humphreys* v. *Brogden*, 12 Q. B. 743. As to the plaintiff's right to recover damages for future injuries, they cited *Lamb* v. *Walker*, L. R. 3 Q. B. D. 389.

February 13, 1882. FERGUSON, J.—The plaintiff complains because she says that water, necessary to the the fertility of her garden, has been drawn away by reason of the excavation by the defendants on their own land; but I think this complaint not established by the evidence with sufficient clearness for me to grant any relief in

regard to it, even if the law on the subject were in her favour. The plaintiff also claimed, and contends, that the defendants have trespassed upon and taken some four or five inches of her land; but I do not think that, in the face of the evidence of Mr. Henderson as to what took place at the time of the purchase of her land, I should be justified in finding against the defendants as for a trespass for this alleged cause.

The plaintiff, however, says that she is entitled to damages occasioned by the depression of her land in certain places along the boundary, in consequence of the insufficient substituted support, furnished by the defendants when they removed the natural support; for the loss of certain shrubs and fruit brushes growing thereon; and in respect of the displacement of the fence. She also contended that she was entitled to have the defendants ordered to construct a support to her land of the most permanent character, and brought before the Court the evidence of professional gentlemen to shew that such a support should be constructed. Her contention was, that this should be constructed of stone in a certain manner, and at very great cost to the defendants. In this last contention I do not think the plaintiff is correct, and no authority was referred to to shew the correctness of it. It was not denied that she was and is entitled to a support sufficient to maintain the surface of her land in position, and the defendants say that they are at liberty to construct such support of any material that to them may seem proper. In this contention I think the defendants are right. I think they may furnish the support of any material, provided it is a sufficient support for the time being, and answers the purpose of preserving the position of the plaintiff's land. The defendants admit that there was and is a defect in the substituted support furnished by them, saying, however, that the defect came about by an accident. It appeared at the hearing that before the litigation commenced an offer of $40 for the alleged damages had been made, and that so far as the amount

was concerned the parties had agreed; the defendants then saying that they would remedy the defects in the support to the plaintiff's land. For some reason this agreement was not concluded so as to bind the parties, and this suit was brought, It was agreed by counsel that I should inspect the premises in question before giving any judgment, and this I have done. I am of the opinion that the present support to the plaintiff's land furnished by the defendants has from some cause proved insufficient, and that by reason of this insufficiency there has been a disturbance of the surface of the land, and a displacement of the fence, the latter to a very considerable extent, and I think the defendants should be ordered to restore the plaintiff's land to its original position; to provide a support sufficient to maintain it in such position; and that they should be ordered to continue such support so as to maintain the plaintiff's land in its original position and (subject to whatever rights or liability there may be by reason of its being a line fence,) to place and maintain the fence on the boundary between the two properties in proper position. This I think the defendants may do with any material and in any manner that to them may seem proper, so that they actually accomplish for the plaintiff what I have stated.

As to the damages, it was agreed that there need not be reference, and that I should say what should be allowed, and in this view evidence was given which otherwise would have been proper for the Master's office. Some of this evidence went to shew that the damage sustained was much greater than $40, the sum before mentioned, but I do not think there is evidence on which I can safely act, shewing that the damages (exclusive of what was claimed in respect of fruit alleged to have been stolen, and excluding also the claim made and sought to be proved in respect of the effect of the defendants' excavation upon the water percolating through the soil on the plaintiff's land, neither of which can I think on principle be allowed,) are greater than that amount. I am, on the other hand, satisfied, both

from the evidence and my observation, that $40 is not an excessive sum to allow for the injuries that are past, in respect of which the defendants can be charged. If, however, the place were permitted to continue in its present condition, the injuries arising to the plaintiff's property might be much, and, perhaps incomparably greater. I am of the opinion that for the past injuries sustained, the damages should be assessed at $40, and notwithstanding the case of *Lamb* v. *Walker*, L. R. 3 Q.B.D. 389, I do not see my way to allowing any sum for damages to arise in future.

It was argued that, under such circumstances, if costs were ordered to be paid, they should be according to the lower scale. I am not of this opinion. I think that there has been an appreciable injury to the plaintiff's real property, and that as such injury was and is of a continuing character, she had a full right to come to this Court for relief; and, notwithstanding that at common law the action would be in Case, as for a resulting injury, and not for a trespass, and the necessity for an appreciable injury to the land before the action would lie, she is in my judgment entitled to be paid by the defendants her full costs of suit.

The judgment will be for the plaintiff, and the order above indicated will issue. The defendants will pay to the plaintiff the sum of $40 as damages, and her full costs of suit.

The defendants should have till some reasonable time during the approaching spring, say till the 15th day of April next, to comply with the order to restore the plaintiff's premises, &c.; and the plaintiff should permit the workmen and servants of the defendants to enter and go upon her land for the purpose of so doing, they doing, whilst there, as little damage as reasonably possible I do not know that I can order the plaintiff to do this, but if she refuse that fact may be the subject of consideration upon any motion that may be made against the defendants for disobedience of the order.

The damages are to be paid forthwith, and the costs of suit forthwith after taxation, and the judgment will be accordingly.

NOTE.—In drawing up the judgment a question was raised as to whether the defendants' company should be directly commanded to restore the plaintiff's land to its former condition, or whether they should be restrained from suffering it to remain otherwise than in its former condition, and on the point being submitted by the Registrar to the learned Judge, he, after conferring with the Chancellor and Proudfoot, J., and referring to the note to *Masson* v. *The Grand Junction R. W. Co.*, 26 Gr. 289, and to the decree subsequntly pronounced by Blake, V. C., in *Masson* v. *Grand Junction R. W. Co.*, entered in the Registrar's Book, 35 fo. 365, and the remarks of Jessel M. R. in *Smith* v. *Smith*, L. R. 20 Eq., 500, directed the judgment to be drawn up commanding the defendant company to restore the land to its former condition, &c.

[CHANCERY DIVISION.]

VANSICKLE ET AL. V. VANSICKLE ET AL.

Will, construction of—After acquired property.

The testator owned eighty acres of land, and sold a part thereof, subsequently and on the 30th March, 1875, he made his will, whereby he devised to his son N. the said eighty acres, "excepting so much thereof as I may have sold and conveyed." Thereafter, and shortly before his death, he again acquired the part which he had sold.

Held, that although the will spoke from his death, the after-acquired property did not pass, for the testator had specified the subject matter of his devise, within which the property in question was not included.

This cause was heard at the Sittings at Hamilton, before Ferguson, J., on the 29th October, 1881.

The bill of complaint asked for a declaration, that the late Benony Vansickle, in his life time the owner of village lots one and two, in the village of Lynden, died intestate in respect of the same, and that the plantiffs and the defendant Nathan Vansickle were entitled thereto as tenants in common; for a partition or sale of the said lands, and for an account of rents and profits as against the defendant Nathan Vansickle.

This defendant set up title to the lands in himself in two ways: First, under or by virtue of a conveyance of the same from one George Vansickle to the late Benony Vansickle, by mistake, instead of to him, the defendant Nathan; alleging that he had made a purchase of the lands from George, and that the conveyance should have been to him; and secondly, under the will of the said Benony Vansickle; and at the hearing he resisted the partition or sale on the grounds that the lands belonged to him. It was contended on behalf of this defendant, that he had contracted to purchase the lands in question from George, and had paid to or for George large sums on account of the purchase money: that he had built a hotel on the land and expended a large sum of money in so doing: that this agreement with George, though only verbal, had been partly performed: that at the time of the conveyance to his father, Benony Vansickle, he, Nathan, was entitled in equity to the lands, and to a specific performance of the agreement: that the conveyance to his father was in error or by mistake, and had he been present when the conveyance was executed in Hamilton, it would have been made to him, instead of to the father: that in this way his father became a trustee of the lands for him, and it was asked (apparently by way of cross-relief), that there should be a declaration of such alleged trust in his favor.

R. C. Smyth, for the defendant, Nathan Vansickle.

T. Robertson, Q. C., for the plaintiffs and the defendants in the same interest. The case of *Crombie* v. *Cooper*, 24 Grant 470, is exactly in point, and shews that the property did not pass under the will. He also referred to *Cole* v. *Scott*, 1 MacN. & G. 518. As to the resulting trust, if there was no bargain between Nathan and George, there could be no resulting trust. The course taken by the defendant, in purchasing part of the land, shewed that he had no confidence in his claim.

February 13, 1882. FERGUSON, J.—[After reviewing the evidence and finding against the defendant Nathan on the facts.]

Then as to the other contention of the defendant Nathan. The claim is made under the fifth paragraph of the will, which is as follows: 5th. "I further give and devise to my said son Nathan, his heirs and assigns, the south eighty acres of said lot number twelve, in the first concession of the said township of Beverley, excepting so much thereof as I may have sold and conveyed, subject, however," &c., Counsel for the plaintiffs admitted that the land in question is a part of this eighty acres. The will was made and executed on the 30th of March, 1875. It is admitted that at that time the testator did not own the land in question at all. The conveyance of it from George to him was a comparatively short time before his death, and long after the making of the will. It was stated at the bar, and not disputed, that the testator had once been the owner of the land in question, but had conveyed it away long before the making of the will. The contention was, that, although this land was not embraced in the description in the will, yet, as the testator acquired it after the making of the will, and as a will speaks, under the statute, from the death of the testator, and not from the time of its execution, this land passed under it. This contention was, however, I think, completely met by the argument of counsel for the plaintiffs, and the cases of *Cole* v. *Scott*, 1 MacN. & G. 518, decided under the Wills Act in England, and the case of *Crombie* v. *Cooper*, 24 Grant 470, 22 Grant 267, and cases there referred to; and I am of the opinion that these lands did not pass under this clause of the will, and that the defence of the defendant Nathan Vansickle fails. I see no reason why the plaintiffs should not have the decree for which they have asked.

There will be a declaration, that as to the lots in question the late Benony Vansickle died intestate, and that the plaintiffs and the defendant Nathan Vansickle are entitled thereto as tenants in common.

It is plain, I think, and it was admitted, that the lands cannot well be partitioned, and the decree will be for a sale thereof instead.

There will be an account of rents and profits taken, as against the defendant Nathan Vansickle.

The defendant Nathan Vansickle will pay to the plaintiffs their costs of suit in excess of the costs of the ordinary application for a partition.

The reference will, I apprehend, be to the Master at Hamilton.

[CHANCERY DIVISION.]

DICKSON V. CARNEGIE.

Riparian proprietors.

A riparian proprietor has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands, but his right is a qualified one, and subject to the lawful and reasonable user of the waters by a mill owner above him on the same stream, and this although the user above him may be at times for an extraordinary purpose.

The facts of this case are as follows:

The plaintiff was the occupant of certain lands and a mill, upon a creek or stream in the Township of East Whitby. The defendant was a riparian proprietor and mill owner, above the plaintiff on the same stream. The lands of the plaintiff and those of the defendant were separated only by a roadway or right of way being an allowance for a public highway. The title of the defendant Carnegie was admitted, and there was a qualified admission of the plaintiff's title; owing, however, to the view taken by the learned Judge at the trial, nothing turned upon the question of title.

The plaintiff by his bill charged the defendant Carnegie with wrongfully keeping and continuing his (the

defendant's) dams, gates, and hatches, shut and closed for long spaces of time, and thereby obstructing the water and preventing it from flowing to the plaintiff's land and mill in its usual and proper course, flow and current, and thereby preventing the plaintiff from using his mill and premises in as beneficial a manner as he otherwise would and could have done; and alleged special as well as general damages. The bill prayed for a declaration that the plaintiff was entitled to the use and enjoyment of the water in the said stream, according to its natural flow, and without interruption or detention thereof by the defendant Carnegie, &c.; for an injunction, and for an account as to the alleged damages. It was not disputed that the defendant Carnegie after using the water of the stream for the purposes of his mill, returned the same to the natural bed of the stream at a point above the boundary of the plaintiff's lands and upon his own lands. Much evidence was given as to the extent and reasonableness of the detention of the water by the defendant, and as to the plaintiff's failing to make use of appliances necessary for the working of his mill, and at the close of the case the learned Judge found, amongst other things, as follows:—1. That there had been a detention of the waters of the stream by the defendant, Carnegie, so that it did not flow to and upon the plaintiff's land in the regular course of the natural stream. 2. That the use of the water by the defendant, Carnegie, was for the purposes of his mill, and reasonable. 3. That the use of the water by the defendant Carnegie, was not, in view of the existence and circumstances of both mills unreasonable. 4. That the plaintiff did not reasonably make use of the appliances necessary for the working of his mill, and that to avail himself properly of the benefit of the water for the purposes of his mill, he should have made use of a certain old dam mentioned in the evidence. 5. That without the use of this dam, and without the benefit of the defendant Carnegie's dam, the plaintiff could not work his mill advantageously. 6. That the benefit derived by the plaintiff from the dam and

pond of the defendant, Carnegie, at least equalled the injuries complained of and proved, and, that if benefit and injury were considered as a whole, the plaintiff had not sustained any injury. 7. That the defendant's mill and his present dam were built and constructed and worked more that twenty years before this suit.

The case was heard before Ferguson, J., at the Whitby Sittings, on the 19th October, 1881.

W. Cassels for the defendant. The evidence clearly establishes that the use of the water of the stream by the defendant Carnegie was reasonable. In order to obtain any benefit from the stream for mill purposes, it is necessary that owners of the stream and lands on each side should be at liberty to store the waters, and if the defendant has acted reasonably in so penning back the waters, and without any *mala fides*, it is submitted the plaintiff cannot complain. In several of the United States this rule of law is adopted, and the circumstances of this country should lead to the same rule being adopted here. If it is not, then for manufacturing purposes a large number of the streams in this country would be useless. Mr. *Cassels* referred to *Embrey* v. *Owen*, 6 Ex. 353; *Higgins* on Watercourses, 66; *Angell* on Watercourses, 7th ed., 119; *Pitts* v. *Lancaster Mill*, 13 Met. 156. The cases like *Bickkett* v. *Morris*, L. R. 1 Sc. App. H. L. 47, and that class of cases do not apply. These are cases of riparian owners on opposite sides of a stream, and do not apply to owners of both banks of the bed of a stream, one being higher up the stream than the other.

Richie, *English* with him, contra. *Primâ facie* each riparian proprietor is entitled to the natural flow of the waters of the stream, and any disturbance of such right gives a right of action. A person may use the water for the purposes of a mill, which is an extraordinary purpose, but if he sensibly diminishes the supply, an action lies. Assuming that the defendant had the right to store the water, he did it in a most unreasonable way.

February 13, 1882. FERGUSON, J.—On behalf of the plaintiff it was contended, First, that he was absolutely entitled to have the water of the stream permitted to flow over and upon his land in the natural course and flow of the stream; and, secondly, that even if this were not so, and the defendant Carnegie had the right to use the water for the purposes for which he did use it, such user by the defendant must be a reasonable one, and that the use in this case by the defendant was unreasonable.

The finding is against the plaintiff on this second contention. Then, as to the first contention, I think the law as stated in *Kent's* Commentaries, vol. 3, pp. 439, *et seq.* (12th ed.) has been adopted and approved of in England: See *Embrey* v. *Owen*, 6 Ex. 353, 369; *Higgins* on the Pollution and Obstruction of Water-Courses, from 67 to 73.

I am of the opinion that the absolute right contended for on behalf of the plaintiff does not exist, but that the right is a qualified one, and subject to the lawful and reasonable user of the water by the defendant Carnegie, and this, although the use was for what is, at least sometimes, called an extraordinary purpose. See also *Angell* on Watercourses, secs. 119 and 119*a*, and cases therein cited, especially the case *Pitts* v. *Lancaster Mills*, 13 Met. 156.

In some of the States of the United States there are statutory provisions on this subject, but the statement of the law to which I have referred has not its foundation in such provisions.

The user of the water in this case by the defendant Carnegie was lawful. I have found upon the evidence that it was reasonable as against the plaintiff. I am of the opinion that the plaintiff's case fails, and I think it is unnecessary to consider the other questions raised, or any of them.

The judgment will be for the defendant, and the plaintiff's bill will be dismissed, with costs.

[CHANCERY DIVISION.]

BARKER v. LEESON.

Chattel mortgage—Sale under after expiration by non-renewal—Creditor, meaning of—Interpleader—Setting up new title.

A chattel mortgage which has expired by effluxion of time under R. S. O. ch. 119, sec. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgagor then existing; and a sale on default, in good faith, made by the mortgagee, with the consent of the mortgagor, though good as between the parties to the mortgage, only passes to the purchaser a title subject to the rights of any creditors who may take steps to follow the goods.

Remarks upon the policy of the Chattel Mortgage Act.

In an interpleader issue the claimant claimed under his purchase from the chattel mortgagee, and the issue was found against him:

Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the Court.

THIS was an interpleader issue, tried by order of the referee at the County Court Sittings of the county of Dufferin.

The claimant was the administratrix of one Thomas Leeson, and claimed the goods and chattels in question under a bill of sale, executed by one Peterson. The goods consisted of various articles, including a quantity of saw logs, all of which were situate in or about a mill, in the township of Caledon, which was worked by the judgment debtor, W. E. Leeson, who was a nephew of Thomas Leeson.

It appeared on the trial that W. E. Leeson in May, 1878, executed a chattel mortgage to Peterson, of certain saw logs on the mill property (not the identical logs seized) and also the various other articles seized under the execution, and that the mortgage had not been re-filed or renewed at the expiration of the year under the statute. In November, 1880, W. E. Leeson, in company with his uncle, Thomas Leeson, called upon Peterson, who had been pressing for payment of his debt, and it was arranged between them that Thomas should assume the debt and take the goods; and a memorandum in writing, specifying the goods and conveying them to Thomas Leeson, was executed by Peter-

son, an acknowledgment being also given by W. E. Leeson of the mortgagee's right to convey the property and assenting to the transfer. Neither the bill of sale by Peterson nor the acknowledgment was registered. The purchaser took formal possession of the goods, and then engaged W. E. Leeson, who had all along been in possession, to work the mill, in and about which the goods were situate. No visible change was made in the possession or user of the property, the mortgagor remained the ostensible owner, and the uncle continued his business as inn-keeper in another place. The execution creditor, Barker, was a creditor of the mortgagor when the mortgage was given, but did not recover judgment and issue execution till 1881. The question of change of possession at the time of sale was not left specifically to the jury.

A verdict was found for the claimant.

On 31st January, 1881, a motion was made upon notice to set aside the verdict and enter a nonsuit on several grounds.

Shepley, for the motion. The evidence of title was not sufficient, and the claimant should have been nonsuited. Peterson's mortgage having expired, his right to the goods as against creditors was gone, and he could convey on title to Thomas Leeson, as against creditors. There was no taking possession by the mortgagee to support the sale of the power in the mortgage is relied on. There was no evidence of any change of possession after the transfer to Thomas Leeson, and the conveyance to Thomas, not being registered, affords no protection as against creditors. He referred to *Chamberlain* v. *Green*, 20 C. P. 304; *Barron* on Bills of Sale, p. 58.

Reeve, contra. The execution plaintiff was not a creditor within the Act, at the time of transfer by Peterson. The conveyance by Peterson was not capable of registration, and it was not necessary to register it, and the change of

possession was all the property was capable of. The logs are the claimant's property altogether, independently of the chattel mortgage, as they were bought by Thomas Leeson after the conveyance by Peterson.

Shepley, in reply. The Act makes no distinction between ordinary creditors and judgment creditors. As to the logs, the claimant on the application for the interpleader order, made title to them through the chattel mortgage, and the issue on the mortgage being determined against her she cannot now set up title another way.

February 15, 1882. BOYD, C.—The claimant's contention is, that as between Peterson and his mortgagor, the security was valid, notwithstanding the failure to comply with the statutory regulations of renewal. Default having been made in payment, Peterson was entitled to treat the security as forfeited and take possession or sell. With the consent of the mortgagor he did sell, and made a bill of sale to the purchaser, which the mortgagor ratified by a writing under his hand. This is conduct on the part of the mortgagor which would estop him from questioning the regularity of the sale, and as regards the three parties concerned passes the absolute property in the goods to the purchaser. So far I agree with the argument.

But the serious question next arises, whether Barker, who was a creditor at the time of the sale and during the currency of the mortgage, but not a judgment or execution creditor till after the claimant's title accrued, can obtain the benefit of that section of the Chattel Mortgage Act, which avoids a mortgage not renewed as therein mentioned as against the creditors of the mortgagor. No direct authority was cited, and I revert to the statute, upon the fair meaning and intent of which the case may be disposed of.

It is said that the statute does not apply, because the creditor who now attacks the transaction had no lien or

execution when the sale was made to Thomas Leeson, who bought for value and *bonâ fide*. The language of the statute is, that every mortgage shall cease to be valid as against the creditors of the person making the same after the expiration of one year from the filing thereof, unless there be a statement of renewal filed, as provided in the 10th section of the Act: R. S. O. Ch. 119. Why should this be read as meaning judgment or execution creditors?

The recovery of judgment merely facilitates the proof of the party who is the creditor, but he is as much a "creditor" before as after judgment. The object of the act is plainly, by means of registration, to inform everybody that goods apparently in the possession and ownership of A. are not in truth his, but are held by him subject to the claim of B. under a chattel mortgage or a bill of sale. The object of the Act is to enforce a visible and actual transfer of possession upon every change of ownership, or to compel the recording of the instruments which manifest the change of property. The intent is, that persons who are about to become the creditors of others by parting with money or money's worth, may, by searches in the public office, obtain information for their guidance; and that the ostensible owners of chattels may not gain fictitious credit on the faith of property which is either encumbered or belongs to other people. By the statute, then, where the mortgagee has not renewed his security by re-filing at the year's end, and is not in possession of the chattels, his mortgage ceases to be valid against creditors. The potential invalidity exists as to all creditors then in existence, although no creditor may be able to obtain a specific declaration of invalidity, and a consequent satisfaction out of the assets, without first proceeding to judgment and execution. The Act does not provide that there may be an equivalent for the statutory means of renewal by a taking possession or a sale under the expired mortgage. No subsequent dealing between mortgagor and mortgagee based upon the continued existence of a security declared invalid as to creditors can re-establish that security or legalize a sale

under it. Any one purchasing at such a sale has explicit notice, from the absence of the statutory requirements, that the instrument has no efficacy as against creditors. He knows that he can only purchase subject to the right of any creditor then existing who chooses to take the proper steps to follow the goods.

In this case the assent of the mortgagor to the sale cannot be more efficacious than if the mortgagee had foreclosed. By a foreclosure the mortgagor would forfeit his title as against the mortgagee, but he would not thereby cure the invalidity created by the statute, or qualify himself to pass an unimpeachable title.

These considerations suffice to determine the litigation adversely to the claimant. The secrecy of the course pursued in dealing with the property, and the fact that practically the mortgagor has been all along in the manifest possession and enjoyment of the goods, are mischiefs which the Legislature intended to counteract. To give effect to the claimant's contention would, in my judgment, be to offend against both the spirit and the letter of the Act.

With reference to the logs, which it is contended are the property of the claimant irrespective of the chattel mortgage, having been purchased by Thomas Leeson subsequently to the sale by Peterson, I find upon referring to the application of the claimant, that she made claim to the logs in question under the chattel mortgage, which I hold invalid. This being so, I think that the verdict should be set aside also as to these logs. The interpleader was simply to advise the Court as to the validity of her claim under the mortgage, and if she has a claim to hold the property, *i. e.*, the logs, by any other title, that would be a matter of substantive application to the Court. But in so far as this issue and interpleader is concerned it should be decided against her.

For the purpose of any such application, let the issue of order be stayed for ten days.

The verdict should be set aside, and a verdict entered for the execution creditor.

[CANCERY DIVISION.]

BRAYLEY V. ELLIS ET AL.

Chattel mortgage—Agreement to execute—Prior advances—Pressure R. S. O. ch. 118.

Where there is a promise to execute a chattel mortgage upon the faith of which money is advanced, or where there is a pre-existing duty to give such a mortgage, which is in consequence of pressure subsequently executed, the mortgage is not void under R. S. O. ch. 118.

Held, also, that the doctrine of pressure which obtained before the Insolvency laws, now occupies the same position since their repeal.

THIS was an action for the purpose of having a chattel mortgage, bearing date the 16th November, 1880, and made by the defendant Ellis, to the defendant Taylor, declared void as against the plaintiff and the other creditors of the defendant Ellis, the plaintiff suing on behalf of himself and all the other creditors of the defendant Ellis, except the defendant Taylor.

It appeared by the evidence that the defendant Ellis commenced business in the village of Tara, in the county of Bruce, in November, 1879, as a milliner, and that she carried on such business until it was closed up by the defendant Taylor, who took possession under the provisions of the mortgage before this suit.

The defendant Ellis in her evidence said that when she went to Tara she had not money to purchase goods, but that she expected money, owing to the death of a relative: that she rented a house from the defendant Taylor, at $96 per year; that she borrowed money from time to time from him; and that in all: Taylor lent her in the years 1879 and 1880 $350, or thereabouts. She said that when she asked defendant Taylor for the money he asked what security she could give him, and that her reply was that she would give him a chattel mortgage on all she had, and that was all she could do. She said that several sums of money had been

borrowed from Taylor, but the mortgage, though promised, was not in fact given, when on one occasion upon asking Taylor for a further loan he demanded the mortgage before lending the money: that she was annoyed at this, and said she would not give him the mortgage at all: that Taylor then went, as she supposes, to his lawyer, and that she received a letter from Taylor's lawyer, threatening legal proceedings for the collection of the sum of $467.48, and that not seeing her way to any other course she executed the mortgage in question. This letter was given in evidence and marked Exhibit P., and was dated the 12th November, 1880.

This sum of $467.48 appeared to be made up of rent, money lent, medical attendance (the defendant Taylor being a doctor by profession), and a small item for interest on the money advanced, and there did not appear to be any good reason for thinking that the account was not genuine, and to secure the payment of this the mortgage was drawn.

This was the account given of the transactions by the defendant Ellis, and that given by the defendant Taylor was substantially the same. The mortgage appeared to be upon household furniture, the stock in trade, and upon goods that might in the then future be purchased by the defendant Ellis, and it was said at the hearing that *all the property* of the defendant Ellis was comprised in it.

The action was tried before Ferguson, J., at the Toronto Sittings on 22nd November, 1881.

W. Cassels, for the defendants. The plaintiff has no *locus standi:* in order to sustain a suit at the instance of a creditor, judgment must have been recovered and execution issued. The rule in regard to the Statute of Elizabeth has been modified, allowing a simple contract creditor to sue on behalf of himself and others, when the plaintiff alleges he was proceeding to recover judgment at law: *Longeway* v. *Mitchell*, 17 Gr. 190; and since the Administration of Justice Act, where he asks judgment in the same suit; but the reasoning of this class

of cases does not apply to suits under R. S. O. ch. 118. In this case the plaintiff does not ask for the payment of his debt, nor does he allege he is proceeding at law. It is proved in evidence there was an agreement to execute a mortgage when the moneys were advanced, and under the authorities this prevents the operation of the rule as to preference: *Allan* v. *Clarkson*, 17 Gr. 570; *Patterson* v. *Kingsley*, 25 Gr. 425. Then again, it is proved the mortgage was executed under threat of suit, and although the doctrine of pressure was held in *Davidson* v. *Ross* not to apply to the Insolvent Act, the cases there cited shew that the Court were of opinion that in cases under an Act similar to R. S. O. ch. 118, the doctrine of pressure still prevailed: *Davidson* v. *Ross*, 24 Gr. 22. There being no provision for a ratable distribution of assets since the repeal of the Insolvent Act, the reason of the decision is gone.

Gibbons, contra. The mortgagee knew that Mrs. Elllis was insolvent, and took the mortgage on all her property. It must therefore be assumed that he knew there would be nothing left for the other creditors, upon whom the mortgage unquestionably was a fraud. Upon this point he cited the following authorities: *Stanger* v. *Wilkins*, 19 Beav. 626; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Lindon* v. *Sharp*, 6 M. & G. 895; *Ex parte Bailey*, 3 DeG. M. & G. 534.

February 18, 1882. FERGUSON, J.—It appeared by the plaintiffs' account against the defendant Ellis, which is in evidence and marked Exhibit L., that from the 10th August, 1880 to the 13th November following, she had purchased goods from him to the amount of $628.83, and that from the 18th October to the 13th December, she had paid him in all $228.90, leaving a balance unpaid of $399.93. The accounts of other merchants in Toronto were put in, shewing that she was indebted in considerable sums of money above what she owed the plaintiff and the defendant Taylor. She said that an object of her borrowing money from the defendant Taylor

was to enable her to make purchases in Toronto, instead of in Owen Sound, she thinking that she could purchase on better terms in Toronto. There is no doubt, that at the time of the execution of this mortgage by the defendant Ellis, the mortgagor was indebted to two firms in Toronto, besides the plaintiff, in considerable sums, and that this indebtedness had not been paid or satisfied.

There is scarcely any evidence (none I may say) opposed to or contradicting that given by the defendants, and the question seems to be simply whether or not, under such circumstances, the mortgage can be upheld, or should be declared void, as against the creditors of the mortgagor. The plaintiff has not recovered a judgment against the defendant Ellis. He does not seek by this suit to recover such a judgment, nor does it appear that any of her creditors has recovered a judgment against her. As the bill is by the plaintiff on behalf of himself and the other creditors of defendant Ellis, excepting Taylor, and does not ask for any relief except having the transaction sought to be impeached set aside, an injunction, and the payment of money into Court by the defendant Taylor, I apprehend that, under the authority of *Longeway* v. *Mitchell*, 17 Gr. 196, it is as a matter of pleading not open to objection. At all events, it has not been objected to.

As I understand the evidence in this case, there was a promise and a pre-existing duty to make such a mortgage as the one in question; and there was also pressure brought to bear upon the mortgagor at the time, in consequence of which the mortgage was executed. In the case of *Allan* v. *Clarkson*, 17 Gr. 570, Strong, V. C., quoting from *Griffith & Holmes* on Bankruptcy, says: "It would appear that the agreement to give this security upon the faith of which the money was lent relieves it from any taint of illegality, for it is there said: 'If there is any contract to give security to a given creditor, or anything in the nature of a duty pre-existing, then the mere fact of impending bankruptcy will not render it fraudulent.' In the case of *Patterson* v. *Kingsley*, 25 Gr. 425,

the present Chief Justice, then the Chancellor, quoted with approval from the same authors: "If there is any contract to give security to a given creditor, or anything in the nature of a duty pre-existing, then the mere fact of impending bankruptcy will not render it fraudulent." And there are other cases going to shew that such was the law, *even during the existence of our late insolvency laws.* In the case of *Davidson* v. *Ross*, in Appeal, reported in 24 Gr. p. 22, Mr. Justice Patterson states what was before the the decision in that case, the law regarding what has been called the "doctrine of pressure." At page 64 he is reported to have said: "I understand the ground of all the decisions respecting *pressure* to be, that a transaction is not *voluntary* when it originates in the will of the creditor, at whose instance it is done, and not in the will of the debtor, who only yields to the solicitation of his creditor, and it is not done *with intent* to prefer, &c. If the motive is to escape the pressure which is exercised, or even to comply with a *bona fide* demand which is made, and not to prefer one creditor to another, even though that may be the necessary and obvious effect of what is done."

This case, *Davidson* v. *Ross*, overruled as many as four reported cases in our own Courts, by deciding that a transfer might be obtained by pressure, and yet be made in "contemplation of insolvency." In deciding this, it appears to me that the Court only placed a construction upon a section of an Act of the Legislature which has since been repealed, and I think the so-called doctrine of pressure now occupies the same position as it did before the passing of the section on which the case, or the branch of the case—*Davidson* v. *Ross*—alluded to, was decided. This was one of the arguments of Mr. W. Cassels, counsel for the defendants, and I think he was correct.

Then, in the absence of insolvency laws, I think it cannot be said, where there has been a promise to make a mortgage and money advanced on the faith of that promise, where there was an existing duty to make the mortgage, as from the evidence I think there was here—

where, before it was made, there was a refusal to make it, and pressure such as is disclosed by the evidence brought to bear by the creditor upon the debtor, the mortgagor, in consequence of which the mortgage was executed—that the mortgage was made with intent to hinder, defeat or delay creditors, or with intent to give this particular creditor a preference or priority over the other creditors of the mortgagor, within the meaning of the statute commonly known as the Indigent Debtor's Act, R. S. O. ch. 118. And besides, I am of the opinion that the actual fact is that the mortgage was not made with such intent.

It was argued—and very pointedly argued, too—by Mr. Gibbons, counsel for the plaintiff, that because the mortgage was upon the whole of the property of the mortgagor pressure by the creditors could not make any difference in the determination of the case, and he cited four authorities in support of his argument, upon which he mainly relied. I have examined these with care. Some of them do in words seem to support the view contended for by the learned counsel; but, in my humble opinion, these cases, so far as they could by possibility be considered to have any application to this case, only decide as to whether or not an act of bankruptcy had been committed, such an act being defined by sections of the Bankruptcy Acts from time to time in force in England; and they really have not any application.

I am of opinion that the mortgage in question must be upheld, and that the plaintiff's bill should be dismissed with costs, and the judgment will be accordingly.

[CHANCERY DIVISION.]

RE BELL AND BLACK.

Seal.

The *testimonium* clause in a power of attorney declared that the principal set his hand and seal to the instrument. The attestation clause declared that it was signed and sealed in the presence of a subscribing witness, and opposite the signature of the principal, was a visible impression made by the pen in the form of a scroll, in which was inscribed the word "seal."

Held, a sufficient sealing of the document.

Petition by James Bell, setting forth that the petitioner on the 8th November, 1881, entered into a written contract with one David Black, whereby the petitioner agreed to sell and Black agreed to purchase the west half of lot number 8, in the ninth concession of Amaranth, of which land the petitioner and one John Bell, his brother, were the owners in fee simple: that John Bell had executed a power of attorney in the petitioner's favour, empowering him to sell and convey the said land: that John Bell executed such power of attorney by signing his name at the end thereof, and by making opposite to such signature a visible impression with the pen in the form of a circular scroll in which was inscribed the word "seal": that such execution of the power of attorney was done in the presence of a witness, who signed the ordinary *testimonium* clause stating that the document was "signed, sealed, and delivered," in his presence. The purchaser, though willing to accept a conveyance if executed under the provisions of a proper and sufficient power of attorney, charged that the instrument was defective by reason of its not having been properly sealed, and the petitioner was therefore not empowered to convey the interest of John Bell. The petitioner prayed that it might be declared that the power of attorney was duly executed.

February 27, 1882. *D. L. Scott*, who appeared by consent for both parties, cited the following authorities to shew the state of the law upon the question; *Nagle* v. *Kilts*, Tay. R. 269; *Clement* v. *Donaldson*, 9 U. C. R. 299; *Foster* v. *Geddes*, 14 U. C. R. 239; *Hamilton* v. *Dennis*, 12 Gr. 325; *Re Sandilands*, L. R. 6 C. P. 411.

March 1, 1882. BOYD, C.—A well known author remarks that the practice of sealing cannot serve any purpose of identification or verification, but has degenerated into a merely useless form: *Josiah Smith* on Real and Personal Property, 917. According to Lord Coke: "*Sigillum est cera impressa quia cera sine impressione non est sigillum*," but the current of modern decisions has worn away every distinctive feature of this ancient definition. Neither wax, wafer, nor other adhesive substance is now required. The seal, once so valuable for the indentification of the owner, may be now superseded by an office-ruler or a stick. All that remains is the impression, and this according to the latest case may be visible by means of an indentation on the face of the instrument, or it may be invisible because of the something intended for a seal being from its nature incapable of retaining an impression: *Re Sandilands*, L. R. 6 C. P. 411, in 1871: which is substantially an affirmation of the same law as was laid down by the present Chief Justice of Ontario, when Vice-Chancellor, in 1866, in *Hamilton* v. *Dennis*, 12 Gr. 325. These cases in effect over-rule *Nagle* v. *Kilts*, Tay. R. 269, unless that case be distinguishable on the ground that there was no evidence to show that the party executing intended to seal the instrument. Here we find sufficient to comply with the requirements of the law as expressed by Spragge, V. C., 12 Gr. 328: "There must, I take it, still be something applied to or impressed upon the document denoting that it is intended as a seal, or as standing for the seal of the party executing. Probably the word "sealed" in the attestation clause may not be sufficient, but there being something impressed or affixed in the position ordinarily occupied by

a seal and which is there for no other purpose than as a seal, I apprehend the Court will hold it to be a seal."

In *Matthews* on Presumptive Evidence it is said the fact of sealing will be presumed, even in cases where no mark or impression on the paper appears, provided that the attestation notice the solemnity to have been complied with. The reason is that it is sufficient if the seal, stick, or other instrument be impressed by the party on the plain paper with an intent to seal: p. 36.

In the case now in hand we find the *testimonium* clause, in which the principal declares that he sets his hand and seal to the power of attorney; we find the attestation of the subscribing witness, who declares that it was signed and sealed in his presence; and we have the visible impression made by the pen in forming the circular scroll and inscribing therein the word "seal," which it was admitted was done by the person executing with the intent to place his seal to the document, and to adopt that scroll as his proper seal thereto. The ceremony of sealing was the expedient of an early age, designed to obtain the solemn and formal authentication of an instrument by some permanent symbol or token apart from the signature. The material with which this is to be done and the manner of doing it have however been modified from time to time by the rejection of non-essential elements. What more conspicuous or permanent "sealing" can be desired than the device employed here, which will last as long as the signature which authenticates the instrument and the paper on which it is written?

For these reasons the prayer of the petitioner is granted.

[CHANCERY DIVISION.]

CROWTHER ET AL. V. CAWTHRA ET AL.

Distributions, Statute of.

The proviso in the Statute of Distributions that "There be no representations admitted amongst collaterals after brothers and sisters children," excludes the children of a deceased nephew of the intestate.

THE proceedings in this action were instituted by the administrators of the estate of the late William Cawthra to determine whether certain children of a deceased nephew of the intestate were entitled to share in the estate under the Statute of Distributions. There being no dispute as to the facts, the matter came up by way of motion for judgment.

In the statement of claim it was alleged that William Cawthra, late of the city of Toronto, Esquire, died on the 26th of October, 1881, intestate and without lawful issue, but leaving him surviving Sarah Ellen Cawthra his widow, Henry Cawthra and Joseph Cawthra, his only surviving nephews, Mary Mulock, his only surviving niece, and the infant defendants, who were the only surviving issue of John Cawthra, a nephew who pre-deceased him.

It was also alleged that as doubts existed as to whether the infant defendants were entitled under the Statute of Distribution to a share in the estate, which was of great value, the administrators instituted this action to determine the question.

The statement of defence of the infant defendants admitted the facts as set forth, but claimed that the infant defendants were entitled to a share in the estate.

The matter was argued before Boyd, C., on the 1st March, A.D. 1882.

Hoskin, Q. C., and *Moss*, Q. C., for the infant defendants. No case has been decided in our Courts upon this point, but it must be admitted that the English authorities are against admitting collaterals of remoter degrees than brother's and sister's children. They referred to the following authorities to shew the state of the law: *Bowers* v. *Littlewood*, 1 P. Wms. 593; *Stanley* v. *Stanley*, 1 Atk. 455; *Williams* on Executors, 8th ed., p. 1518-1519; *Burton* on Real Property, 8th ed., sec. 1411; *Leith's* Blackstone, 172. The question of the Statute of Distributions being in force in this country has never been decided.

S. H. Blake, Q. C., *McArthur* with him, for plaintiffs. The law is perfectly clear that the infant defendants are not entitled: *Watkins* on Descents, 261; *Pett's* Case, 1 P. Wms. 25. As to the Statute of Distributions not being in force; in *Corporation of Whitby* v. *Liscombe*, 23 Gr. 1, it was decided that the Statutes of Mortmain were in force, and that decision would be applicable to this case.

C. Robinson, Q. C., for Henry Cawthra, referred to *Williams* on Personal Property, 8th ed., p. 375; *Kent's* Commentaries, 12th ed., vol. 2, p. 422; *Smith's* Real and Personal Property, 5th ed., p. 551 and 552.

March 1, 1882. BOYD, C.—William Cawthra died intestate, leaving him surviving, his wife, and, as next of kin, two nephews and one niece, and the infant defendants, who are the children of a deceased nephew of the intestate.

The question arises under the Statute of Distributions, whether the infants can share with the niece and nephews. This depends on 22 & 23 Car. II. ch. 10, sec. 7, which contains a proviso, that "there be no representations admitted amongst collaterals after brother's and sister's children" Precisely the same question first arose two centuries ago, in 1681, in *Carter* v. *Crowley*, Sir T. Raym. 496, before North, C. J., and is therein elaborately discussed, and a

decision is pronounced upon the language of the Act and in conformity with the opinions of the learned Doctors of Doctors Commons, as to the course of the Ordinary: that in the collateral line only the intestate's brother's and sister's children can be admitted to have distribution *jure repræsentationis in loco parentis*, and that representations cannot be admitted in remoter degrees of collaterals to the children of such as were brothers and sisters to the collaterals. This authority was expressly recognized and followed in 1700, in *Pett's Case*, 1 P. Wms. 25, S. C. 1 Comyn 87, a case on all fours with the present, in which it was held that the grand nephew and grand niece could not come in for a distributive share with the niece of the intestate. In 1719 Lord Chancellor Macclesfield states the law as settled by *Pett's Case* in *Bowers* v. *Littlewood*, 1 P. Wms. 593, and so it hasremained down to the present day. There remains nothing to be done, therefore, in this case, but to declare that the infants cannot share *per stirpes* as they claim, and to award all parties costs out of the estate.

[CHANCERY DIVISION.]

WILKES v. WILKES.

Will, construction of—Legacy reducible by testator's debt.

A testator bequeathed, "unto my sister M. J. such sum as will together with what shall be at her credit in my books at Montreal, make $6,000." At the time of the making of the will there was $3258.47 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of $2,000 to M. J.'s credit, making the whole sum at her credit $5,258.42: of this sum, $3,000 was placed on a special account at interest, $2,000 was agreed to be paid to her by the purchasers, and the balance $258.42 was paid in cash, and her account balanced in the books, leaving nothing at her credit.

Held, that M. J.'s legacy was to be reduced by the amount of testator's debt to her at the time of his death: that what had taken place amounted to payment of the debt: and that she was entitled to the legacy of $6,000.

SPECIAL case submitted for the opinion of the Court.

The testator, Robert Wilkes, by his will, made on the 31st January, 1880, made among others the following bequest:

"I bequeath unto my sister Mary Jane such sum as will together with what shall be at her credit in my books at Montreal make $6,000."

At the date of his will the testator was engaged in a large wholesale business in Montreal, and $3,258. 42 were then standing to the credit of Mary Jane in the books of the business.

On the 17th July, 1880, the testator disposed of his business in Montreal to one Jakes and others who had been for some time in his employment, and as part of the arrangement he proposed to place $2,000 more to the credit of Mary Jane in the books, thus making the whole sum at her credit $5,258.42. Of this sum, $3,000 were to be placed on a special account at interest, and a further sum of $2,000, was to be repaid to Mary Jane by the purchasers of the business by annual instalments covering ten years, without interest.

One the 31st July, 1880, the necessary entries to carry out the terms of the sale were made in the books; Mary Jane was credited with the additional $2,000, and her account was charged with merchandize $5,000; and on the following day $258.42 were paid to her, and her account was then balanced in the books leaving nothing at her credit.

On the 2nd August, 1880, Mary Jane entered into an arrangement with the purchasers, and received from them their undertaking to pay the $5,000, pursuant to the terms agreed on when purchasing. The testator died on the 16th August, 1880.

The question upon which the opinion of the Court was sought was, whether Mary Jane was entitled to $6,000, or only to $2,741,58, being the difference between what was at her credit at the date of the will and $6,000.

February 22, 1882. *Robinson*, Q. C., for Mary Jane Wilkes. There is nothing in the will to shew that in respect of the legacy to Mary Jane Wilkes the will was not to speak from the death of testator; on the contrary the words "shall be" indicate that the amount at her credit at the time of the making of the will was not to be considered. There are no decisions in point. In *Blundell* v. *Gladstone*, 14 Sim. 83, testator devised his farm in A. in possesssion of T. H. to T. R.; he had in fact two farms in A. in possession of T. H., and it was held that both passed. This case was afterwards overruled, but on the ground that he held one farm in trust. Suppose testator had given his sister the rents of a farm rented at $200 a year, less whatever income she might derive from another farm, and that testator sold the latter farm for $1,000 and gave his sister the purchase money, she would certainly still be entitled to the $200 a year. The deduction here having failed she is entitled to the whole $6,000. He cited *Ford* v. *Fowler*, 3 Beav 146; *Jarman* on Wills, 4th ed., vol. 2, p. 591, *et seq.*; *Redfield* on Wills, 2nd ed., vol. 2, p. 388-9, *et seq.*

Moss, Q. C., for the executors. The Court should look

at all the circumstances at the date of the will in order to ascertain the testator's meaning. *Morgan* v. *Thomas*, L. R. 6 Chy. D. 176, shews that the date of the will may be looked at for some purposes. It is plain the testator contemplated there being something to her credit, and his desire was to increase it. The most difficulty occurs in the words "shall be" in the devise. From the authorities it would almost appear that a sufficient contrary intention appeared to prevent will from speaking from death of testator. Upon this point he cited in *Re Gibson*, L. R. 2 Eq. 669. Then there is the question whether the placing of $2,000 to her credit was not in satisfaction *pro tanto* of the legacy. Upon this he cited *Nevin* v. *Drysdale*, L. R. 4 Eq. 517; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258. If a legacy is given for a purpose, and a gift *inter vivos* for the same purpose, that will adeem the legacy provided the testator stands in *loco parentis*. This rule is referred, to in *Pankhurst* v. *Howell*, L. R. 6 Chy. App. 136, although it was held therein that the legacy was not addeemed; also in *Williams* on Executors, 8th ed., p. 1343. If the $2,000 placed to her credit can be considered as a portion, there is no doubt it would be a payment *pro tanto* of the legacy. He also referred to *Wagstaff* v. *Wagstaff*, L. R. 8 Eq. 229; *Castle* v. *Fox*, L. R. 11 Eq. 542; *Trinder* v. *Trinder*, L. R. 1 Eq. 695.

March 8, 1882. PROUDFOOT, J.—The general rule is, that the will speaks from the death unless a contrary intention is found in the will: R. S. O. ch. 106, sec. 26. Any intention to be found in this will is rather in favour of the rule than against it. The deduction from the legacy is to be of what *shall be* at her credit; and there being no specific limitation of time in the future, it will not be restricted to any period short of the time when the will becomes operative—the death of the testator. It is true that the testator does not bequeath to the legatee the debt he shall owe to her—the *legatum debiti* of the civil law —but the legacy he does give is to be reduced by the

amount of that debt, so that the amount to pass as a legacy is to be ascertained at the future time indicated.

There was nothing to prevent the testator paying the debt at any time, and if it had been paid there can be no doubt that the legacy of $6,000 would have remained unaffected. What was done in this case in effect amounts to such payment; the testator arranges that the purchasers of the business are to become the debtors to Mary Jane instead of him, and she accepts the delegation and takes from them their agreement to pay. The debt is wholly erased from the books of the testator, he no longer owes it, and the purchasers became the debtors. It is a complete novation. So that at the time of the death nothing stands to the legatee's credit in his books.

It is of little use to refer to cases on the subject. None have been referred to that are applicable to the circumstances of this case, except as to the meaning of the general rule, to be found in the text books.

I have no doubt that the legatee is entitled to the $6,000, and answer the question accordingly.

The costs will come out of the estate. (a)

(a) See *In re Russell—Russell* v. *Chell*, L. R. 19 Chy. D. 432.

[CHANCERY DIVISION.]

CHAMBERLEN V. CLARK ET AL.

Administration—Deficiency of assets—Liability to refund—R. S. O. ch. 107, sec. 30—Secured creditors.

The R. S. O. ch. 107, sec. 30, which enacts that on the administration of the estate of a deceased person, in case of a deficiency of assets, all debts shall be paid *pari passu*, not only abolishes privilege among creditors, but places them in the same position with respect to each other as legatees; and a creditor receiving payment in full, either in an action against the executor or by the voluntary act of the latter, must refund the excess above his proportionate share at the instance of other creditors.

A secured creditor need not bring his security into hotchpot as a condition precedent to ranking on the estate, his lien being expressly preserved by the Act.

Petition filed by the plaintiff praying that certain creditors of the estate of William Clark, deceased, whose claims had been paid in full by the executors, be ordered to recoup to the estate the sum received by them above the amount to which they would be entitled in respect of their claims upon a ratable distribution of the assets of the estate amongst all the creditors.

The plaintiff was the holder of a mortgage made by the said late William Clark, to whom he had advanced certain sums of money. About two years after Clark's death the plaintiff filed his bill of complaint to realize his security, and in the event of a deficiency for administration of the estate. An account was taken upon the mortgage, and there was found due to the plaintiff the sum of $2,180.39. The property was then offered for sale, and after several attempts to dispose of it was finally purchased by the plaintiff, with the authority of the Court, for $1,000, leaving therefore the sum of $1,180.39 still due to the plaintiff from the estate. The petition, in addition to setting forth the above facts, alleged that the executors in administering the estate of the testator, and in collusion with certain of the creditors, wrongfully paid off and satisfied in full the claim of certain

creditors: that the executors were insolvent, and the plaintiff was unable to recover from them the balance of his claim: that the petitioner had applied to the several creditors paid as aforesaid, to recoup to the estate the excess above their *pro rata* share of the amount so paid to them and they had refused to refund.

February 22, 1882. *H. Cassels*, for plaintiff. Under the cases of *Taylor* v. *Brodie*, 21 Gr. 607, and the *Bank of British North America* v. *Mallory*, 17 Gr. 102, the plaintiff is entitled to the order prayed for. In the case of legatees the law is plain that they can be called upon to recoup to the estate the surplus over their *pro rata* share: *Gillespie* v. *Alexander*, 3 Russell 130; *Divies* v. *Nicholson*, 2 DeG. & J. 693: and R. S. O. ch. 107 has placed creditors and legatees on the same footing.

Moss, Q. C., contra. There is a wide distinction between the position of creditors and legatees, and the fact that legatees may be called upon to refund furnishes no argument for creditors being compelled to do so. The one takes as a matter of bounty, the other by right; and although there may be good reason for not allowing one legatee to be paid in full to the exclusion of others, still a creditor who succeeds in collecting his debt should not be deprived of the reward of his diligence. A testator might create by covenant a debt for which his estate would be liable for twenty years, and it would seem an extraordinary doctrine that would allow a creditor, years after debts had been paid, to call upon other creditors to refund. The only case in plaintiff's favour is *Taylor* v. *Brodie*, cited on the other side, but that case does not contain the principle involved here. *Taylor* v. *Brodie*, was overruled by *Doner* v. *Ross*, 19 Gr. 229, where it is laid down by the full Court that a creditor who has been paid cannot be made to refund. In the present case the plaintiff has got his remedy against the executors, which is all he is entitled to. The rule that legatees can be called upon to refund does not apply where they are in the same class: *Hilliard* v.

Fulford, L. R. 4 Chy. D. 389: in which case it is clearly laid down that as between legatees of the same class, those who have been paid cannot be called upon to refund. The case of *In re Radcliff*, L. R. 7 Chy. D. 733 authorizes an executor to make payment up to the time of administration proceedings; if then the executor can be allowed payments made up to that time, the creditor should be allowed to hold them. In the present case the payments have been allowed by the Master and cannot now be objected to. In any case, the plaintiff must either come in as a creditor from the beginning or from the time his claim is ascertained. If he be a creditor from the beginning he should bring his mortgage into hotchpot. If he be considered a creditor from the time his claim is ascertained, and so he has elected, as a subsequent creditor he cannot call upon prior creditors who have been paid to refund.

G. H. Watson and *J. Pearson*, for other creditors who had been paid by executors.

H. Cassels, in reply. The last clause in sec. 30, ch. 107, R. S. O. expressly saves the rights of parties who hold securities, and it was therefore not necessary that plaintiff's mortgage be brought into hotchpot. As to Dinworthy, for whom Mr. Moss appears, he took in payment of his claim a piece of land, and the *Bank of British North America* v. *Mallory*, *supra*, decides that when a creditor is paid in full out of the lands, he may be called on to refund.

Moss, Q. C. By leave of the Court. A creditor who by means of an execution against the personal representative receives payment in full out of the lands, can be made to refund, because it is only by a fiction lands are said to be in the executor's hands, and the only remedy of the injured creditors would be against the creditors who have got the advantage; but in the case of goods, the unpaid creditors have their remedy against executors: *Doner* v. *Ross*, 19 Gr. 229. In the present case it was the executors who conveyed the lands, so there is nothing in the objection.

March 8, 1882. PROUDFOOT, J.—The bill was filed by a mortgagee against the executors of the mortgagor for a sale of the mortgaged property, and in case of deficiency for an administration of the mortgagor's estate. A sale has taken place, and has resulted in leaving a considerable sum due to the plaintiff. An account has been taken of the estate, still leaving a large sum due to the plaintiff and other creditors who have proved their claims.

The executors in administering the estate paid a number of the creditors in full.

This petition is now presented, alleging the insolvency of the executors, and praying that the creditors who have been overpaid may refund the excess received by them above what their proportionate share of the assets amounted to.

The R. S. O. c. 107, s. 30, abolishes all distinction between creditors in administering the estate of an insolvent deceased debtor, and directs that all debts shall be paid *pari passu* and without preference or priority of debts of one rank or nature above another, but without prejudice to any lien existing in the debtor's lifetime on any of his real or personal estate.

This statute while putting an end to any privilege among creditors, appears in another aspect to place them on the same footing as legatees; for while legatees were only entitled to their legacies after the debts were paid, by this Act creditors are only entitled to so much of the assets as will pay them *pro ratâ*. And as legatees who had received their legacies before payment of the debt might be called on to refund, so creditors who have received payment in full, without provision for a *pro rata* payment, should also be liable to refund. The object of the Act can be secured in no other way. Nor would it appear to be of any importance whether the assets consisted of real estate or of personal estate. In both cases they are assets, and must be distributed *pro rata*. Nor does it make any difference whether the creditors have been paid as the result of an action, or by voluntary payment. The

unpaid creditors have the right, under the statute, to enforce an equal distribution, and although the conduct of the executor may preclude him from resisting a claim, that will afford no answer to the action of the creditors.

The absence of a precedent for compelling a creditor to refund under the former law, where debts had not been paid according to their legal priority, is not a conclusive argument against such a proceeding being competent. Under that system, as between creditors of equal degree there could have been no right to have a refund, as the executor might prefer one to another, or if the creditor got paid otherwise in full, as by execution, he might retain it. And there would seldom be a case of an executor paying debts of an inferior degree when he had notice of debts of a higher degree unpaid, and if he had no notice he would have been protected. But instances are not wanting in which actions involving a similar principle by an executor against a creditor have been sustained. In *Clark* v. *Houghan*, 2 B. & C. 149, an executrix had committed a *devastavit* by paying a debt she ought not to have paid, and she was held entitled to recover it from the person to whom it was paid in an action in her representative character. The money paid was assets, the payee was not entitled to receive it, and when recovered it would again be assets. A *devastavit* was a wrong which could be corrected in that way. Now payment of more than a proportionate share is a *devastavit*, the creditor is not entitled to receive it, and according to that case might be called on to refund in an action by the executor. Of a somewhat similar nature is *Pooley* v. *Ray*, 1 P. Wms. 355, where a mortgage came to an executor, who received the money and paid it away to the testator's creditors. It afterwards appeared that the mortgage had been satisfied in the testator's lifetime. It was held that the executor must refund, and must have his remedy over against such creditors as by mistake he had paid. Lord Cowper compared it to a debt recovered by the executor by action and paid to creditors, and the judgment after-

wards reversed in error. The money then never was assets in fact, just as under our statute anything beyond a *pro rata* share is not assets for any of the creditors, and by a parity of reason such excess would appear properly recoverable.

The question is not whether there be a precedent for such a proceeding, but what does the statute provide. The object of the statute is to secure perfect equality among the creditors of the deceased debtor, and that is violated if any one gets more than his share. The cases of *The Bank of British North America* v. *Mallory*, 17 Gr. 102; *Parsons* v. *Gooding*, 33 U. C. R. 499, and *Taylor* v. *Brodie*, 21 Gr. 607, construe the Act in this way. The case of *Doner* v. *Ross*, 19 Gr. 229, is cited as authority that a creditor receiving payment out of personal estate under an execution cannot be called on to refund. But upon examination it will not be found to sustain so broad a proposition. There the executor had paid a number of debts in full. Then Ross, another creditor, sued the executor and obtained judgment against him for default of appearance and placed a writ of execution *de bonis testatoris*. Doner, the executor, soon afterwards obtained an order to administer the estate, and gave notice of the order to Ross. Ross insisting that he had a right to proceed with his action Doner moved to restrain him. Before the motion came on, the sheriff returned the writ *nulla bona*. The Court granted the injunction, which upon rehearing was dissolved.

The motion for an injunction was made by the executor, although he had suffered judgment to go by default, and thereby admitted assets and had previously admitted assets by paying some creditors in full. He had thus committed a *devastavit* for which he was responsible: he ought to have had the assets in hand to apply on the plaintiff's execution. This appears to me a sufficient reason for refusing to stay the proceedings, and that the execution creditor ought not to be delayed while the executor endeavoured to relieve himself of his own maladministra

tion. And it is upon this ground that the Court concurred in dissolving the injunction. "Admitting the debt, he ought to shew why he does not pay it. * * I incline to think that the weight of authority is against the Court interfering by injunction in favour of an executor who has, before decree or order for administration, allowed judgment to go by default, and who does not shew (as is not shewn in this case) that he did so with a view of coming to this Court."

In the present case it is not the executor who is making the application—he has not suffered judgment by default—he has made no admission of assets, save by the payment of some debts in full, an admission that is not conclusive, and may be explained to have been made by mistake or for other reasons: *Postlethwaite* v. *Mounsey*, 6 Hare 33, n. *a*; *Savage* v. *Lane*, 6 Hare 32. The application is by a creditor, and the executors are insolvent. Where the executors are insolvent the remedy against a legatee is direct: *Orr* v. *Kaines*, 2 Ves. Sen. 194; and the same rule should apply against a creditor under our statute.

In *Taylor* v. *Brodie*, 21 Gr. 607, the application to make the creditors refund was at the instance of creditors who had not received their proportionate share, and though the order was made in the first instance against the executrix for having neglected her duty, she was granted a remedy order against creditors whom she had overpaid. In my judgment this is the proper mode of procedure and necessary to give full effect to the Act, and not at variance with any other decisions.

There will be a reference to the Master to ascertain the deficiency of assets, and the sums that have been overpaid to any of the creditors, who will be ordered to refund the excess above their porportionate share. The costs will be reserved.

I had almost forgotten to notice the contention on behalf of the respondonts that the plaintiff could not have the relief he seeks without bringing his security into hotchpot. There never was any foundation for such an

argument in administering estates in this Court, and the benefit of the security is preserved to the creditor by the statute in express terms.

Mowat, V. C., in *Doner* v. *Ross*, says: "It is well settled that money may be followed into the hands of a legatee or next of kin; and in *Story's* Equity Pleading, sec. 106, a creditor is put on the same footing; but the only cases cited are of legatees or next of kin." The only cases referred to by *Story* in that section are of legatees, but he probably had in his mind the law of his own country by which creditors and legatees are, for this purpose, on the same footing; and in his Equity Jurisprudence, s. 92, he cites in support of the statement the cases of *Walker* v. *Hill*, 17 Mass. R. 380, and *Walker* v. *Bradley*, 3 Pick. R. 261. These are authorities for the purpose, and from the statement of the law of Massachusetts in the former of those cases, it would seem to be similar to that under our statute, and they determined that to maintain the equality of distribution among creditors, it is necessary that overpaid creditors should refund.

[CHANCERY DIVISION.]

McDowall v. Phippen.

Mortgage sale—Growing crops—Purchaser's right to.

Upon default made in payment of a mortgage the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security. Therefore, when land was sold in July under a decree made in a mortgage suit, without any reservation of crops,

Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the unsecured growing crops, mature and immature.

Rehearing before the full Court of case tried before Blake, V. C., at the Kingston Sittings, on 9th May, 1881.

The action was brought to recover the value of certain crops, vegetables and fruit growing upon the east half of lot number 4 and the west half of lot number 5 in the first concession of south Fredericksburg.

The plaintiff had mortgaged the property in question and default having been made in payment of the mortgage a bill was filed against him by the mortgagee in October, 1879, to recover possession and realize the security, and a decree for sale was subsequently made therein. The advertisement was settled for the sale of the property in June, 1880, and the sale took place on 17th July, 1880, when crops, wheat, and the like, which the law distingushes as emblements, were in the ground. The purchaser, the defendant in this action, paid his purchase money and took possession of the land on the 2nd August, upon the mortgagor, the present plaintiff, being ejected by the sheriff. The plaintiff claimed that he was entitled to the crops then matured or maturing, which were cut down and harvested by the purchaser between the second of August and the 1st of October, when the report on sale was confirmed.

The evidence shewed that at the time of the sale the mortgagor claimed to retain the crops, but the solicitor of the mortgagee asserted the superior claim of his client and

stated that the crops would be sold. The defendant said he bought and paid the price he did on the faith of this statement.

P. McGregor, for the plaintiff. The defendant is in the position of an ordinary purchaser only: *Dart*, 5th ed., 247; *Richardson* v. *Trinder*, 11 C. P. 130; *Stephenson* v. *Bain*, 8 P. R. 258. The interest did not vest till report confirmed, and the purchaser was not entitled to the crops that matured between time of sale and the time the title became absolute.

Moss, Q.C., for the defendant. The purchase money was paid before the 2nd August, and the purchaser was to have possession on payment of it. The crop that was cut on or before the 2nd August was accounted for by the purchaser. The purchaser from the mortgagee had all the rights of the mortgagee, and the mortgagee might have taken possession of the crops at the time of sale: *Cleaver* v. *North of Scotland Canadian Mortgage Co.*, 27 Gr. 508. The purchaser is protected by the Court. The advertisement was settled in presence of all parties in June. The plaintiff knew on 2nd August that defendant claimed the crops. The purchaser would have had a right to compensation if the crops had been taken from him, but a vesting order was made on the 9th October, after which defendant could not claim compensation. When a sale is confirmed it relates back to the day of purchase: *Brady* v. *Keenan*, 6 P. R. 263.

P. McGregor, in reply. There was nothing in the conditions as to selling the crops, only the land was sold. There was no title to the land or crops till sale confirmed.

March 11, 1882. BOYD, C.—This case is to be determined not as argued by Mr. McGregor on the law applicable to vendor and purchaser, but upon the law peculiar to mortgagor and mortgagee. [Here the learned Judge stated the facts as above set forth.] As between vendor and vendee it might be important to consider the ques-

tion discussed in *Stephenson* v. *Bain*, 8 P. R. 258, as to when the contract of sale was completed; but as against the mortgagor, the turning point of the case is, what was the subject matter of the mortgagee's security, and what was sold at the Chancery sale? The law is unquestionable, that the mortgagee after default has the right to take possession of the property in the state in which it then is as to crops, and hold the entire as his security. No distinction exists as between mature and immature crops, so long as no severance has taken place.

In *Keech* v. *Hall*, 1 Doug. 21, Lord Mansfield's language is: "A mortgagor is not entitled to reap the crops as other tenants at will are, because all is liable to the debt." In *Ex parte Temple*, 1 Gl. & J. 216, the Vice-Chancellor said: "When the mortgagor has personally occupied the premises, and the actual possession is afterwards delivered to the mortgagee by the sheriff, the growing crops which are found upon the premises become part of the security, and may be applied by the mortgagee to his own use. In other words, after the mortgagor is dispossessed he has no right to enter on the premises to gather or harvest any of the crops in the ground—that pertains to the mortgagee who has taken possession and those claiming under him. To the same effect is the late case of *Bagnall* v. *Villar*, L. R. 12 Chy. D. 812. See also *Coote's* Law of Mortgages, 4th ed., pp. 706, 722, 396. No less effect should be given to the possession taken by the purchaser than if the mortgagee himself had taken possession, claiming the crops.

Then the mortgagee, having power to enter upon the land and receive the rents and profits thereof, had power to sell as much as he could beneficially hold possession of under his security. No exception of the crops is made in the advertisement, and the intention to sell the whole is made manifest by what took place at the sale. The mortgagee might then have withheld the growing crops from being sold, but he did not do so, and in consequence they were bought by the purchaser, and to this extent increased the amount realized by the sale in discharge of the debt

due by the mortgagor. These conclusions are in conformity with a decision of Walworth, C., upon a similar case in *Aldrich* v. *Reynolds*, 1 Barb. Ch. R. 613, in which he held that the purchaser at a foreclosure and sale of mortgaged premises is entitled to the crops which were growing upon the land at the time of the sale. Many other United States decisions to the same effect may be found; one of the more recent is *Sherman* v. *Willett*, 42 N. Y. (Hand's R.) 146.

It was stated in the argument that some personal chattels were also taken possession of by the purchaser and converted to his own use. There is no evidence as to this, but the bill may be dismissed without prejudice to the further assertion of such a claim if the plaintiff is so advised, after paying the costs of this litigation.

The decree appealed from should be affirmed.

FERGUSON, J.—I am of the same opinion. The error of the plaintiff is, that he seeks to liken this case to certain cases that arise between vendor and purchaser, when it is really of a different kind.

This is a case in which the mortgagee had a right to sell, and, through the Court, did sell to the defendant the land and the crops now in question, and for these the defendant paid his purchase money. The plaintiff being the mortgagor had a right, as against the mortgagee, to an account of all this purchase money, and in this way got the benefit of the value of the crops once, and he now seeks to get this benefit again from the defendant. This, I think the plaintiff cannot have, and I am of the opinion that the decree should be affirmed. I think the learned Judge before whom the cause was heard was as nearly correct as possible when he said it was the case of a man endeavouring to "eat his cake and have it."

[CHANCERY DIVISION.]

DAY V. HARRIS.

Legacy.

A testator by his will directed that "$5,000 of the money which I may be entitled as my share of the partnership business now carried on at," &c., under the name of E. H. & Co., should be invested by his executors at interest, and that the income derived therefrom should by them be paid over as received, to his daughter M., for her maintenance until she attained twenty-one, when she should be entitled to $5000; and if the interest in any year from the investment should fall short of $400, the difference to make up that sum should be paid by his executors out of the interest or profits derived from the remainder of her estate. "Subject as aforesaid, he gave the residue of his estate, real and personal, to his executors in trust for his son," &c. Subsequently to the making of the will, the partnership of E. H. & Co., was dissolved, and the testator until his death carried on the business alone, but under the name of E. H. & Co., his interest in the partnership having been realized by him and carried into his new business.

Held, that the legacy of $5,000 was demonstrative and not specific, and that she was entitled to be paid the same out of the general estate.

THIS matter came up by way of motion for judgment upon the pleadings.

The action was brought by the executors of Edwin Harris, to determine the interest of the defendants, Maud and Alfred Harris, under the will of their father.

In 1876, the testator carried on business with another person, and by his will, made in that year, bequeathed as follows:

"I will and direct that $5,000 of the money to which I may be entitled as my share of the partnership business now carried on at Nos. 42 and 44, King Street East in the city of Toronto, under the name of E. Harris & Co., shall be invested by my executors at interest in some good and safe security; and that the income derived therefrom shall by them be paid over from time to time as the same is received, to my daughter Maud Harris for her maintenance until she attains the age of twenty-one years, at which age she shall be entitled to receive the whole of the said principal sum of $5,000; and if the interest or profit in any year derived from the investment of the said sum of money falls short of $400, the difference to make up that

sum shall be paid by my executors out of the interest or profits derived from the remainder of my estate hereinafter mentioned. Subject as aforesaid I give, devise, and bequeath all the rest and residue of my estate, real and personal, to my said executors in trust for my son Alfred Harris, &c."

In 1878 that partnership was dissolved, and the testator from that time till his death carried on the business alone, but under the same style of E. Harris & Co. His interest in the partnership was realised by him and carried into his new business carried on by himself.

The matter was argued before Proudfoot, J., on 15th March, 1882.

W. N. Miller for the executors.

John Hoskin, Q. C., for Maud Harris. The legacy is clearly demonstrative, and whether the fund is in existence or not, Maud Harris should take, and moreover the Courts lean against legacies being specific. He cited the following authorities: *Williams* on Executors, 8th ed., vol. 2, 1176; *Webster* v. *Hale*, 8 Ves. 410; *Sibley* v. *Perry*, 7 Ves. 522; *Kirby* v. *Potter*, 4 Ves 748.

Davidson, for Alfred Harris. In the cases cited by Mr. Hoskin the legacies were payable "out of" certain funds, but in the present case it is different. He cited the following authorities to show that the legacy was specific: *Theobald* on Wills, 2nd ed., 104, 108; *Harrison* v. *Jackson*, L. R. 7 Chy. D., 339; *Davies* v. *Fowler*, L. R., 16 Eq., 313; *Miller* v. *Miller*, 25 Gr. 224.

March 23, 1882. PROUDFOOT, J.—Assuming that the bequest of $5,000 of the money to which he might be entitled as his share in the partnership business was in itself specific, and that the word *now* is to be referred to the business carried on by him at the date of the will, that will not suffice to determine whether this bequest was specific or not. For the whole will is to be looked at, and the construction is to be made by considering all its pro-

visions. The bequest is to supply maintenance during minority, and if the income of the sums specified does not reach $400, it is to be made up out of the rest of the estate. These provisions indicate that Maud should have this amount of $5,000 at all events. The bequest to the son, however, shows this more clearly. The bequest to him, no doubt, speaks from the death, and it is *subject to the aforesaid bequest* to the daughter. It would rather seem therefore that the testator intended to embrace in his general estate all that he derived from the partnership or otherwise, and to make it all subject to the bequest to Maud. The statement of the source from which it was to be derived is only demonstrative and not specific. Besides, the bequest to Maud is of a part of the share to which he *might be* entitled, which would carry on the period from the date of the will to the termination of the partnership. And there was much more than $5,000 received by the testator from the partnership, and carried into his sole business. Carrying it into his sole business would not be an ademption of the legacy. The bequest is not of so much as should be due to him from the partnership, which might probably be adeemed by the receipt of the sum by the testator himself. His *share* would rather mean the amount he should receive from the partnership upon a dissolution. It would then form part of his general estate, and the bequest would simply be a legacy of $5,000 out of that general estate, a conclusion that seems justified by the other provisions of the will. In addition to the cases cited in the argument, I refer to *Ellis* v. *Walker*, Amb. 310.

Declare Maude entitled to the $5,000. The costs of all parties out of the fund. Let the aunt of the infants be appointed guardian for both of the infants, giving security as usual.

[CHANCERY DIVISION.]

CARROLL V. WILLIAMS.

Agreement for lease—Statute of Frauds—Specific performance.

The plaintiff was the lessee of certain premises used as a factory, and having become insolvent the lease was forfeited by the lessor, the defendant, though at what particular time did not appear. The plaintiff continued in occupation, and an arrangement was entered into, whereby one F. agreed to purchase the machinery on the premises from the official assignee, giving the plaintiff the option to redeem it within two years. The plaintiff further obtained from the defendant an agreement, as follows:

"Toronto, January 27th, 1880.

"In the event of Thomas Carroll continuing the occupation of building on Hayter street, I promise and agree to give a new lease at a rental of $600 for five years, also agree to allow," &c., &c., (specifying certain allowances.) (Signed)

"R. S. WILLIAMS."

The defendant refused to sign a lease of the premises to the plaintiff, and an action being brought for specific performance,

Held, dismissing the action, that the agreement was not sufficient to satisfy the Statute of Frauds, as it did not appear from it with certainty when the term was to begin, nor to whom the lease was to be given.

Semble, that the official assignee should have been made a party, and that in any event it would have been a case for damages, not for specific performance.

THE plaintiff was formerly the lessee of the defendant, under a lease for five years commencing on the 22nd February, 1877, at a rental of $500 per annum.

The plaintiff having become insolvent in the year 1879, the lease was forfeited by the defendant; at what particular time the forfeiture took place did not appear by the evidence. The plaintiff however continued in occupation of the premises, and on the 27th January, 1880, being desirous of making an arrangement with his creditors, entered into an agreement, whereby it was arranged that one John Finken should buy his machinery situate in the premises in question, from the official assignee, on the understanding that the plaintiff should have the privilege of redeeming it at the expiration of two years. In order to facilitate this arrangement, and to enable the plaintiff to carry on his business, it was considered desirable that some new agreement should be obtained from the defend-

ant, to grant a further term of the premises in question. On the 27th January, 1880, the defendant gave the plaintiff the following memorandum.

"Toronto, January 27th, 1880.

"In the event of Thomas Carroll continuing the occupation of building on Hayter street, I promise and agree to give a new lease at a rental of $600 for five years, also agree to allow at end of term one half of valuation of a brick front on Hayter street, and brick for west or (a) walls of new building, and a smoke stack, I receiving a piling place in rear of present shed, with the upper flat of a shed extending to line of next lot on Gerrard street, to be built by me, and Thomas Carroll to have lower portion in rear of planers."

(Signed)

"R. S. WILLIAMS."

Two days thereafter, and before negotiations with Fisken were concluded, or he had paid his purchase money, a solicitor, acting for both Fisken and Carroll, applied to the defendant to grant a lease in accordance with the memorandum, and a draft lease was submitted to him which, after some correspondence, he ultimately refused to sign, and the negotiations fell through on 10th February, 1880. No further effort appeared to have been made before the commencement of this action to procure the execution of a lease by the the defendant, but the plaintiff and Fisken and others claiming under them, continued in possession of the premises and paid rent. The plaintiff had applied for a discharge in insolvency, but the application had been refused in consequence of the opposition of the defendant.

In June, 1881, the defendant gave the plaintiff and Fisken notice to quit, and at the expiration of the notice he entered into possession, and commenced to tear down the building, which was a frame one badly out of repair and of little value, with a view to erecting a new brick building upon the premises at a cost of $30,000. On the 14th January, 1882, the plaintiff gave the defendant notice

(a) Sic, in the original.

to desist from the destruction of the premises, and on his refusal to do so commenced the present action for specific performance of the agreement of 27th January, 1880; and on the 1st February, 1882, obtained an interim injunction restraining defendant from proceeding with the destruction of the building, a speedy trial of the cause being at the same time directed.

The action came on for trial at a special Sittings before the Chancellor, at Toronto, in February.

S. H. Blake, Q. C., and *A. H. Meyers* for plaintiff.

The memorandum of agreement of 27th January, 1880, is a binding agreement under the Statute of Frauds.

Although the plaintiff is an undischarged insolvent the defendant cannot now set up his insolvency, as the agreement was entered into with the defendants, during the insolvency.

The plaintiff entered into possession and has been paying rent to the defendant, and the rent has been paid up to the time when the defendant wrongfully entered into possession and commenced to pull down the buildings on the demised property.

The plaintiff is entitled to judgment for possession, restoration of the building, and specific performance of the agreement to grant a lease.

J. E. Rose, Q. C., and *J. H. Macdonald*, for defendant.

The memorandum does not shew a completed agreement. It does not shew to whom the lease is to be made, and the terms of the lease are not settled thereby. Shortly after the date of the agreement, the defendant informed the plaintiff that he would not grant a lease. The delay for two years thereafter creates sufficient laches to form a defence to an action for specific performance.

The memorandum was given on the understanding that plaintiff was about to procure his discharge, and there never was an intention to grant a lease until he had procured his discharge. It would be inequitable to compel the defendant to execute a lease to an insolvent, there being no security

from the covenants or otherwise; and in its discretion the Court can refuse specific performance. From the evidence it appears that the plaintiff's application for specific performance is not made in good faith; that his object is to endeavour to extort money from the defendant, who is now erecting a large manufactory on the premises, and therefore specific performance will be refused.

February 18, 1882. BOYD, C.—Assuming that a valid agreement for a lease had been proved, I thought when granting the interlocutory injunction that the assignee was a necessary party for the proper adjudication of the case, and I still think he ought to be before the Court and elect whether he will take the benefit of the agreement for the lease or not. But if the assignee were a party, and did not elect to take the benefit of the agreement, it would even then, it appears to me, be a case for damages, and not for specific performance. The plaintiff being an undischarged insolvent his covenant would be nugatory, and it would be inequitable to enforce a specific performance when the covenants of the lessee would be worthless. The property is so deteriorated that it could be of no benefit to plaintiff. On the evidence, he might possibly realize $300 a year, but he would have at least to pay that sum in rent, and there would therefore be no substantial benefit to the plaintiff by obtaining the execution of the lease he claims.

The question, however, is, whether the agreement for a lease on which the plaintiff relies is sufficient within the Statute of Frauds. I do not think the agreement sufficient. The time for the commencement of the proposed term does not appear: there had been a prior lease between the parties, and it is not shown when that was forfeited: the plaintiff was in actual occupation when the memorandum was given: there was no actual and visible change of possession consequent upon the memorandum, and the memorandum is silent as to when the term of five years was to commence: there is therefore nothing

to show when the term was to begin. It may have been from the date of the forfeiture of the old lease, or from the date of the memorandum, or from the date when the plaintiff should obtain his discharge, but which of those dates it is impossible to determine by the evidence. Moreover, it does not appear from the memorandum to whom the lease was to be given, and there is an element of uncertainty in that respect also. The agreement not being sufficient within the Statute of Frauds, the plaintiff is compelled to rely on parol evidence.

If the evidence is looked at, then the explanation of the defendant as to how the agreement came to be drawn is more satisfactory than that of the plaintiff. The plaintiff's evidence, however, in a very material respect supports the defendant's contention that the agreement was conditional on the plaintiff obtaining his discharge in insolvency. No doubt it was given in order to facilitate a settlement with the plaintiff's creditors, and it seems to have been conditional on the discharge being obtained. As matter of fact the plaintiff has not yet obtained his discharge. Mr. Fisken cannot be said to have changed his position on the faith of the agreement, because before he advanced his money to the plaintiff, his solicitor was well aware that the defendant had refused to grant the lease. A draft lease was then prepared, and submitted to the defendant, and there were a variety of terms such as the alteration and repairs of the premises, as to which the parties were not agreed; yet these conditions were a very important element in the agreement for the five years' term; and then on the 10th of February, 1880, it is clear that the parties were at arm's length. Beyond the continuance in possession, nothing is done by the parties to enforce the agreement. Then notice to quit is served, and still the plaintiff lies by.

The continuance of the plaintiff in possession does not aid the plaintiff; he was in the position of an over-holding tenant, and afterwards, by the receipt of rent by defendant, the plaintiff became, perhaps, a tenant from year to

year. I think the parties being at arm's length so soon after the making of the alleged agreement gives great force to the argument founded on the laches of the plaintiff.

I am therefore of opinion that the plaintiff is not entitled to the relief he claims, because the agreement is not sufficient within the Statute of Frauds, and the action must therefore be dismissed, with costs.

NOTE.—See *Marshall* v. *Birridye*, L. R. 19 Chy. D. 233.

[CHANCERY DIVISION.]

FLETCHER V. RODDEN.

Mortgage—Foreclosure—Recovery of land—Statute of Limitations.

The remedy by way of foreclosure or sale in mortgage suits is a proceeding to recover lands within the meaning of R. S. O. ch. 108, sec. 4. Therefore when a suit to foreclose a mortgage was commenced ten years and eight months after the date of the default in payment, and the plaintiff claimed payment of the mortgage debt, possession, and foreclosure.

Held, that the only relief to which the plaintiff was entitled, was judgment upon the covenant for payment.

REHEARING before the full Court of cause heard by Proudfoot, J., at the Lindsay Sittings.

The action was brought by John Fletcher, the assignee of a mortgage made by Jane Eliza Rodden and John Charles Rodden to one William Rodden, for the recovery of the amount due under the mortgage, for foreclosure and delivering up of possession of the mortgaged lands. The plaintiff in his bill alleged he had never been in possession.

The mortgage in question was dated 14th April, 1868, and was made "for securing the payment of the interest (at the rate of ten per cent per annum) upon one thousand dollars, being the sum of $100 per annum from the date of the said indenture of mortgage and from thenceforward during the lifetime of one Veronica Rodden, and which

said interest was to be paid quarterly on the first days of the months of May, August, November, and February, after the date of the said indenture of mortgage, and until the death of the said Veronica Rodden." Veronica Rodden died 6th May, 1879, the last payment on the mortgage was made in the month of November, 1868, and the first default was made in February, 1879.

Plaintiffs bill was filed 13th October, 1869.

The defendants in their answer, besides stating their defence on the merits, which it is unnecessary to set forth, claimed the benefit of R. S. O., ch. 108 and all other Statutes of Limitations in bar to the relief sought by the plaintiff.

The learned Judge who tried the case held that the plaintiff was not entitled to foreclosure, the right to which had been barred by the statute, foreclosure being a suit for the recovery of land.

C. H. Richie, for plaintiff. The sole question is one of the Statute of Limitations. The last payment was in November, 1868, and the bill was filed 29th October, 1879. All the instalments that accrued due within ten years are moneys that can yet be charged on the lands, and the plaintiff is entitled to foreclosure as to all moneys falling due since the November payment of 1868. The payments are not interest and do not come within R. S. O. ch. 108, sec. 17. It will be contended this comes under the 4th section of the Act, but mortgages are dealt with in another part of the Act, under the heading "Mortgages." Foreclosure is not a suit to recover land: *Darby* on Limitations, p. 370.

Moss, Q. C. This action is one to recover land, and the right of action accrued on the first default: *Harlock* v. *Ashberry*, L. R. 18 Chy. D. 233. The only disability clauses are those respecting the recovery of land or rent, and if the disability clauses apply to foreclosure it shews that the action of foreclosure is one to recover land: *Wrixon* v. *Vize*, 3 Dr. & War. 104. *Heath* v. *Pugh*, L. R. 6 Q. B. D.

345, affirms the view that the action is one to recover land, Lord Selborne saying, when the plaintiff foreclosed he recovered the land. The learned counsel also referred to *Leith*, 2nd ed. 445-446, sec. 13 and 22, in the note of the author. In *Jones* on Mortgage, sec. 1210, it is laid down that the time begins to run from the first breach; he also referred to *Crone* v. *Crone*, 26 Gr. 459, and *Banning* on Limitations, 150. In 1868, Jane Eliza Rodden was a married woman, and was not then in a position to charge her estate, and her covenant is a nullity: *Royal Canadian Bank* v. *Mitchell*, 14 Gr. 412; *Lawson* v. *Laidlaw*, 3 App. R. 77; *Boustead* v. *Whitmore*, 22 Gr. 222; *Clark* v. *Creighton*, 45 U. C. R. 514; *Standard Bank* v. *Boulton*, 3 App. R. 93; *Pike* v. *Fitzgibbon*, L. R. 17 Chy. D. 454; *Robinson* v. *Pickering*, L. R. 16 Chy. D. 660; *Smith* v. *Lucas*, L. R. 18 Chy. D. 545. Then, unless the plaintiff can recover on the covenant this must be an action to recover land. As a direct charge upon the land the action is barred and the plaintiff cannot fall back on the covenant. No personal order should therefore have been made against the married woman: C. Law Times 730, 5th Dec. 81.

C. H. Richie, in reply. At the time of the making of the mortgage the wife had the $1,000, and it is not necessary for her to have separate estate at the time of judgment.

March 11, 1882. BOYD, C.—The mortgage in question herein dated 14th April, 1868, provides for the payment of $100 per annum during the life of one Veronica Rodden, to be paid quarterly on the 1st day of May, August, November, and February, and in default the mortgagee had the right to enter, dispossess the mortgagors, and sell. Veronica died in May, 1879. The last payment made was the quarterly payment which fell due in November, 1868. The bill was filed on the 30th October, 1879, to enforce the arrears: praying payment forthwith under the covenants to pay contained in the mortgage, and praying also foreclosure and delivery of possession. The question was much discussed as to whether this was a suit to recover land, or one to

recover money charged on land: it being argued by the plaintiff that he had the right to go back ten years from the filing of the bill, under R. S. O. ch. 108, sec. 23, and charge that much on the land; against which it was urged by the defendant that sec. 4 of the Act was applicable, and that as default was made and the right of suit accrued more than ten years before the bill was filed there could be no recovery as against the land.

The learned Judge who tried the cause took the latter view, and upon a consideration of the cases which have been decided both before and after *Barwick* v. *Barwick*, 21 Gr. 39, I think a great preponderance of authority supports his conclusion. It is unquestionable that the right of action or suit under the mortgage first arose upon the failure to pay the instalment which fell due on 1st February, 1869. There was then a forfeiture for non-payment, which entitled the plaintiff to enforce the security as to what was overdue. The ordinary rule of equity is, that when a plaintiff properly comes into the Court to enforce presently part of his claim he may and should seek the assistance of the Court to work out in the one suit his full rights which are accruing due in respect of the same claim. It might not be the case that the Court would, upon the first default, have decreed a foreclosure for the whole amount secured, by referring it to the Master to compute what would be a proper sum to allow, having regard to the probable duration of the life of Veronica Rodden; but a decree such as is granted in cases of annuities charged upon land would unquestionably have been made, under which practically there would have been a realization of the land for the purpose of satisfying the arrears and answering the accruing payments under the mortgage. See forms of such decrees in *Seton*, at p. 1562, 4th ed., providing in one case for sale of a sufficient part of the land to satisfy the arrears, and a setting apart of sufficient land to secure the growing payments; and in the other case providing for a sale of the entire *corpus* of the land. The right to obtain this relief, and the present right to lay hold of the

land for the satisfaction of the moneys secured by the mortgage, first arose more than ten years before the filing of this bill, whether the case falls within the 4th or the 23rd section of the Act. So that *quacunque via* I incline to think the decree is right. But, looking at the course of decision, it is preferrable to hold that the remedy by way of foreclosure or sale in mortgage cases is a proceeding to "recover the land" within the meaning of these words, as used in the Statute of Limitations.

In 1839, Shadwell, V. C., held in *Dearman* v. *Wyche*, 9 Sim. 575, that a bill of foreclosure was in substance a suit in equity for the recovery of money. In 1843, Wigram V. C., expressed an opinion to the same effect in *Du Vigier* v. *Lee*, 2 Hare 326. (It is to be noted that the decision in this case was overruled in *Hunter* v. *Nockolds*, 1 McN. & G. 641, Seton, p. 1056.) In 1853, Romilly, M. R., expresses himself somewhat equivocally in *Sinclair* v. *Jackson*, 17 Beav. at p. 412, thus: "A suit to foreclose is a suit to recover money within 3 & 4 Wm. IV. ch. 27, sec. 42, which enacts that no arrears of interest shall be recoverable but within six years. Now, strictly, a suit to foreclose is not a suit to recover money, but to exclude a right given to the mortgagor by the rules of the Court." These are the cases relied upon and followed in *Barwick* v. *Barwick*, 21 Gr. 39. But the authority of Sir John Romilly is in truth the other way, as will be seen by reference to a later decision not cited to the learned Judge who decided *Barwick* v. *Barwick*. In *Wilson* v. *Lady Dunsany*, 18 Beav. 293, (1854), the Master of the Rolls says: "A suit for foreclosure is not a suit for the recovery of money, but to bar the equity of redemption in the estate. In such a suit the Court has no jurisdiction to make a decree for the payment of a sum of money," p. 299. He proceeds to discuss the effect of a decree in a mortgage suit in Ireland, where, as may be in our practice, the land is directed to be sold, and considers its effect not to be different; and ends thus: "It is not a decree for the payment of money; and the form of the decree is the same, where there is a personal liability under

the mortgage deed as where there is a mere charge on the estate," p. 299.

This case, not referred to in *Darby* and *Bosanquet's* Book on Limitations, displaces their views upon the alleged distinction between English and Irish foreclosures, as discussed at pp. 115, 116.

Then there is the express decision of Sugden, V. C., in 1842, in *Wrixon* v. *Vize*, 3 Dr. & War. 104, to the effect that a bill of foreclosure is not a suit in equity for the recovery of the money charged upon the land, although it may lead to that, but that it is in effect to recover or obtain the equity of redemption, which is in the view of equity an actual estate, p. 120, *S. C.* 2 Con. & Law 138. This decision is all the more important and weighty, because in an *obiter dictum* reported in *Henry* v. *Smith*, 2 Dr. & War. 387, the Lord Chancellor had been disposed to agree with *Dearman* v. *Wyche*, which he in the later case pointedly dissents from. So the authorities remained till last year, when the English Courts have emphatically pronounced in favour of the doctrines enunciated by Lord St. Leonards.

In 1881, the question arose before Fry, J., in *Harlock* v. *Ashberry*, 29 W. R. 887. He held that the object of the action brought for foreclosure was to cut off the right of redeeming the land, and the recovery of the money, if it occurs at all, resulted from the condition which the Court imposed on the right of the plaintiff (*a*.) And lastly, the seal of highest authority is placed upon Lord St. Leonards' decision by the unanimous approval of the Court of Appeal consisting of Lord Selborne and Lords Justices Baggallay and Brett in *Heath* v. *Pugh*, 29 W. R. 904, (Aug. 1881,) (S. C. L. R. 6 Q. B. D. 345).

In the present case the mortgagee had the legal estate, and the mortgagors the equity of redemption with right of possession until default in payment. This equity of redemption is an estate in the land, and the person entitled to it is in equity the owner of the land: *Casborne* v. *Scarfe*,

(*a*) Since affirmed on this point by the Lords' Trustees, *Harlock* v. *Ashberry*, 19 Chy. D. 539.

3 Atk. 603. A foreclosure, said Lord Hardwicke in this case, is considered as a new purchase of the land. The prayer of this bill is for three things: payment of the money, possession of the land, and foreclosure. These are three distinct causes of action: the first depending on the covenants to pay contained in the sealed instrument: the second depending on the possession of the legal estate as in an ejectment; and the third invoking the aid of equity to make absolute that forfeiture which began with the first failure to observe the conditions of the mortgage. It is obvious that so far as the claim for possession is concerned, that depends upon the same construction of the statute as obtains in cases of ejectment; and so far as the claim to foreclosure is concerned, that is a proceeding to take away from the mortgagor his ownership of the property, and to vest it indefeasibly in him who before was but an incumbrancer.

By the interpretation clause of R. S. O. ch. 108, the term "land" covers any estate of inheritance or any estate transmissible to heirs. This includes an equity of redemption in fee simple lands, such as these are. The fourth section in terms extends to a suit to recover any land, and provides in sec. 5, sub-sec. 9, that the right to recover the land, when the person is claiming by reason of any forfeiture or breach of condition, shall be deemed to have first accrued when the forfeiture was incurred or the condition broken. Then sec. 22 provides that any person claiming under a mortgage of land may bring a suit in equity to recover such land at any time within ten years next after the last payment, although more than ten years have elapsed since the right to bring the suit first accrued. And by sec. 29 no suit in equity to recover land shall be brought after the time when the plaintiff, if entitled at law, might have brought an action therefor. These sections indicate plainly enough that if a foreclosure suit is one to recover land, (which in view of the cases cited is no longer an open question) then that suit will fail if brought after ten years from the time at

which the right of suit first accrued. Such is the position of the case in hand, and therefore so far as the bill seeks to affect the possession of or the title to the land in question, or to make absolute that forfeiture which originated in the first default, the plaintiff should be refused any relief.

The decree should be affirmed, with costs.

FERGUSON, J.—The mortgage or document on which the suit is brought is made by the defendants, who are husband and wife. The suit is one of foreclosure, and also an action on the covenant contained in the mortgage. The money was payable quarterly. The last payment was made in the month of November, 1868, and the first default was made in the month of February, 1869. This suit was commenced on the 29th day of October, A.D. 1879, more than ten years after the date of the first default. The learned Judge, before whom the cause was heard, decided that the right of foreclosure was barred by the Statute of Limitations, but he gave effect to the covenant, and made an order upon the defendant, the husband, to pay the money, and directed, as I understand, a reference as to the separate estate which the defendant, the wife, had at the date of the mortgage, and which she still retained at the time of the hearing of the cause, and ordered payment out of such estate or such remainder thereof.

It was argued before us that a *foreclosure* suit is not an action or suit for the recovery of land, and that the decision of the learned Judge was not correct in holding that the Statute of Limitations applied so as to bar the right to *foreclose*. I think it is too late now to argue that a foreclosure suit is not a suit for the recovery of land. The judgment (in appeal) in the suit *Heath* v. *Pugh*, L. R. 6 Q. B. Div. 345, referring to and adopting the doctrine of *Wrixon* v. *Vize*, 3 Dr. & War. 104 and referring also to many other cases on the subject, as well as the case *Harlock* v. *Ashberry*, L. R. 18 Ch. Div. at p. 233, and the same case in appeal, W. N. 18 February, 1882, seem to me to settle the point, at all events so far as this Court

is concerned. There are other cases deciding in the same way, but I do not think it necessary to refer to them here.

Then the suit, so far as it is a suit for foreclosure, being one for the recovery of land, and the first default and accrual of the right of action being ten years and eight months before the commencement of the suit, I think it plain that the 4th sec. of ch. 108 of the R. S. O. applies, and the right of foreclosure is barred.

I think the defendant the husband is liable upon the covenant that he executed, and that the order made in respect of the estate of the defendant the wife is, under the authorities, the proper order. I am therefore of the opinion that the decree should be affirmed.

[CHANCERY DIVISION.]

MUNSIE v. LINDSAY.

Will—Devise to attesting witness—Election by heir—26 Geo. II., ch. 6, sect. 1.

Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of the 26 Geo. II. ch. 6, sect. 1, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the will.

IN this action the plaintiff, William Munsie, Junior, set up in his statement of claim that his father, William Munsie, who died in August, 1854, by his will left a certain lot of land to his wife for life, and after her death to his son Robert Munsie, charged with certain legacies; but that the said Robert Munsie was one of the attesting witnesses to the said will, by reason of which the said bequest to him was invalid; and claimed a declaration that the testator died intestate as to the said lands, and that on the death of the widow the heirs were entitled, and also an account of rents and profits, and a partition among the parties entitled to the said lands.

The defendant, Lindsay, in his statement of defence set up an assignment to himself, for value, of the said land in fee simple from one James Munsie, to whom the said Robert Munsie had by deed duly executed conveyed the said land in fee simple; and that the said James Munsie had paid the legacies charged on the said land, and that he, the said defendant, had made valuable improvements; and he claimed that as to any portion to which the plaintiff should establish a title, he, the said defendant, was entitled to have the same charged with a proportion of the legacies paid, and of the value of the improvements which were made under a *bona fide* mistake of title.

The above statements were duly proved, and it also appeared that the widow had released her life interest to James Munsie by deed executed previously to the assignment to the defendant William Lindsay.

The testator by his said will also bequeathed a legacy

of £250 to the plaintiff, William Munsie, which he charged upon certain land left by him to his son Alexander Munsie, one of the defendants.

The action was heard on April 28, 1882, at the Spring Sittings at Toronto.

W. Cassels (*Brough* with him), for the plaintiff. The plaintiff, though one of the heirs and a legatee under the will, is not put to an election here; *Jarman* on Wills, 4th ed., p. 447; *Sheddon* v. *Gooderich*, 8 Ves. 494; *Dewar* v. *Maitland*, L. R. 2 Eq. 839. He is entitled to the improvements: *McGregor* v. *McGregor*, 27 Gr. 274. As to the legacies, we do not object to the actual sum paid by James Munsie being charged on the land in Lindsay's favour.

J. Bethune, Q. C. (*Barwick* with him), for the defendant Lindsay. The will is valid for every purpose except as to the part relating to Robert: 25 Geo. II. ch. 6, sect. 1. The charges are good in the hands of the heirs at law, and should not be confined to the sum which was paid by James Munsie. The point as to election is new, and not covered by any case. The will manifests a clear intention on the testator's part as to his property; he gave to Robert the benefit of the property devised, just as he intended William to have the benefit of the legacy: *Noys* v. *Mordaunt*, 1 Wh. & Tud. L. C. 367, 5th ed. The heir at law cannot elect to treat one part as invalid and claim the rest as good; the will must be looked at to see whether this legacy would have been given to the plaintiff if the devise to Robert failed: *Kerr* v. *Wauchope*, 1 Bligh 40, and the decision of Lord Kaims therein referred to; *Dundas* v. *Dundas*, 2 Dow & Cl. 374; *Orrell* v. *Orrell*, L. R. 6 Chy. 302; *Dewar* v. *Maitland*, L. R. 2 Eq. 834; *Brodie* v. *Barry*, 2 Ves. & B. 127; *Warren* v. *Rudall*, 1 John. & Hem. 1. The testator might have annexed it as an express condition, and an implied condition is equally strong here.

W. Cassels, in reply. The Wills Act, R. S. O. ch. 106, sect. 17, makes the devise null and void: *Jarman* on Wills, 4th ed., p. 447. He also referred to *Rice* v. *George*, 20 Gr. 221.

May 10, 1882. BOYD, C.—Since the beginning of this century the law has been treated as settled in the manner in which it is found laid down in the text books, namely, that the doctrine of election is not applicable when real property is assumed to be devised by a will not executed so as to pass it and by the same will a legacy is given to the heir. In such a case the heir may take the legacy without making good the devise in the absence of any express condition to that effect: *Williams* on Executors, p. 1449, (8th ed.) In 1803 Lord Eldon so explained the law in *Sheddon* v. *Gooderich*, 8 Ves. 497, observing that the distinction made between an express and an implied condition if *res integra* would be questionable. But he thus concludes: "Though, with Lord Kenyon, I think the distinction such as the mind cannot well fasten upon, it is better the law should be certain than that every Judge should speculate upon improvements in it."

In this case the attesting witnesses to the will by which the land in question is assumed to be devised to the testator's son Robert are the same son Robert, and Robert McTavish, the husband of a legatee, whose legacy is charged on the same land. It was conceded that this avoided the will as to the land in question by virtue of 26 Geo. II. ch. 6, sect. 1, by which the will, so far as concerns any beneficial devise to an attesting witness, is rendered in terms "utterly null and void." It is in truth the same as if the testator had died intestate as to this property, and the will cannot be regarded. The plaintiff is entitled to call for a partition of the land, but the shares of the heirs must be onerated with their proportions of the valid charges on the land created by testator. And although some have been obtained by the person under whom Lindsay claims at less than their full value, yet he should be allowed as if the whole had been paid. It is conceded that his permanent improvements are to be allowed as against rents, for which he should account. The usual partition decree in other respects, and each share to bear its own costs.

[CHANCERY DIVISION.]

COURT v. WALSH.

Statute of Limitations—Mortgage—Insolvency.

When the right of action for entry or foreclosure is taken away by virtue of R. S. O. ch. 108, sect. 15, the title itself of the mortgagees is extinguished, and the right of action wholly disappears.

A mortgagee who has suffered the statute to run before he asserts his right of entry cannot, by afterwards getting possession of the property, revive his title to it, but he is in as a mere trespasser.

The insolvency of the mortgagor and the appointment of an assignee in insolvency, does not suspend the running of the Statute of Limitations, so as to preserve the lien and security of the mortgagee on the land mortgaged.

THE bill of complaint in this cause was filed by James Court, assignee of the estate and effects of James O'Neil and Richard O'Neil, insolvents, praying a declaration that all claims, rights, titles, and demands of the defendant, Mary Ann Walsh, into or upon the lands in the pleadings mentioned as comprised in a mortgage executed by the two O'Neils to her, and dated September 9th, 1868, were barred and extinguished by the Statutes of Limitations; and for an order for delivery up by the said defendant of possession of the said land, and for an account of rents and profits.

The plaintiff alleged in his bill that the said defendant had so entered into possession after the making of the assignment in insolvency, without the knowledge and consent of the plaintiff, and after all her claims had been barred as aforesaid.

The evidence of Mary Ann Walsh showed that she had never received any part of the principal money or interest secured by the said mortgage.

The remaining facts of the case are sufficiently set out in the judgment.

The hearing was commenced before the Hon. Mr. Justice Ferguson, at Toronto, on December 11th, 1881, when the case stood over, the plaintiff desiring certain amendments which were allowed.

The case came on again on May 1st, 1882, before Boyd, C., at Toronto, when it was agreed that all the evidence already taken should be used, but no further evidence given.

Maclennan, Q. C., for the plaintiff. No interest was ever paid on the mortgage, and the defendant's title was extinguished before the action of ejectment was begun. The defendant should account for rents: *Sanders* v. *Sanders*, L. R. 19 Ch. D. 373.

Bethune, Q. C., for the defendant. Defendant is in possession, and should not be turned out except on equitable terms. The Insolvent Act is to be considered, 38 Vict. c. 16, sects. 83, 84, 85, 86. We have a right to go into insolvency, and put a value on the security and work out our rights there. When insolvency begins there is a trust for all parties, and the law of limitations ceases: *Banning* on Limitations, p. 264; *Re Ross*, 2 G. & J. 46; *Sterndale* v. *Hankinson*, 1 Sim. 393. The assignee by coming here cannot put us in a worse position then if he went to the Insolvent Court. Foreclosure would not now lie against the assignee. *Henderson* v. *Kerr*, 22 Gr. 91, should be overruled now in view of *Harlock* v. *Ashberry*, 51 L. J. Ch. 394; S. C. L. R. 18 Ch. D. 229. See also Insolvent Act, sect. 125. Ejectment will not lie by the assignee against the defendant, because the legal estate is in the defendant, who is in possession; *Jones* on Mortgages, sects. 715, 716, 1205. R. S. O. c. 108. sec. 15, does not apply to mortgage cases, which are provided for in separate sections by themselves. The plaintiff may be able to say that we cannot bring an action, yet we can nevertheless defend against ejectment. The plaintiff has not been in possession, and possession will be attributed to us who have the legal title. Plaintiff may apply for redemption. R. S. O. c. 108, sect. 19, has not deprived him of this right; neither does sect. 22 enable him to get us out of possession. If the possession be changed it should be without prejudice to our rights in the Insolvency forum, and it should be declared that the mort-

gage is a valid security for what is due. I also refer to Insolvent Act, sect. 16; and to 40 Vict. c. 41 sect. 21 Form N.

Maclennan, Q. C., in reply. The point to be decided is, whether we have, as we assert, the legal title to this property. R. S. O. c. 108, sect. 15, bars the right and divests the title or extinguishes it; and it applies to all sections of the Act. Both the mortgagor and the mortgagee have the right to take proceedings in Chancery irrespective of the Insolvent Act; and the defendant chose to rely on her security, instead of proving her claim in insolvency. She then brought ejectment against the tenant, and got possession without the knowledge or consent of the plaintiff. *Re Ross* only applies to the debt, and not to the security. The O'Neils might have sold the equity of redemption before insolvency. Moreover the Dominion Act as to Insolvency cannot interfere with the Provincial Act as to Limitation of Actions; *Mahar* v. *Fraser*, 17 C. P. 408. The defendant may still be able to prove for her mortgage debt in insolvency, and I do not object to the decree being without prejudice to such right.

May 10, 1882. BOYD, C.—The mortgage was, in this case, made on the 9th of September, 1868, and provided that the mortgagor should, till default, retain possession. Default in payment was made on 9th September, 1869, and a right of entry then first accrued to the mortgagee. No steps, however, were taken by the mortgagee to obtain possession or otherwise till the 12th September, 1879, when an action of ejectment was brought against the person in possession, who was tenant of a second mortgagee. Possession was subsequently obtained by the mortgagee who is the defendant. The plaintiff is the assignee in insolvency of the mortgagor, who became insolvent on the 8th January, 1877.

Many of the matters discussed in this case have been considered in the case of *Fletcher* v. *Rodden*, *supra* p. 155. Two points were presented for adjudication in the contention

made on behalf of the defendant. First, is the mortgagee's title extinguished? That depends upon the Statute of Limitations, and is now clearly settled by the cases adversely to the defendant. The Master of the Rolls thus regards the effect of 3 & 4 Wm. IV., ch. 27, sect. 34 (which is the origin of R. S. O., ch. 108, sect. 15) in *Dawkins* v. *Lord Penrhyn*, L. R. 6 Ch. D. 318: when the right of action for entry or foreclosure is taken away "the title itself is extinguished, and the right of action wholly disappears." Therefore it is not merely a loss of the claim, but it is a divesting of the title or a transfer of title to somebody else.

This view of the Statute was confirmed on appeal to the House of Lords: *S. C.*, L. R. 4 App. 51. This section was held by Lord Selborne to be applicable to mortgage cases, and to have the effect when the mortgagee is barred by the statute of transferring the whole right, title, estate, and interest of the mortgagee to the mortgagor, in *Heath* v. *Pugh*, L. R. 6 Q. B. D. 345, 364.

At the end of ten years from the 9th Sept., 1869, and three days before the action of ejectment was begun, the title of the mortgagee to the land was extinguished, and by virtue of the statute a parliamentary re-conveyance was made to the plaintiff as assignee of the equity of redemption.

Then does the subsequent entry by the defendant avail to change the state of the title? Plainly not. The very point came before Lord Selborne, sitting for the Master of the Rolls, in *Bryan* v. *Cowdal*, 21 W. R. 693. He there held that a person who suffered the statute to run before he asserted his right of entry could not by getting possession of the property revive his title to it; for the Act had barred his estate and he was in as a mere trespasser. To the same effect is *Sanders* v. *Sanders*, L. R. 19 Ch. D. 373.

The second question is that argued by Mr. Bethune, that the effect of the insolvency of the mortgagor was to suspend the running of the Statute of Limitations, and that the assignee became a trustee for the benefit of all creditors.

To this I quite agree so far as the mortgagor is a creditor under his covenants in the mortgage, but it does not follow that the lien and security of the mortgagee on the land mortgaged is affected by the insolvency. On the contrary the reverse has been held in *Henderson* v. *Kerr*, 22 Gr. 91, and there is nothing in the facts of this case to lead me to depart from that authority.

If the assignee had taken possession of the mortgaged property, then the precise question argued as to the effect of section 125 of the Insolvent Act would have arisen.

The result is, in my judgment, that the laches of the mortgagee has by the operation of the Statute of Limitation caused an extinguishment of her title, so that she no longer can claim the benefit of sect. 84 of the Insolvent Act, and insist on valuing her security as if the mortgage still subsisted on the land.

As at present advised I think the defendant has the right to prove as a creditor in the insolvency, and claim a dividend out of the undistributed estate of which the land in question forms an asset discharged of her mortgage.

The decree will be without prejudice to this right; costs to the defendant. The defendant should account for rents received since possession was taken by her, and order for delivery of possession. Rents hereafter should be paid into Court, and rents in her hands. Accounts may go to the Master's office. Possession not to be changed till 8th June.

[CHANCERY DIVISION.]

BRIGHT v. MCMURRAY.

Conveyance—Mortgage—R. S. O. ch. 108, *ss.* 15, 19—*Statute of Limitations.*

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular," the mortgaged land, *habendum* "as and for all the estate and interest" of the grantors "in and to the same."

Held, sufficient to pass the fee to the grantees.

Held, also, the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, passed by the above deed to the grantees, and coupled with their own subsequent possession for the necessary period conferred on them an absolute title to the land by virtue of R. S. O. ch. 108, ss. 15, 19.

IN his statement of claim in this case, the plaintiff set out that he had been at the dates thereinafter mentioned, and was then the owner of certain lands in the township of York; that on July 31st, 1880, the defendant procured from one John Fisken an instrument purporting to be a conveyance to him of an undivided one-half interest in the said lands, and on February 15th, 1881, the defendant procured from one T. R. Wadsworth a similar instrument purporting to be a conveyance to him of the other undivided one-half interest in the said lands; that at the time of the execution and registration of these two instruments, neither the said John Fisken nor T. R. Wadsworth had any title to, or estate in the said lands; and the plaintiff claimed a declaration to that effect, and to the effect that the said instruments and the registration thereof were a cloud on the plaintiff's title, and that the said instruments might be delivered up to be cancelled and their registration vacated.

By his statement of defence, the defendant said that at the time of the execution and registration of the said two instruments, the said John Fisken and T. R. Wadsworth, the grantors therein named, were respectively seized in fee simple of the said lands thereby conveyed to him; and by way of counter claim he claimed title in himself to the said lands under the said conveyances, and also by length of possession of himself and those through whom he

claimed; and he claimed possession of the said lands, and $150 for mesne profits from the year 1878.

The case was heard at the Spring Sittings at Toronto, on April 29th, 1882.

The evidence adduced and the devolution of the title is sufficiently set out in the judgment of the learned Chancellor. There was a mortgage effected on the property in question, subsequent to the one to E. W. Thompson, of February, 1849. With this, however, the present proceedings were not concerned.

Moss, Q. C., (with him *J. E. Robertson*), for the plaintiff. The deed from the City Bank to Wadsworth and Fisken does not convey this land because it is only a quit claim deed, and there was no estate in Wadsworth and Fisken, for it to operate on. The land was wild land; *McConaghy* v. *Denmark*, 4 S. C. 610, 629, 630. If the bank is to be treated as mortgagee, it did not pass title as such by the deed of September, 1865.

H. J. Ferguson, for the defendant. Bowler took possession, as caretaker for the bank, in 1859, and held continuous possession. The benefit of the possession by the bank passed to the grantees under the instrument of September, 1875, and the person in actual possession attorned to them; by its instrument the bank handed on its possession. The bank is, *quoad* Bright, mortgagee, and the deed of September, 1875, transfers its interest as mortgagee; in any event, the plaintiff should get no relief as against us. He cited *Kay* v. *Wilson*, 2 App. 133.

Moss, Q. C., in reply.

Sanders v. *Sanders*, 51 L. J. N. S. 276, S. C. L. R. 19 Ch. D. 373, and *Harlock* v. *Ashberry*, L. R. 18 Chy. D. 229, were also referred to on the argument.

May 10, 1882. BOYD, C.—So far as the papers and evidence before me shew the state of the title, I come to the following conclusions:

John Scarlett, being the owner of the whole in fee simple,

made a mortgage in February, 1849, which conveyed the legal estate to E. C. Thompson, and which, by various *mesne* assignments, became vested in the City Bank in 1862. Scarlett conveyed his equity of redemption to John Major in October, 1853. Part of the equity of redemption (viz., that of the five acres in question) was conveyed by Major to the plaintiff's father, W. Bright, in July, 1856, and the rest of the equity of redemption was conveyed by Major to one Macdonell, from whom it passed to one Woodside.

The City Bank, in October, 1862, took proceedings on their mortgage, but not making Bright a party thereto, and obtained a decree and vesting order to themselves in 1865, the effect of which was to vest the property absolutely in them, save as to the Bright part. Practically these proceedings need not be further regarded, and the case should be viewed as one in which the mortgage exists as to the land now in question: *Russell* v. *Romanes*, 3 App. R. 643.

The first mortgage was for £1,000, to be paid in February, 1853, with interest at six per cent., payable half yearly, and it was provided that until default the mortgagor should remain in possession. It appears from the last assigment of this mortgage that £871 was due of principal money in May, 1862, and interest from 1st February of that year.

The bill by the City Bank states that John Major had died before it was filed: the precise date does not appear; nor does it appear precisely when default was first made in the mortgage, but it is not pretended that any payment was made thereon by or on behalf of the Brights. The evidence leads very distinctly to the conclusion that the bank took possession of the property in 1859, and perhaps before this. By their caretaker, Bowler, they were then in actual possession of half the land now in question, and he had a general oversight over the whole of the estate. The rest of the land now in question was then in bush, between which and the cleared part used by Bowler for cultivation ran a fence, which is said still to be on the ground in dispute. Bowler had the privilege of taking,

and did take wood for his use from the bush, and a quantity of wood on 100 acres was sold by the bank. This state of affairs continued till the bank sold to Wadsworth and Fisken in September, 1875: after which, as the witness Bowler says, "Wadsworth put me in charge of all till such time as he sold." There is no evidence that Bright ever was in possession of the part he bought, and no possession of it is taken by the plaintiff claiming under him till about July, 1878. A very significant piece of evidence is proved by the tax officer, who says he applied in 1860 to Mr. Bright to pay his proportion of the taxes according to a plan handed to the officer by Mr. Woodside: but Bright refused to pay, and said he would have nothing to do with it. The whole was then assessed to the City Bank, who paid taxes from that date down to the sale in 1875: *Davis* v. *Henderson*, 29 U. C. R. 358; *per Morrison, J.*

Upon this state of facts the proper inference is, that default was made in paying the mortgage, and that the bank lawfully exercised their right of entry in 1859, and took possession of the whole: *Kay* v. *Wilson*, 2 App. 133.

The new Statute of Limitations (R. S. O. ch. 108) came into force before the plaintiff took possession in July, 1878, so that section 19 of that Act applies as between the mortgagees and the plaintiff, and his right to redeem was gone at the latest in July, 1877. The effect of this under section 15, was to extinguish his title and to operate as a statutory foreclosure, according to the authorities which I cite in *Court* v. *Walsh*, *supra* p. 167; and his entry on the land in 1878 would not revest or revive his title to the land, and he would be there as a trespasser. Upon this point, I find that the plaintiff's case fails to establish that he is the owner, or that the registration of the instruments complained of does him any harm. This, in my opinion, would suffice to dispose of the action, and that adversely to the plaintiff, but for the counter-claim of the defendant, who seeks that he may have possession given to him, and to be declared the owner.

This involves the consideration of the legal effect of

the dealings between the City Bank and Wadsworth & Fisken. The Bank sold and conveyed to these persons a large part of the estate specifically described, and not now in controversy, for $15,000. The conveyance, which was executed in September, 1875, embraced the land now in dispute by a clause therein thus expressed: "And this Indenture further witnesseth that for the consideration aforesaid the Bank do hereby convey, assign, release, and quit claim to Wadsworth & Fisken their heirs and assigns for ever, all and singular all other portions of the said Runnymede estate not hereinbefore described, in which the Bank have any estate or interest. To have and to hold the same as and for all the estate and interest of the said parties of the first part in and to the same."

The estate and interest of the Bank at that time in these five acres was that of mortgagees in fee in possession.

The operative words were "convey, assign, release and quit claim" to the purchasers, "their heirs and assigns," and the *habendum* is to have and to hold for all the estate and interest of the City Bank.

In the case cited of *Acre* v. *Livingstone*, 26 U. C. R. 282, it was held that the words "remise, release, and quit claim," did not carry the fee in the land to a stranger. If there had been a valuable consideration as in this case, no doubt the instrument would have been sufficient to entitle the purchaser to a proper conveyance, but the attempt to obtain this failed in that case for want of consideration (among other reasons): *Livingstone* v. *Acre*, 15 Gr. 610, 612. The case itself has not been viewed with much favour, but would, if in point, bind me as it did the very learned Judge who decided *Collver* v. *Shaw*, 19 Gr. 599.

The words "convey, transfer, and deliver," without any words of inheritance, were deemed sufficient to pass the estate, by Proudfoot, V. C., in *McDonald* v. *Georgian Bay Lumber Co.*, 24 Gr. 356, and with this agreed Patterson, J., in the Court of Appeal: S. C. 2 App. R. 47; but the Supreme Court differed from this view: *S. C.* 2 S. C. 364, 381.

These decisions eliminate the words "convey" and "re-

lease," and "quit claim" from the operative words in the present deed, and leave but the one word "assign." Now it is true that in *Moran* v. *Currie*, 8 C. P. 60, this word was held insufficient to convey the legal estate in a mortgage thus assigned, but the report shews that was because no apt words were found to assist it, or rather because the words of limitation indicated that the legal estate was not being dealt with, as the assignment was to the plaintiffs, their "executors, administrators, and assigns." But the same Judge who decided *Moran* v. *Currie*, also held in *Watt* v. *Feader*, 12 C. P. 254, that every estate and interest in lands may be assigned, and that the proper technical words of assignment are "assign, transfer, and set over." And in a later case of *Fraser* v. *Fraser*, 14 C. P. 78, it was decided that the word "assign" is sufficient to pass the fee of itself. This is in accord with what is laid down in *Cruise's* Dig., vol. iv., pp. 88, 89; and with the view of Chancellor Kent, 4 Com., 11th ed., pp. 491-2, in notes. Here we have then the technical word "assign" coupled with the proper words of limitation to heirs and assigns, and the *habendum* to hold the land for all the "estate" of the mortgagees in possession. This is a sufficiently definite description to pass the fee to the defendant: *Crabb* on Real Property, sect. 958. Thus the benefit of the possession of Bowler from 1859, passed to Wadsworth and Fisken, which coupled with their own subsequent possession perfected their title as against the plaintiff before they conveyed to the defendant in 1880.

My judgment is therefore a declaration in favour of the defendant as being the owner of the land, and dismissing the plaintiff's action, with $20 for *mesne* profits to be paid by the plaintiff, as well as the costs of suit.

[CHANCERY DIVISION.]

SANDERS v. MALSBURG.

Separate property of married woman—Conveyance by wife to husband—R. S. O. c. 109, sect. 2.

Where by an agreement before marriage made in Montreal between the intending husband and wife, it was provided that each should enjoy all property, real and personal, which either might posssess at the time of, or acquire during the marriage, in any way, as his or her separate and respective property, and should have the absolute control and management thereof free from the debts and demands of the other, and after marriage the wife acquired certain land of which she and her husband executed a mortgage, and the wife conveyed to the husband in fee.

Held, that by the agreement the land was vested in the wife as her proper separate estate, and there was no incongruity in the husband being the grantee of the wife.

Ogden v. *McArthur*, 36 U. C. R. 246, distinguished.

Semble, that R. S. O. c. 109, sect. 2, is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment.

ON September 8th, 1863, William J. J. Malsburg, of the first part, and Maria P. Denant, of the second part, in contemplation of marriage, entered into an agreement before public notaries in the city of Montreal, whereby they covenanted and agreed that they would take each other for husband and wife, and as to their property they covenanted and agreed as follows:

"In case the said intended marriage shall be solemnized there shall be no community of property (*communite des biens*) whatsoever, either real or personal, between them, the said William J. J. Malsburg and the said Marie P. Denant, any law, usage, or custom to the contrary notwithstanding. . . That each of the said parties of the first and second parts shall, separately and individually hold, use, enjoy, and possess the property, real and personal, which they or either of them may or shall respectively and individually hold and possess on the day of the said marriage, or which they or either of them may respectively or individually acquire during the same either by donation, succession, legacy, bequest, or by any title or way whatever, as his or her own separate and respective property and estate in every respect absolutely clear, free, exonerated, and discharged of and from all and every incumbrance, mortgage, hypothec, debt, hindrance, or demand whatsoever proceeding from any act or acts of the other; and that each of the said parties of the first and second parts shall have the whole and sole absolute management, disposal and administration of their said

separate and respective property and estate without the let or hindrance of the other of them, he, the said party of the first part, hereby giving and granting to the said party of the second part all and every necessary power and authority for the free and absolute administration and disposal by her as she may be advised of all and every part and portion of the said property, real and personal, acquired as aforesaid. * * And, in order to establish the property of the said parties of the first and second parts, it is declared that the property of the said party of the second part shall consist of her wearing apparel * * and effects set forth * * in the schedule * * hereunto annexed to form part hereof * * together with all moneys, property, and effects which she may hereafter acquire by purchase or otherwise howsoever, which said property and effects shall be and belong to her and her heirs as her and their absolute property."

The intended marriage was subsequently duly celebrated, the four children issue of the marriage being the defendants in the present action.

Subsequently to the said marriage, and on June 15, 1871, the Colonial Securities Company sold and conveyed to the said Marie P. Denant, then Marie P. Malsburg, in fee, certain lands in the City of Toronto, being the lands in question in this cause, the husband not being a party to the deed.

On June 13, 1872, Marie P. Malsburg and her husband, by two separate instruments, mortgaged the said premises to the said company to secure the sum of $4,866 and $633 and interest.

On December 26, 1872, by indenture of bargain and sale made between the said Marie P. Malsburg, of the first part, and the said William J. J. Malsburg, her husband, of the second part, it was witnessed that in consideration of $2,300 therein expressed to have been paid by the said W. J. J. Malsburg to the said M. P. Malsburg, the receipt whereof she did thereby acknowledge, the said M. P. Malsburg did grant unto her said husband, his heirs and assigns, the said premises in the deed of June 15th, 1871, mentioned, in fee, for his and their own use and benefit absolutely.

The said last mentioned conveyance contained the usual covenants for title by the grantor, including a covenant for further assurance.

Subsequently, and on November 28, 1873, the said W.

J. J. Malsburg, being indebted to one Samuel Ollendorff, in the sum of $10,000, executed a mortgage of the said lands to the said Samuel Ollendorff, to secure the said sum; and the said M. P. Malsburg joined in the said mortgage for the purpose of barring her dower. The said mortgage contained absolute covenants for title, including one for further assurance.

On December 23, 1873, the said last mentioned mortgage, was by deed assigned by Samuel Ollendorff to Alexander Sanders, the present plaintiff, and default being made in the payment of the money thereby secured, the plaintiff instituted a suit for foreclosure against the said W. J. J. Malsburg and his wife, and obtained a final order of foreclosure sometime before the commencement of this action.

Default, moreover, was made by the said Marie P. Malsburg, in the payment of the above mentioned mortgages to the Colonial Securities Company, of June 13, 1872, and the same were paid in part by the said W. J. J. Malsburg, and the balance by the plaintiff.

Subsequently W. J. J. Malsburg and his said wife departed this life intestate, leaving the defendants to this action their heirs-at-law, them surviving.

Doubts having arisen as to whether the conveyance of December 26, 1872, operated as a transfer of the estate in the said lands vested in Marie P. Malsburg to her husband, the plaintiff instituted this action for the purpose of removing these doubts by obtaining a conveyance from the defendants, or a vesting order by way of confirmation of his title.

By his statement of claim the plaintiff set out the above facts, and claimed to have the cloud on his title removed, and a declaration that he was entitled to a specific performance as against the defendants of the covenants for further assurance contained in the conveyances of Dec. 26, 1872, and Nov. 28, 1873; or a declaration that the estate, if any, of the said M. P. Malsburg in the premises in question passed by the deed of Dec. 26, 1872, to her husband; or that if any estate or interest passed to the defendants

on the death of their mother, they might be declared trustees thereof for the plaintiff.

By their statement of defence the defendants set out the above mentioned ante-nuptial settlement entered into between their father and mother; and, amongst other things, submitted that the conveyance of December 26, 1872, was inoperative and void in law, both in the province of Quebec and in this province. They further charged the facts to be that their mother at the time of the said conveyance was without independent legal or other advice, and wholly unaware of her rights; and that upon this, if upon no other ground, the transaction should be be declared a nullity.

The case came on for hearing at the sittings at Toronto, on Wednesday, May 3rd, 1882.

No evidence was given to shew any unfair dealing between the husband and wife in reference to the conveyance of December 26th, 1872.

G. Morphy, for the plaintiff, referred to R. S. O. ch. 109; *Allan* v. *McTavish*, 28 Gr. 539; *Bishop* on Law of Married Women, secs. 713, 716, 717; *Shepard* v. *Shepard*, 7 John, ch. 57; *Putnam* v. *Bicknell*, 18 Wise 351; *Hannan* v. *Oxley*, 23 Wisc. 519; *Kerr* on Fraud, 48, 53; *Rawle* on Covenants, 4th ed., p. 401; *Sidmouth* v. *Sidmouth*, 2 Bea. 447.

T. S. Plumb, for the defendants. The infants are entitled to the benefit of any doubt. The plaintiff was informed of his position by registration: *Lloyd* v. *Spillet*, 2 Atk. 150; *Lavin* v. *Lavin*, 27 Gr. 567. Advancement in favour of wife is presumed: *Lewin* on Trusts, 7th ed., p. 163; *Ogden* v. *McArthur*, 36 U. C. R. 246; *Glaister* v. *Hewer*, 8 Ves. 198; *Grey* v. *Grey*, 2 Sw. 594; *Kingdon* v. *Bridges*, 2 Vern. 67; *Christ's Hospital* v. *Budgin*, 2 Vern. 683; *Back* v. *Andrew*, 2 Vern. 120.

May 10, 1882. BOYD, C.—The agreement between the intending husband and wife was executed in Montreal, and in the absence of any evidence to the contrary I must

assume that its legal operation and effect is such as would be given to it if entered into in this Province. By it the parties mutually agree that each of them shall separately hold, use, and enjoy, the real and personal property which either may acquire during the marriage whether by donation, succession, legacy, bequest, or by any title or way whatever, as his or her own separate and respective property and estate in every respect, and each is to have the whole and sole absolute management, disposal and administration of his and her separate and respective property and estate without the let or hindrance of the other.

This instrument is more explicit than the one referred to in *Adams* v. *Loomis*, 24 Gr. 242, and its effect is to vest the land then and subsequently held or acquired by the wife in her as proper separate estate to all intents and purposes. When the company in this case made a conveyance of the land to Mrs. Malsburg it became by virtue of the ante-nuptial settlement her separate estate with all the right and incidents pertaining thereto. A mortgage being given back to the company, this left in her the equity of redemption, which she had power to deal with and alienate as a *feme sole*. This she had as of right, by virtue of the equitable quality of the estate, without the aid of the statutes relating to married women, and without the concurrence of her husband: *Adams* v. *Loomis*, 22 Gr. 99, 24 Gr 242; *Place* v. *Spawn*, 7 Gr. 406; *Pride* v. *Bubb*, L. R. 7 Ch. 64.

This characteristic distinguishes the present case from *Ogden* v. *McArthur*, 36 U. C. R. 246, where the wife's estate was no more than the modified separate estate which is the offspring of the statutory law. In *Ogden* v. *McArthur*, the wife had no power of alienation except that conferred by the statute, which prescribes that the husband must be a grantor with her. He could not therefore take as grantee. But in this case the wife could convey without the joinder of the husband, and there is no incongruity in his being the grantee.

The language of Wood, V. C., in *Vansittart* v. *Vansittart*,

4 K. & J. 70, is a distinct recognition of the power of the wife to contract with the husband in respect of the separate estate. Here the transaction does not rest in executory contract, but is completed by the execution of a conveyance to the husband. Though the technical learning as to the legal unity of husband and wife may require at law the intervention of trustees in their dealings *inter se*, yet the course of the Court of equity is to give effect to such transactions by holding the one a trustee for the other.

The most recent cases declaring this where the husband conveyed directly to the wife are *Baddeley* v. *Baddeley*, L. R. 9 Ch. D. 113, and *Fox* v. *Hawks*, L. R. 13 Ch. D. 822. In both these the settlement was a *voluntary* one on the part of the husband. Here the conveyance purports to be for value and has the usual receipt acknowledging the payment of the consideration. I see no reason why this rule applied to the husband should not apply conversely to the wife when dealing with her separate estate so as to convert her into a trustee for her husband. Here there is not only the deed to the husband, but it is followed up afterwards by the husband and wife joining in a mortgage to Samuel Oldendorff, in which Mrs. M. bars dower.

The deed to the husband purports to be for value. I think upon further consideration of R. S. O. ch. 109, sect. 2, that it may apply to this case, although the transaction was in 1872, so as to cast the *onus* on the plaintiff of disproving the payment of the consideration. See also R. S. O. ch. 110, sect. 10, sub-sect. 2, also *Allan* v. *McTavish*, 28 Gr. 547; *Regina* v. *Guthrie*, 41 U. C. R. 148.

No evidence is given to shew any unfair dealing between husband and wife. It is said that she was *inops consilii*, but there is no rule requiring me to assume anything against a transaction such as this completed and acted on with all the formalities: *Grigby* v. *Cox*, 1 Ves. Sr. 517; *Essex* v. *Atkins*, 14 Ves. 542; *Nedby* v. *Nedby*, 5 De. G. & M. 377.

Upon the whole case as now presented I am justified in declaring the infants to be trustees for the plaintiff, and vesting in him all their estate in this land. The plaintiff should pay the infants' costs.

[CHANCERY DIVISION.]

GAIRDNER V. GAIRDNER.

Will—Vesting—Gift over—Contingency—Parties—R. S. O. ch. 49, sect. 9.

A testator by his will, gave his homestead and certain personality to his wife, while unmarried for the maintenance and support of the family surviving him, until the members of his said family should respectively attain twenty-one, and afterwards for the maintenance of his wife for life. He then proceeded to give and bequeath all his other real and personal estate, not thereinbefore mentioned, to his executors in trust to dispose of and invest, and "upon my son Thomas attaining the age of twenty-one years, should he be my only child, in trust to pay to him and put him in possession of the said residue," but if there were more children, he directed that it should be divided amongst all, in the proportion of one part to a daughter and two parts to a son, to be paid to them, when they should respectively attain twenty-one. He then proceeded to devise to his son Thomas the homestead together with the household goods, etc., on the decease or second marriage of his said wife, should he have attained his twenty-first year. And in case his son Thomas should not survive him, or attain the age of twenty-one, or in case he (the testator) should have no other surviving child who should attain the age of twenty-one, or in case he should have no grandchild, his real and personal estate was to be divided in certain proportions among his brothers and sisters.

Thomas, the only child surviving the testator, attained twenty-two, and died without issue, leaving him surviving his mother who had not married again.

Held, Thomas took a vested estate, for that it did not appear that the testator intended it to be contingent either on his attaining twenty-one, or surviving his mother.

Held, also, the testator's intention was that the gift over should not take effect unless Thomas died under twenty-one, without leaving a child.

THIS action was brought by certain persons claiming as beneficiaries under the will of one Thomas Gairdner, and by the surviving executors of the said will. The defendant, Christina Gairdner, was the widow of the testator who had taken possession of and claimed to be entitled to all the real and personal estate of the said testator under his will, and under the will of Thomas Gairdner, the younger, the only child of the testator, who survived him. The other defendant was a daughter of a deceased sister of the testator. The provisions of the will in question and the circumstances of the case are stated in the judgment.

The plaintiffs, in their statement of claim, submitted that according to the intention of the testator and the true construction of the said will, his property was in the event

of his leaving no other surviving child, or leaving no grand child at the death of his son Thomas, and in the event of his said son Thomas dying without leaving any children him surviving to go to the brothers and sisters of the testator, subject to the provisions therein made for the defendant, Christina Gairdner, the said property having been inherited by the testator from his father as his eldest son, and the testator's intention being that it should failing his own descendants go to his brothers and sisters. And the plaintiffs claimed a declaration to this effect, and that the defendant Christina Gairdner might be ordered to deliver up possession of the said real and personal property to the brothers and sisters of the testator, and the children of those deceased, except the portion devised to her by the said will, and that the same might be partitioned among those entitled thereto; and that she might account for rents and profits.

By her statement of defence, the defendant Christina Gairdner, submitted that the personal representatives of Beatrice Gairdner, a deceased sister, and of David Gairdner, a deceased brother of the testator, were necessary parties to the action. She also submitted, that upon the true construction of the said will, and in the events which had happened the residuary estate of the testator became vested in his son Thomas Gairdner, the younger, absolutely for his own use and benefit, and that she became and was entitled thereto by virtue of the will of the said Thomas Gairdner, the younger; and she denied the right of the plaintiffs to the said property or to any part thereof.

The case came up on motion for judgment on March 8th, 1882.

Maclennan, Q. C., for the widow of the testator, one of the defendants, raised the preliminary objection that Beatrice Gairdner and David Gairdner, two of the beneficiaries under the will, being dead, their shares would belong to their personal representatives, who were not before the Court.

PROUDFOOT, J.—I think the plaintiffs, the husband of Beatrice and child of David, may be ordered to represent the absent parties under R. S. O. ch. 49, sec. 9.

S. H. Blake, (*H. Cassels* with him,) for the plaintiff. The devise to Thomas is contingent. He takes no interest until he attains twenty-one, and until the death or second marriage of the wife. Thomas attained twenty-one, but died in the lifetime of the widow, who still lives, and is a defendant: *Sheffield* v. *Lord Orrery*, 3 Atk. 282; *Theobald* on Wills, 1st ed., 263, 265, 277; *Thompson* v. *Ludington*, 104 Mass. 193; *Alexander* v. *Alexander*, 16 C. B. 59; *Walker* v. *Mower*, 16 Beav. 365. There is here a double contingency which distinguishes this from *Boraston's Case*, 3 Rep. 19. We refer also to *Doe* v. *Freeman*, 1 T. R. 389; *Fox* v. *Fox*, L. R. 19 Eq. 286; *Re Ashmore's* Trusts, L. R. 9 Eq. 99.

Maclennan, Q. C., for the widow. The interest vested in Thomas on his attaining twenty-one, and he then made a will devising all to his mother. There is an unconditional gift to Thomas of all but the homestead on his attaining twenty-one. As to the homestead, the devise is to the wife for life, with remainder to the son. There is no gift over in case Thomas died after twenty-one in the lifetime of the widow The devise to Thomas includes the homestead as well as personal property, and the fact of *time* being included in the gift does not as to realty make it contingent. Maintenance is given to Thomas out of the property devised to him; and is provided for the children till twenty-one, to be furnished by the wife till second marriage, and then by the executors. "Family" does not include wife: *Re Hutchinson*, L. R. 8 Chy. D. 540.

Blake, Q. C., in reply, cited *Jarman* on Wills, 4th ed., p. 699. 837; *Underhill* v. *Roden*, L. R. 2 Chy. D. 494; *French* v. *Lane*, L. R. 10 Eq. 501; *Price* v. *Hall*, L. R. 5 Eq. 399; *Hawkins* on Wills, p. 237.

May 18, 1882. PROUDFOOT, J.—Thomas Gairdner, by his will made on the 13th March, 1858, gave to his

wife an annuity of $200, in lieu of dower, for her life, to be paid out of his personal or real estate as to his executors might seem most suitable. He also gave and devised to his wife, as long as she remained unmarried, the homestead and farm on which he resided, with the use of all his household goods, &c., and the use of his stock and farming implements, in trust for the maintenance and support of whatever family might survive him, until he or they should attain the age of twenty-one years and thereafter, for the maintenance and support of his wife so long as she remained unmarried. In the event of his wife marrying again he desired that the homestead, household goods, farming stock, &c., should be taken possession of by his executors at once in trust to be disposed of as thereinafter mentioned, making in the meantime such provision as might be required for the maintenance, education and support of his surviving child or children, if still in his or their minority. And he further gave and bequeathed all his other personal and real estate, bonds, mortgages, accounts, notes, &c., not before mentioned, to his executors in trust, to dispose of and invest to the best advantage, and after paying all his just debts and executorship expenses in trust to apply the same as follows: "To pay whatever amount may be requisite to give my child or children a liberal education, and upon my son Thomas attaining the age of twenty-one years, should he be the only child, in trust to pay to him and put him in possession of the said residue" of his personal and real estate which might remain in the hands of his executors after payment of debts, legacies, expenses, &c. But if there were more children he desired that it should be divided amongst all in the proportion of one part to a daughter and two parts to a son, to be paid to them when they should respectively attain the age of twenty-one years.

He further devised to his son Thomas the homestead, together with the household goods, farming stock, etc., on the decease or second marriage of his wife, should he have attained his twenty-first year; but, should he be still in his

minority, to be taken possession of by his executors till he attained his majority.

In case his son Thomas should not survive him or attain the age of twenty-one years, and in case he should have no other surviving child who should attain twenty-one years of age, or in case he should have no grandchild, he directed his real and personal estate to be divided in certain proportions amongst his brothers and sisters.

The widow of the testator still lives, and has not married again.

Thomas was the only child surviving the testator. He attained twenty-two years of age, and died unmarried, and without leaving any issue, having made a will bequeathing all his real and personal estate to his mother, the widow of the testator.

The plaintiffs claim under the devise over, and submit that upon the true construction of the will and the circumstances that have happened the devise over took effect.

The widow is a defendant, and denies the right of the plaintiffs to the property, or any part of it.

Leaving out of consideration so much of the will as refers to the second marriage of the wife and the directions consequent thereon, and also so much as provides for other children, which is now unimportant, we find there is a particular devise of the homestead and certain personal estate united with it, and a general devise of the residue, or, as it is termed, all his other personal and real estate; for though the phrase might include so much of the homestead as was not previously disposed of, viz: the remainder after the life estate, yet as he subsequently makes a different disposition of the homestead, it seems clear that he did not mean to include it in the *other* estate.

The homestead and certain personalty is given to the wife while unmarried, for the maintenance and support of the family surviving him, until he or they should attain the age of twenty-one years, and afterwards for the maintenance and support of the wife. Family here plainly means children, and as there was only the one child, Thomas, the

devise is for his benefit till he attain twenty-one, and then for the support of the wife. On the death of the wife he devises it to Thomas, should he have attained his twenty-first year, and if at that time he had not reached twenty-one, the executors were to take possession till he did attain twenty-one. There are two apparent contingencies here: attaining twenty-one, and surviving the wife. But it is clear that the attaining twenty-one was not deemed by the testator to be a contingency upon which Thomas's right should depend, for if he survived the wife while a minor, the executors were to hold it till he reached his majority, and then it must be inferred that he was to get possession. Nor does it seem to me that Thomas's interest was contingent on his surviving the wife. The testator had previously given it to the wife for life, and the devise to Thomas, on the decease of the wife, appears to express the intention that the wife should, at all events, have it for life, and to limit the time when Thomas should be put in possession. *Anon.* 2 Vent. 363; *Pearsall* v. *Simpson*, 15 Ves. 29; 2 *Jarm.* on Wills, 421, 422, 5th Am. ed. by Randolph & Talcott.

The devise of the homestead for the maintenance of Thomas is another cogent circumstance in favour of the vesting of his estate at the death of the testator. A gift of maintenance out of the interest of a legacy does not show the legacy to be vested, but a gift of the whole interest for that purpose does: *Fox* v. *Fox*, L. R. 19 Eq. 286. Nor is it material that the amount to be expended is discretionary with the executors: *Harrison* v. *Grimwood* 12 Bea. 192; *Fox* v. *Fox, supra*. This rule in terms applies to legacies, but it was adopted from analogy to the rule in Boraston's case 3 Rep. 19, that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, divided into two distinct portions or interests for the purpose of postponing not the vesting, but the possession only: 2 Jarm. Wills, 460, 466, Am. ed. A gift of the rents for maintenance would appear to have as much effect in

determining the vesting of devised land, as the vesting of a legacy.

Walker v. *Mower*, 16 Beav. 365, was cited for the plaintiffs. In that case there was a devise to trustees in trust for A. for life, and afterwards to convey and assure to A.'s children on their attaining twenty-one. A. died leaving one child who did not attain twenty-one, and it was held that he did not take a vested interest. But the ground of the decision was the interposition of the trustees, and that where an estate is given to trustees, in trust to convey to children on attaining twenty-one, there is no vested interest before the time for conveying arrives—that is, before the child attains twenty-one. In the present case the devise of the homestead is direct, and not through the channel of trustees, and that case does not apply.

Sheffield v. *Lord Orrery*, 3 Atk. 282, was also cited for the plaintiff. It was held that, upon a devise to the wife for life upon this express condition only, "that if my said wife shall marry again, then my will and meaning is, that my said house shall go forthwith to my eldest son and his issue," the limitation to the son was but a contingent remainder, and to take effect only on the widow's marrying again. If the bequest to the son in the present case had been only that contained in the first clause of the will, it might have been necessary to consider the effect of *Sheffield* v. *Lord Orrery*, and the cases of a somewhat similar character, such as *Luxford* v. *Cheeke*, 3 Lev. 125, and *Gordon* v. *Adolphus*, 3 B. P. C. Toml. 306, but here there is a subsequent gift of the homestead couched in different terms, to which these cases would have no application.

As to the residue or other estate, the devise does not appear to be connected with the second marriage of the wife, and it is to the trustees to pay for a liberal education for Thomas, and upon his attaining twenty-one to pay to him and to put him in possession of the residue, &c. Thomas attained twenty-one, and the question of vesting at an earlier period need not be discussed.

Having come to the conclusion that the estate of Thomas was vested, it remains to consider whether the circumstances contemplated by the will have occurred upon which the devise over was to take effect. These are, as stated in the will, in case Thomas should not survive the testator, or attain the age of twenty-one years, or in case the testator had no grandchild. As the testator had no other children, failing a grandchild, means failing a child of Thomas.

I think the testator's intention was, that the estate should not go over unless Thomas died under twenty-one without leaving a child. As to the residue it is clear that on attaining twenty-one Thomas was to have the full possession and absolute control of it. If there had been more children it was to be divided amongst all, and paid to them on their respectively attaining twenty-one; and language of that kind has always been construed as giving an absolute interest. When a legatee, and the same rule must apply to a devisee, is to have the absolute control at a specified time, a subsequent gift over will be limited to take effect before the time. Thus in *Clark* v. *Henry*, L. R. 6 Chy. 588, a testator bequeathed all he should die possessed of to be equally divided between his sisters Ann and Sarah, Ann to have the immediate control of her share, and Sarah upon attaining the age of twenty-five years, until which time his uncle would hold it in trust for her, and in case of the death of either of his sisters before the testator, or before marrying and having children of their own, the whole to go to the survivor. The Lord Justices held that Sarah had an absolute interest not contingent on her marrying and having children. That the gift to the survivor on the contingency of the death of the other, before marrying and having children, was referable to such death occurring before she should attain twenty-five. James, L. J., says, the testator "did not contemplate a trust during the whole life of either." So in the present case, where the executors are directed to pay over to and put Thomas in possession of the residue at twenty-one their trust ended.

In *Brotherton* v. *Bury*, 18 Beav. 65, a testator gave his

personal estate and the produce of his real estate between his children equally. There was a gift over if any child should die after the testator's decease without leaving issue surviving him. A child died after attaining twenty-one without leaving issue. It was held that his share did not go over. The clause giving over on death without issue, was construed to mean on such a death *under twenty-one.* There are other cases to the same effect.

If that be the true construction as to the residue, the language must receive the same meaning as applied to the homestead. It is true that in some instances the same words in a will have a different meaning given to them when applied to real and to personal estate, as in *Forth* v. *Chapman*, 1 P. W. 663; but where the two properties are made liable to one contingency, that contingency must receive the same construction as to both: *Paylor* v. *Pegg*, 24 Beav. 105.

The plaintiffs seem to me to have no title, and there will be a declaration to that effect.

As the difficulty arises upon the construction of the will the costs must come out of the estate.

[QUEEN'S BENCH DIVISION.]

WINFIELD v. KEAN.

Malicious prosecution—Reasonable and probable cause—Malice—Misdirection—New trial.

In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action. Therefore where the jury were directed, in the course of the charge, that if a person makes a charge against another for the purpose of his being arraigned upon it without being justified in point of law, then he does it maliciously: that they need not trouble themselves with a question of malice except as it might be inferred from want of reasonable and probable cause, and that if the information had been laid without proper cause the result would be that it was laid maliciously; and the plaintiff obtained a verdict of $500.

Held, misdirection, for which a new trial should be granted.

Per HAGARTY, C. J., dissenting. Though the directions standing alone might be open to criticism, the charge must be read as a whole, but as the jury were afterwards told repeatedly that they should find for defendant if they thought that he believed the matters sworn to in his information, there was no misdirection which would warrant interfering with the plaintiff's verdict.

Where the damages are large, and to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection.

PLAINTIFF'S statement contained causes of action for malicious prosecution, in charging the plaintiff and causing him to be arrested and imprisoned on a charge of feloniously stealing two cant hooks, a saw-set and other articles, and with having assaulted the defendant; for assault; and for slander in saying that the plaintiff was a thief and stole defendant's goods.

The defendant denied the plaintiff's allegations, and in reference to the charge for malicious prosecution set up that the defendant left his mill fastened and locked up on Saturday, 2nd October, 1881, and on the following Monday he was informed by his workmen that the mill had been broken into during the night, and his tools—being the tools mentioned in the plaintiff's statement of claim, and which were the property of the defendant—had been taken: that he examined the premises and found that the staple had been drawn, the chain fastening the door removed, and

the tools taken away; that on the same day, shortly after, plaintiff went to the house of one Burgay, where the plaintiff at the time was living, and asked the plaintiff if he broke into his, the defendant's, mill; the plaintiff replied that he had, and had taken the tools: that the defendant then informed the plaintiff that if he did not return the tools before the following morning, so that his men could have them to work with, he would have him arrested: that the plaintiff not having returned the tools, the defendant, thus knowing the premises, and having reasonable and probable cause for suspecting and believing that the plaintiff was the person who had broken into the mill and taken the said tools, and had the said tools concealed in the house of the said Burgay, went before a magistrate and laid the information under which the alleged proceedings were taken against the plaintiff.

The action was tried at Barrie, in May last, before Patterson, J. A., and a jury.

From the evidence it appeared the plaintiff had been in the employment of the defendant as his foreman: that the tools in question were in part his own and in part borrowed by him, and were not the tools of the defendant, but that he had used them in the defendant's work: that the defendant, after the plaintiff left his employment, had told the plaintiff to come and take his tools away: that the plaintiff did go in the evening, in the absence of the defendant, and broke open the small house or shed in which the tools were placed, the staple, chain, and lock fastening the same, having been put on the door by him, the plaintiff, and being his property. The plaintiff swore that he told the defendant, when the defendant asked him if he had taken the tools, that he had, and that they were his own. The defendant stated that he supposed the tools were his, as plaintiff bought things for the mill and defendant settled with him for such things. It also appeared when the plaintiff's box was examined, in which the tools were, there was a small jack or screw, or part of one, used in pressing shingles, found which belonged to the defendant and not to

the plaintiff, but the defendant had not missed this at the time he laid his information, and it did not appear how it got into the tool chest, or that the plaintiff knew of its being there till it was found on the search under a search warrant.

At the close of the plaintiff's case the defendant's counsel contended that the plaintiff had failed to show want of reasonable and probable cause for the prosecution of the plaintiff on the charges laid, and that that was a question for the Judge and not for the jury. The learned Judge overruled the objection, and left the case to the jury in a charge set out in the judgment of Cameron, J., below. The jury found a verdict for the plaintiff generally for $500, and judgment was directed to be entered for the plaintiff, with costs.

May 18, 1882, *Lount*, Q. C., obtained an order *nisi* to set aside said judgment, and to enter a nonsuit as to the plaintiff's claim in respect of the prosecution for stealing the tools, on the ground that the learned Judge before whom the case was tried should have held and determined that the evidence failed to show want of reasonable and probable cause, and should have entered a judgment of nonsuit; or why a new trial should not be directed, on the ground that reasonable and probable cause was shown, and the jury should have been so directed; and on the ground that the learned Judge was wrong in directing the jury, on the question of malice, that if the information was laid without there being probable cause, the result would be that it was laid maliciously; and for excessive damages; and that the verdict was contrary to law and evidence.

May 26th, 1882. *Lount*, Q. C., supported his motion, contending that there was reasonable cause for the arrest as to the whole of the articles, and that, at any rate, as to one article (a "nut,") which was clearly not the plaintiff's property, there was reasonable cause; and that if there was reasonable cause for any one article, then that was sufficient.

He also contended that there was misdirection in telling the jury that malice was *necessarily* to be inferred from want of reasonable and probable cause; and that the damages were excessive under the circumstances. He cited *Donnelly* v. *Bawden*, 40 U. C. R. 611; *Hicks* v. *Faulkner*, L. R. 8 Q. B. D. 167; *Lucy* v. *Smith*, 8 U. C. R. 518; *Rice* v. *Saunders*, 26 C. P. 27; *Lister* v. *Perryman*, L. R. 4 H. L. 531.

Pepler, contra. The facts clearly showed a most extreme case of want of reasonable and probable cause, and as to the "nut," it was true it was not the plaintiff's property, but it (a perfectly valueless article) was only by accident discovered by defendant and the constable when making the search, mixed in with the tools of plaintiff in his tool box, and was not the subject of the information or proceedings in any way, and was properly treated before and at the trial by all parties as of no consequence; and at any rate, if *any* of the charges in the information were malicious and without reasonable and probable cause, the case was proved, although there was good ground for some of the charges: see *Reed* v. *Taylor*, 4 Taunt. 616.

While admitting that the correct rule is, that malice may be inferred from want of reasonable cause, but the jury are are not *obliged* to so infer, yet, on the authority of *Mitchell* v. *Jenkins*, 5 B. & Ad. 588 & 594, and *Payne* v. *Revans*, 9 W. R. 693, it is only where the question of malice is in effect *wholly withdrawn* from the jury, or where—which is tantamount to the same thing—they are told that the evidence of want of reasonable cause is *conclusive* evidence of malice, that there is misdirection. Here the charge was not so; and that part of the charge objected to was really nothing more than a paraphrase of the preceding definition of implied malice, and correct; and nowhere did the Judge charge in the imperative form; and further, as there was express malice proved, and which from the size of the verdict (under the Judge's charge "that if express malice was proved plaintiff was entitled to a substantial verdict,") the jury must have found, the charge as to implied malice is quite immaterial.

Moreover, under marginal rule 311 of the Judicature Act, a new trial should not be granted unless there would be a substantial miscarriage of justice, &c., which can can hardly be contended in this case on the whole facts. See as to this, *Reid* v. *McDonald*, 26 C. P. 147; *Smith* v. *Murphy*, 35 U. C. R. 569; *Gould* v. *British America Ass. Co.* 27 U. C. R. 473, and *Dear* v. *Western Ins. Co.* 41 U. C. R. 553.

As to the excessive damages, the true rule is, that that is not a ground for new trial, unless there is obvious error or misconception, or there has been some undue motive actuating. "Damages are the peculiar province of the jury," &c., as laid down in *Berry* v. *D'Acosta*, L. R. 1 C. P. 331; and see *Appleton* v. *Lepper*, 20 C. P. 138; *Robertson* v. *Meyers*, 7 U. C. R. 423; *Clissold* v. *Machell*, 25 U. C. R. 80, S. C. in App. 26 U. C. R. 422; *Campbell* v. *McDonell*, 27 U. C. R. 343; *Crandell* v. *Crandell*, 30 C. P. 497; *Woodman* v. *Blair*, 30 C. P. 452.

June 23rd, 1882. CAMERON, J.—The learned Judge charged the jury on the claim for malicious prosecution in respect to the question of malice as follows: "In bringing an action for malicious prosecution, as this is called, what the plaintiff has to establish is this, that the prosecution was, as you have been reminded here, instituted maliciously and without reasonable and probable cause. I want to call your attention to the force of that. It is upon the effect of that particularly I want you to pronounce. What is understood by the word malice in a case of this kind, need not trouble you much. It is sufficient to understand that in law a person is said to do an act maliciously in respect to another, when he does an act which he intends will do the other an injury or cause him any inconvenience. No doubt, if a person makes a charge against another for the purpose of his being arraigned upon it, he intends he should be arraigned. *If he does that without being justified in point of law, then he does it maliciously.* His object is, that his act shall have its natural and ordinary

effect. Sometimes in cases of this kind we require to look into the matter to see whether there is not some greater degree of malice, ill-will, or spite, because if there is, that enters into that part of the case which relates to reasonable and probable cause in an indirect way. I do not think that you need trouble yourself with the question of malice in this case, except in the view that I have been pointing out. If this information was laid without there being proper cause, the result would be that it was laid maliciously. The plaintiff, however, contends that there was more than implied malice—that there was actual malice; that the whole thing was done out of spite. He attempts to give a ground for saying that by giving evidence from which he asks you to conclude that the ill-will originated from the fact of his telling Power's foreman of his intention to take his logs. He gives this evidence to show that these logs had been got into the boom by Kean, (defendant) for the purpose of stealing them, and he says that on account of his telling Power the defendant conceived this ill-will against him. If the plaintiff is right, if that is the case, the plaintiff would have a right to ask a verdict at your hands, and to ask you for very substantial damages. * * * That is about the way the plaintiff's case is presented before you. Do you believe that is the correct view? If you do, undoubtedly you should give substantial damages. If that is the reason he instituted the prosecution against this defendant, you should give him fair damages. In deciding the case you have to weigh the evidence. You are not bound to place credit on the evidence given by any of the witnesses: you can form your own conclusions where the evidence conflicts. It is not the question here whether the plaintiff has been shewn to have stolen these things, it is not the question whether they were his tools or not: the only question is, whether the defendant Kean, when he laid that information, had reasonable and probable cause to lay it. That does not mean that he did it with the absolute certainty of being able to prove the charge: that is not neces-

sary, because were that the case—were people liable to damages because they were not able to prove the offence, though they had a just and reasonable suspicion—the effect would be, that people would not take the risk, and crime would go unpunished. All the law requires is, that there be a reasonable and probable cause. * * What the plaintiff has to maintain is this—he has to make out, not simply that he was prosecuted, that the prosecution terminated in his favour, but that it was incited without reasonable and probable cause. He is not to challenge the other party to shew that there was reasonable cause, but he has to shew that there was not. He has to prove the negative in that sense. The question is, whether the plaintiff has shewn that there was an absence of reasonable and probable cause. It is generally a question for the Court to say whether he has done so or not. In this case I have not felt that it was my province to pronounce upon that, for this reason—if a man is charged with fifty things, and he is only properly charged with stealing one, he cannot maintain an action. Well now the plaintiff says in the witness box these were mine; one cant hook was lent me, and the other was mine; the saw set was lent me; the defendant knew this, therefore he had no right to institute the prosecution. If that were so, then the defendant had no reasonable cause to lay a complaint; I cannot say that he did fail to shew an absence of reasonable and probable cause. The defendant, on the other hand, says that was not the state of facts at all. He says, these things may not have been mine when the actual property is looked into. I supposed they were mine, and they were taken under circumstances that led me to think they were taken wrongfully, and therefore I had the right to lay this information. If that was true the defendant had the right. It then comes to be a question of fact, did the defendant when he laid the information believe what he tells us now? It therefore becomes a question of fact depending on what view you may take of it. I ask you, therefore, did defendant believe what he stated in the information? That is the question."

The learned Judge then summed up the evidence, presenting it most fairly and clearly for the consideration of the jury, bearing upon the question of reasonable and probable cause and the belief of the defendant, and then added: "The question is, whether you are satisfied that when the defendant went before Mr. McCosh and laid that information, that the cant hooks and the saw-set had been feloniously stolen, he believed that he had the right to these things as against the plaintiff. If he really believed that he had the right to them, and that they were taken away clandestinely, then I think he had reasonable and probable cause to lay the information. His right to recover upon that charge depends upon you."

This charge was objected to by the counsel for the defendant. The note of the objection taken by the shorthand reporter is: "Malice must be shewn, in addition to the want of reasonable and probable cause, by some evidence." This way of stating the objection is not that which is taken by the rule, and is not a correct statement of the law. The want of reasonable and probable cause enables a jury to infer malice in the defendant, and furnishes evidence to go to them of malice; but, as the law has been recently stated in *Hicks* v. *Faulkner*, L. R. 8 Q. B. D. 167, it is by no means conclusive evidence of malice, and the statement of the law to the jury by the learned Judge seems to be open to the objection to it presented by the ground taken in the rule. In delivering judgment, Mr. Justice Hawkins, at p. 170, stated the obligation of the plaintiff at the trial thus: "To succeed in an action for malicious prosecution the plaintiff must allege and establish two things—absence of reasonable and probable cause, *and malice*. The affirmative of these allegations is upon him. Failing to establish *both* of them, he fails altogether. It is an essential element in his case that the jury should, under the Judge's direction as to what facts will suffice for that purpose, find affirmatively the non-existence of probable cause, and they have no right to assume it without proof." * * * Then, after stating that under the circumstances of the case it became unne-

cessary to consider the question of malice, he adds at p. 174: "I cannot, however, refrain from referring to an argument of Mr. Grantham, that if the learned baron ought to have told the jury there was want of reasonable and probable cause, that of itself was evidence of malice. I do not agree to this. It is true, as a general proposition, that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury, and not at all for the Judge. The malice necessary to be established is not even malice in law, such as may be assumed from the intentional doing of a wrongful act—see *Bromage* v. *Prosser*, 4 B. & C. 255, per Bayley, J.—but malice in fact, *malus animus*, indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect and improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion on the question the jury are to take into consideration all the circumstances of the case, and to form their own opinion upon them, uninfluenced by any opinion of the Judge, unless that accords with their own view. If, among the circumstances, it appears to the jury there was no reasonable ground for the prosecution, they may, though by no means bound to do so, well think that it must have been dictated by some sinister motive on the part of the person who instituted it. Absence of reasonable cause, to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the Judge upon that point if it differed from their own, as it possibly might, and in some cases probably would, as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the Judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of

reasonable cause is for the Judge alone to determine, upon the facts found, for the jury. As evidence of malice, it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he *bonâ fide* believed to be right in the interests of justice, in which case they ought not, in my opinion, to find the existence of malice: *Mitchell* v. *Jenkins*, 5 B. & Ad. 588; *Turner* v. *Ambler*, 10 Q. B. 252, 254; *Lister* v. *Perryman*, L. R. 4 H. L. 538." In this judgment Huddleston, B., concurred; and if the law be correctly laid down, that the want of reasonable and probable cause does not necessarily establish the kind of malice requisite to maintain an action for malicious prosecution, it is impossible to hold in this case the jury were not misdirected when the learned Judge told them, "I do not think that you need trouble yourself with the question of malice in this case, except in the view I have been pointing out. If this information was laid without there being proper cause, the result would be, that it was laid maliciously." This entirely takes it out of the control of the jury to say whether there was or was not malice in fact, and puts it as an irrebuttable presumption of law, which does not seem to be warranted by the authorities. Those referred to by Mr. Justice Hawkins fully confirm the accurateness of his exposition of the law. In other respects the charge of the learned Judge at the trial fully accords with the decisions, and is certainly not unfavourable to the defendant. The question of reasonable and probable cause was one that under the circumstances of the case could not have been withdrawn from the jury, and the Judge could not have determined whether or not, without the assistance of the jury, there was or was not reasonable or probable cause for the prosecution. His reasons are fully set forth in his charge why he could not decide without the jury found the facts necessary to enable him to do so. I concur in these reasons.

The only consideration that remains is, was the misdirection complained of such as to have no material influence upon the jury and so bring the case within the operation of sec. 289 of ch. 50, R. S. O., which prohibits the granting of a new trial on the ground of misdirection, unless, in the opinion of the Court, some substantial wrong or miscarriage has thereby been occasioned in the trial of the action.

There is no doubt evidence from which the jury might have found malice on the part of the defendant, if the jury believed it, quite apart from the want of reasonable and probable cause; but it is not so strong or cogent as to make it apparent that the jury were not influenced by and acted upon the direction, that if they found the defendant acted without reasonable or probable cause—or, in other words, that he did not believe that the plaintiff had stolen the articles mentioned in the information as he had charged him with doing—the result was, he acted maliciously.

The damages are large if considered with regard to the actual injury sustained by the plaintiff, but are perhaps not so large as to induce the Court, in the exercise of the discretion it has, to grant a new trial on the ground of excessive damages merely. But when the damages are large and to a great extent sentimental, that circumstance may well be considered in determining the question whether there has been a substantial wrong or miscarriage in the trial caused by a clear misdirection or the improper reception of evidence.

This Court, in the case of *Ferguson* v. *Veitch*, 45 U. C. R. 160, where there had been an improper reception of evidence, which might, though not necessarily would, influence the jury in estimating the damages, set aside the verdict obtained by the plaintiff. In *Bernard* v. *Coutellier*, 45 U. C. R. 454, it declined to disturb the verdict where the defendant had the full benefit of the evidence, only the order of presenting it having been changed by the ruling of the Court that was complained of. In the present case, and in cases like it, it would not be safe to allow a verdict

to stand where there has been a clear misdirection, as I think there has been in this case. The judgment therefore entered for the plaintiff should be set aside, and a new trial had.

ARMOUR, J., concurred.

HAGARTY, C. J.—Objection is chiefly raised to the following sentences in the charge:

"If he does that without being justified in point of law he does it maliciously."

"If this information was laid without there being proper cause the result would be, that it was laid maliciously."

"The only question is, whether the defendant, when he laid the information, had reasonable and probable cause to lay it."

"All the law requires is, that there be a reasonable and probable cause to lay it."

Afterwards we find directions like these:

"Defendant says, 'I supposed the tools were mine, and they were taken under circumstances that led me to think that they were taken wrongfully, and therefore I had the right to lay this information.' If that was true, the defendant had the right. It therefore becomes a question of fact, did the defendant when he laid the information believe what he tells us now? * * I ask you therefore did defendant believe what he stated in the information? That is the question."

"If the defendant believed these were his, and that they had been wrongfully taken, and that circumstance of the drawing of the staple was a very suspicious one, he had a right to lay the information as he did."

"If he really believed he had the right to these, and that they were taken away clandestinely, then I think he had a reasonable and probable cause to lay the information: his (the plaintiff's) right to recover upon that charge depends upon you."

The passage objected to, separated from the context and

taken without any qualification, may be open to criticism. It appears to me, however, that I must read the charge as a whole, and consider how it must have been naturally understood as an exposition of the law by those to whom it was addressed.

As a whole I see no reason to dissent from it. The passages objected to are, in my opinion, amply explained and qualified by the learned Judge, and I cannot understand how any jury could have been misled by them.

When I find the jury told, over and over again, that they should find for the defendant if they consider that he believed the matters sworn to in his information, and this directly made, as I read the charge, the turning point, the leading feature of the whole case, I cannot hold there was such a misdirection as would warrant our interference. It would be, I think, for the plaintiff, if any one, to complain of making such a direction the rule of decision. As it is so distinctly laid down by the House of Lords in *Lester* v. *Perryman*, L. R. 4 H. L. 531, "there must be a reasonable cause, such as would operate on the mind of a discreet man; there must also be a probable cause, such as would operate upon the mind of a reasonable man."

I think this is an intelligible exposition of the law, and I prefer its plain direction to some of the subtleties that have of late expanded and idealized the theory of reasonable and probable cause.

I think the charge now complained of by the defendant was as favourable to him as any Judge could have delivered.

I am not prepared to hold that the direction, standing alone, that if a prosecution be instituted without reasonable and probable cause, the law will infer malice, can be said to be absolutely wrong. There must always be that reasonable cause that should operate on the mind of a discreet man, (as Tindal, C. J., says,) and when a jury has it fairly explained to them how they should apply and modify this general proposition, I do not see any mischief done by its assertion.

When, as in the case before us, it was finally brought

down to the issue, did the defendant really believe the truth of what he swore to in the information, I think all reasonable objection on defendant's part ought to disappear.

I think this emphatically a case to which, even if there may have been partial error in some part of the charge, our statute ought to apply, as I am satisfied beyond doubt that no substantial wrong or miscarriage was thereby occasioned. But I rest my opinion on the general law, without the aid of the statnte.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

LEIGHTON V. MEDLEY.

Lessor and lessee—Covenant to keep up fences—Removal of fence—Waiver.

Semble, that in this country the removal of a fence on a farm from one place to another is not *per se*, as a matter of law, a breach of a covenant to repair and keep fences in repair; and whether it is so or not would be a question of fact under the circumstances of each case.

When the lessor accepted rent after such a removal with knowledge of it,

Held a waiver of the forfeiture, if any, and that he could not afterwards claim to re-enter for the continuance of the fence in its altered position as a breach of the covenant.

EJECTMENT for the west half of lot No 5, in the first concession of the township of Amaranth, county of Dufferin, tried at Orangeville, on the 5th April, 1882, before Burton, J. A., and a jury.

The plaintiff was the landlord of the defendant under a lease under seal for five years from the 1st February, 1878, and he claimed to recover possession by reason of a right of re-entry for breach of the defendant's covenants.

The plaintiff in his statement of claim alleged that by the lease the defendant covenanted to use his best and earnest endeavours to rid the land of all docks, wild mustard, red root, Canada thistles, and other noxious weeds: that he would in each and every year during the term seed down ten acres of the said land; and that he would, at his own cost and charges, well and sufficiently during the said term repair, and keep repaired, the fences erected and to be erected on the said premises.

The following breaches of covenant were alleged:

1. That defendant had not used his best and earnest endeavours to rid said land of Canada thistles and other noxious weeds growing thereon, but on the contrary during the year 1881, and subsequently, wilfully allowed Canada thistles and other noxious weeds to grow up in said land, and made no effort to remove the same, whereby the land had been greatly damaged. 2. That the defendant did not,

in the year 1881, seed down ten acres of the said land. 3. That the defendant had not repaired, and kept in repair, the fences erected upon the said land, but allowed the same to fall into dis-repair, and broke down and carried away and destroyed some of the fences, and burnt and otherwise destroyed a large quantity of rails of which the same were built.

It was admitted by the defendant that he had changed the position of some of the fences, but he denied having in any other way committed a breach of the covenants or any of them.

The proviso contained in the lease, permitting the plaintiff to re-enter on non-payment of rent or for breach of the covenants, was as follows: "Provided always, that if the said yearly rent hereby reserved, or any part of it, shall be in arrear for twenty-one days after any one of the days appointed for payment thereof as aforesaid, whether the same shall be lawfully demanded or not; or * * in case of breach of any of the covenants herein contained, then, and in any of the said cases, it shall be lawful for the said lessor into or upon the said premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess, and enjoy as in his first and former estate, and the said lessee, and all persons claiming under him, thereout to expel, put out, and remove, anything hereinbefore contained to the contrary notwithstanding."

The learned Judge left the following questions to the jury:

1. Did the defendant use his best and earnest endeavours to rid the land of thistles? 2. Did he wilfully allow them to grow without making a reasonable effort to remove them? 3. Was the seeding down in the spring of 1881 such a seeding down as was contemplated by the lease? 4. Was the seeding upon stubble in November, 1881, a compliance with the requirements of the lease? 5. Were any of the rails suitable for fences burnt by the defendant, or with his consent or authority? 6. Had the plaintiff, when he received the rent, knowledge of any breach of the covenants

of the lease? Did he then know of the removal of the fences? Did he know that there had been no proper seeding down in 1881?

The learned Judge's report of the jury's finding upon these questions was as follows:

1. The defendant did use his best and earnest endeavours to rid the land of thistles. 2. And did not wilfully allow them to grow without making a reasonable effort to remove them. 3. The seeding down in the spring of 1881 was such as was contemplated by the lease. 4. That on the stubble in November of the same year was not in compliance with the requirements of the lease. 5. None of the rails fit for fence rails were burnt by the authority of the defendant. 6. The plaintiff had, when he received the rent, knowledge of the breach of covenant as to the removal of the fences, but he did not then know that there had been no proper seeding down in 1881.

Upon these answers and findings the learned Judge entered judgment for the defendant, with costs of suit.

On the 17th May, 1882, the plaintiff served notice on the defendant's attorney, by leave of the Master in Chambers, that the Queen's Bench Divisional Court of the High Court of Justice would be moved on Thursday, the 18th day of May, 1882, at 12 o'clock, noon, or as soon thereafter as counsel could be heard, for an order that the judgment entered for the defendant upon the findings of the jury, and upon the admissions and evidence taken at the trial of this action by the learned Judge who tried the action, be set aside and judgment entered for the plaintiff, on the grounds that upon the admission made at the trial that the defendant had moved and altered the fences upon the premises the plaintiff was entitled to judgment, such moving and alterations being waste, and a violation of the contract in that behalf contained in the lease of the premises from the plaintiff to the defendant, entitling the plaintiff to take the benefit of the forfeiture clause in said lease; and that the learned Judge who tried the action should not have left to the jury the question as to whether or not the seed-

ing down done upon the premises in the fall of 1880, and spring of 1881, was such as the lease contemplated, but should have himself ruled upon the question in the plaintiff's favour, it being a question of law for the Judge, and not of fact for the jury; and that upon this application would be read the certified copy of the pleadings and the evidence taken at the trial.

May 18, 1882. *Clement* moved, on behalf of the plaintiff, to set the above notice of motion down upon the paper for argument. No one appeared to oppose the motion, and the leave was granted by the Court to set the same down.

May 23, 1882. *McCarthy*, Q.C., supported the motion. A covenant to keep fences in repair is, that the covenantor will keep them in repair where they are, and will not remove them; if he removes them it is waste. It has been held that a covenant to keep a house in repair is broken by opening partition walls. The non-repair is a continual breach, and is not waived by receipt of rent: *Thompson* v. *Baskerville*, 40 U. C. R. 614; *Ainley* v. *Balsden*, 14 U. C. R. 535. Removal of fences is a breach of covenant to repair: *Pickard* v. *Wixon*, 24 U. C. R. 416; *Wixon* v. *Pickard*, 25 U. C. R. 307; *Gange* v. *Lockwood*, 2 F. & F. 115; *Borgnis* v. *Edwards*, 2 F. & F. 111; *Woolcock* v. *Dew*, 1 F. & F. 337.

As to the seeding, the contention is, that defendant was to increase ths pasture land every year by ten acres, so as to ease or rest the land.

No one appeared *contra*.

The evidence taken at the trial was not filed with the notice of motion or on the argument.

June 23, 1882. CAMERON, J.—Looking at the covenants in the lease and the pleadings, without having before us what occurred at the trial, and a knowledge of the actual contention of the parties then advanced, it would not be possible to say whether the questions submitted to the jury and their findings, apart from the legal effect of the

admitted removal of the fences, determined the questions really in dispute between the parties, and warranted the entry of judgment in the defendant's favour. The first question only relates to the destruction of thistles, while the defendant's covenant extended to other noxious weeds as well as thistles; and the breach alleged was, that he had not used his best endeavours to rid the land of Canada thistles, but, on the contrary, during the year 1881, and subsequently, wilfully allowed Canada thistles and other noxious weeds to grow up on the said land. A finding, then, that the defendant used his best endeavours to rid the land of thistles, would not shew a performance of the covenant in respect of other noxious weeds; but it must, I think, be assumed that the contest was only in relation to thistles. Again, the question, were any of the rails suitable for fences burnt? and the finding that not any suitable for fences were burnt, would not cover the breach of covenant alleged, that the defendant burnt and otherwise destroyed a large quantity of rails. The way in which the question was put, and apparently without objection, would indicate that the only destruction of rails complained of was by burning. The burden of showing a breach of the defendant's covenant rested with the plaintiff, and certainly he has not shewn any in respect of those relating to the thistles and weeds or the actual destruction of rails. The covenant with respect to seeding down was, that the defendant would, each and every year during the term, seed down ten acres of the said land. It is not stipulated that the seeding down should be done at any particular time—that is, either spring or fall—and the jury having found that the seeding down in the spring of 1881 was such a seeding down as was contemplated by the lease, the finding that the seeding on the stubble in November, in the same year, was not a compliance with the lease, would seem to be unimportant, as it was not covenanted that there should be two seedings down, nor that these should not be in the same year. The plaintiff in his notice of motion makes no objection to what was done in

the fall of 1881, but contends that the learned Judge should have ruled, as matter of law, that the seeding down in the fall of 1880 and spring of 1881 was not a compliance with defendant's covenant. I do not see how the question, whether the seeding was such as was required by the lease, could be withdrawn from the jury, and determined as one of law. What is seeding down? Does it mean seeding with grass, clover, or grain? The covenant is silent, and without extrinsic evidence the Court would have no knowledge of what was meant by seeding down; and whether seeding twice on the same field in two consecutive years would be proper or good husbandry must be a question of fact, to be determined by the jury or the Judge, as the case may be. I think therefore there is no ground for objection to the course pursued by the learned Judge in leaving the question to the jury. We were told that the evidence showed that the defendant seeded down a field in the fall of 1880, and the seed was winter killed, and took only in places, and that in the following spring of 1881 the defendant sowed fresh seed on the bare patches, and this is what the jury found was a compliance with the lease. It is impossible, even if the evidence were before us, which it is not, to say this was not a proper seeding down according to defendant's covenant. But conceding it was not, it was only a question of fact to be tried by a jury, the tribunal selected by the parties, and the Court in a case where the alleged breach worked a forfeiture, which it is said the law does not favour, could not interfere properly, and if it did, it could only be to the extent of granting a new trial, which has not been asked for.

The remaining question is, did the mere act of changing the position of the fences constitute a breach of the covenant to well and sufficiently repair and keep repaired * * the fences and gates erected or to be erected upon the premises, and if so, was there such a waiver of the plaintiff's right of entry by the accepting of rent accrued due after the admitted change of position? The jury found that the rent was accepted with knowledge of the alleged change.

The cases cited by Mr. McCarthy show that acceptance of rent does not prevent a forfeiture of the term where the breach is continuing; by which I understand there is a want of repair from day to day, or time to time, so that a payment of rent yesterday would not relieve against an omission to repair to day. Can that rule be applied to a case like the present? The fences as they stand are not out of repair; their condition is not objected to, but their position, which is different from what it was at the time of the demise. That position, however, is the same as it was before and when the last rent accrued and payment was accepted by the plaintiff. It seems to me, if acceptance of rent, after a known breach of covenant, which creates a forfeiture or gives a right of entry, is a waiver of such forfeiture or right of entry, it ought to be equally a waiver in the present case. The law is clearly and unequivocally laid down in a number of cases that an acceptance of rent after a breach of covenant by the lessee, where the lease contains a provision making such a breach work a forfeiture of the term, or gives to the lessor a right of entry, is a waiver of the forfeiture. This is the general rule. Where the breach is continuing, that is, is renewed immediately after the last acceptance of rent, a different rule or exception to the rule is created.

In *Doe Baker* v. *Jones*, 5 Ex. 505, an arbitrator made an award as follows: "I do award and determine that looking at the state of the premises on the 25th March, 1847, if the lessee were entitled by law to a reasonable time to put the premises in repair, such reasonable time had not elapsed when the declaration in ejectment was served. But I award and determine it was the duty of the lessee from time to time to repair the premises pursuant to the covenant, and that any reasonable time for so repairing must date from the time each particular reparation was required." Chief Baron Pollock said in reference to this finding: "That appears to me to be the correct rule of law, and we cannot lay it down that a new time for reparation commences after each receipt of rent. There

may be a considerable distinction between the case of an actual breach before the receipt of rent, the reasonable time having elapsed, and where the reasonable time is still running; because in the latter case there is no breach to waive, but in the former there is some ground for saying the acceptance of rent is a waiver of the forfeiture actually incurred. * * It is sufficient to say, that upon the present award and finding the question must be decided in favour of the lessors of the plaintiff, unless as matter of law the lessors were entitled to a reasonable time for reparation after the rent received became due, which I think they were not." Baron Alderson said: "The receipt of rent is a waiver of all forfeitures which are, so to speak, single and complete, and are not in the nature of continuing forfeitures. So with respect to continuing forfeitures, where the lessee is bound from time to time to keep the premises in repair, and he omits for an unreasonable time, but afterwards repairs them, there the receipt of rent waives the previous forfeiture. But where the matter is plainly a continuing breach, the only question is, whether when the party seeks to re-enter the premises the premises have been an unreasonable time out of repair and so continue." Rolfe, B., stated his opinion thus: "If, instead of 'a reasonable time,' the lease had named five days within which the lessee was to repair, there would have been no difficulty, because the five days had elapsed on the 25th March, 1847: the receipt of rent would have been a waiver of the actual breach, but it would have been no waiver of a neglect to repair between the 21st and 25th, for then there was no complete breach." Platt, B., said: "It is a fallacy to say the receipt of rent was a waiver of the breach of contract to repair, for it was a continuing breach, and until the repairs were perfected the lessors were entitled to re-enter for the forfeiture."

Would the language of these learned Judges apply to the case of the removal of a fence ten feet, and kept in perfect repair in the new position, and could the change of position be tortured into a continual want of repair unwaived by the

receipt of rent after removal and repair in the new position? To so hold, it appears to me, would be doing violence to reason and common sense.

The case of *Ainley* v. *Balsden*, 14 U. C. R. 535, is a case in this Court fully adopting the law as stated in *Doe Baker* v. *Jones*, and *Ambler* v. *Woodbridge*, 9 B. & C. 376; but there the conclusion arrived at was sustained by the fences continuing in a dilapidated condition after the plaintiff had received rent, and is therefore distinguishable from the present case. *Thompson* v. *Baskerville*, 40 U. C. R 614, was only a decision on demurrer, and stated the law as it is—that payment of rent is only a waiver of breaches committed before the payment, and does not prevent a forfeiture for a continuing breach.

The circumstances of the present case bring it more nearly in principle within the decision in *Walrond* v. *Hawkins*, L. R. 10 C. P. 342. In that case it was held, under a covenant not to assign or demise to or permit any other person to occupy premises or any part thereof without the consent in writing of the lessor, the lessee having underlet, and the lessor having after the assignment destrained for rent, the permitting the under tenant to continue in possession after the distress, during the term for which the underletting had been made, was not a continuing breach of the covenant not to permit any other person to occupy, as the lessee by his agreement with the under tenant had precluded him from interfering with his occupation during the year. This makes it distinguishable from the present, if the ground of distinction is really important, as here it was in the power of the defendant to have replaced the fences in the position they had been. But what prevented the forfeiture was the waiver of the act of subletting by the distress, as here the plaintiff waived the right to object to the change in the position of the fences by the acceptance of rent.

The decision in *Walrond* v. *Hawkins* was approved and followed by the Queen's Bench Division in *Griffin et al.* v. *Tomkins*, 42 L. T. N. S. 359. In that case

the lease contained covenants against the use of the premises, except in the ways specified therein. The premises were used contrary to the terms of the lessee's covenants, so as to give the lessor a right of entry. With knowledge of this—the breach being the permitting of a prohibited trade to be carried on—the lessor accepted rent and gave notice of repairs required to be done, and it was held these acts amounted to a waiver of the breach as long as the term lasted, for which the person who entered under the lessee and carried on the prohibited trade had a right to hold the premises sublet to him. Manisty, J., stated his view of the law as follows: "Now, as at present advised, I am of opinion that, having waived the forfeiture which was worked by converting the premises into shops, with the knowledge that those shops were being used, that was a waiver once for all of that covenant, as regarded the conversion into shops, and I think it carried with it the user of the shops, because a waiver of the forfeiture is in the nature of an assent to that which has been done and is being done at the time the forfeiture is waived."

Cockburn, C. J., said: "But I cannot help thinking that where a lessor, with full knowledge that a breach has been committed of this particular description, waives the forfeiture by a distinct acceptance of rent accruing due after the forfeiture, that amounts not merely to a waiver of the past breach, but to a license to continue the breach in future. There is, to my mind, an obvious distinction between the case of something which is to be done and which remains undone, and the doing of which may be postponed, and the doing of something which is forbidden, but which having once been done may be acquiesed in for the future. I think it would be monstrous if it were otherwise. It would amount to this—that the lessor, with a full knowledge that the thing had been done which was prohibited by the lease, and upon which a forfeiture was to accrue if it was done, might continue as long as it suited his purpose to receive his rent, and so waive the forfeiture up to the time that rent was received, and then when it suited

his purpose, upon a change of circumstances, turn round and say, 'Although I have allowed you thus by implication to suppose that I was licensing what you were doing, I now take advantage of it, and turn you out of what is to you a beneficial lease.'"

If the covenant of the defendant in the present lease had been not only that he would keep the fences in repair, but also that he would not remove or change the position of any of them, the last case would be a clear authority for holding that the plaintiff could not, after the receipt of the rent with knowledge of the change of position of the fences, avail himself of the forfeiture; in other words, having done that which was expressly prohibited, he would be in a better position than, if the plaintiff's contention is entitled to prevail, he is for doing that which, if prohibited at all, is only so by implication. I cannot adopt this view of the law, and without questioning those cases in which it has been held a breach of covenant to repair and keep in repair is a continuing breach, and may work a forfeiture after the acceptance of rent, I can only say, it is not every breach of covenant to repair that will be a continuing breach, and in my opinion the present is a case in which what was done was a breach that if it created a forfeiture it was a forfeiture that could be waived, and being once waived could not be again set up. In an action for breach of covenant to repair, the payment of rent after default, or the consent of the lessor to the non-repair, would furnish no answer. It is quite a different thing to say the lessor may not waive his right to make an entry upon the land to resume possession, and when he accepts rent after the alleged forfeiture, he declares the tenancy to be subsisting.

I am not prepared to hold that the removal of a fence from one place to another, in this country, *per se* is a breach of a covenant to repair and keep fences in repair, as matter of law. Much must depend upon the nature of the fence and the use to which it has been put. It would be absurd to say that the removal of a fence put around a hay or

straw stack to keep cattle off, because it happened to be in that position at the time of the demise, would be a breach of the covenant to repair and keep in repair. It would be equally absurd to say that a fence run across the cattle yard temporarily to keep certain animals separate, because it was in that position at the time of the demise, could not be moved without committing a breach of the covenant. It would not be less unreasonable to say that a lessee could not remove a brush fence when he found it convenient to bring some portion of unfenced land for the purpose of cultivation within the enclosure. And I think when a landlord knows of his tenant having moved a fence, and makes no objection to his so doing, and accepts rent afterwards, it is fair to assume that such removal was an act contemplated by the parties at the time of the demise, as not against but as conducive to the use of the farm according to good husbandry, and so not a breach of the covenant to repair. At all events, whether it is so or not would be a question of fact under the circumstances of each case, and not an unmixed question of law. I therefore think the plaintiff's motion to set aside the judgment for the defendant should be dismissed, with costs.

HAGARTY, C. J., concurred.

ARMOUR, J., took no part in the judgment, having been absent during the argument.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

McLellan v. McKinnon.

Conviction—Hard labour—Amendment of sentence by Sessions—Quashing conviction—Trespass.

Where an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the Sessions amended the record by striking out "hard labour,"

Held, (CAMERON, J., dissenting) that their assuming so to amend the conviction was not a quashing of the conviction, and therefore trespass would not lie against the Justice.

Per ARMOUR, J.—The General Sessions of the Peace have no power, under 32-33 Vic. ch. 31, to amend the sentence in a conviction, as by striking out the part imposing hard labour, but can hear and determine an appeal on the adjudication of guilt only. HAGARTY, C. J., inclined to agree, but gave no express decision on this point.

Per ARMOUR, J.—This Court has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect of such adjudication; and sec. 71 of 32-33 Vic. ch. 31, D., does not take away the *certiorari* in such a case.

The conviction awarded imprisonment with hard labour in default of payment of the fine. The Sessions amended the conviction by striking out hard labour, and awarding imprisonment only in default of distress. The commitment under which plaintiff was confined directed imprisonment at hard labour.

Per CAMERON, J.—The conviction as amended, which was the only one put in evidence, superseded the original conviction, and in effect quashed it so far as regarded the hard labour; defendant was bound to shew an existing conviction authorizing the commitment, and as he failed to do this, the excess of jurisdiction in awarding hard labour made him liable in trespass; and, *Semble*, that the award of imprisonment in the first instance, under the circumstances in evidence, would also make him so liable.

The conviction was under a village by-law, for writing and posting up an indecent placard, and the placard was a criminal libel. *Quære*, *Per* CAMERON, J., whether the municipality could thus make a new offence, and award a new or additional punishment for what was already a criminal offence.

The by-law directed imprisonment only in default of distress. *Quære*, *Per* CAMERON, J., whether the 32-33 Vic. ch. 31, sec. 59, would apply so as to enable the Justice to commit under it in the first instance upon proper evidence.

Per CAMERON, J.—*Quære*, whether upon the evidence, set out below, the finding that the plaintiff was not put to hard labour was justified.

THE plaintiff, in the first count of his declaration, charged that the defendant, a Justice of the Peace, assaulted the plaintiff and gave him in custody to a constable, and caused him to be imprisoned.

In the second count the charge was that the defendant, acting as a Justice of the Peace with another Justice of the Peace, having convicted the plaintiff of writing and posting up indecent placards in the village of Tiverton, in violation of a by-law of that village, and having adjudged him to forfeit and pay $20, and $5 for costs, illegally and contrary to the provisions of the by-law, having further adjudged, if those sums were not paid forthwith, the plaintiff was to be imprisoned in the common gaol at hard labour for thirty days, unless the said sums and the costs of conveying him to gaol should be sooner paid; and the said sums not having been paid by the plaintiff forthwith —maliciously and without reasonable or probable cause, and without causing any minute of such judgment or order to be served on the plaintiff, and without issuing a warrant of distress, issued his warrant to arrest the plaintiff, and caused the plaintiff to be arrested and imprisoned in the common gaol for four days at hard labour.

The defendant pleaded not guilty by statute, noting in the margin of his plea the following statutes:—R. S. O. ch. 73, secs. 1, 3, 4, 7, 9, and 17; R. S. O. ch. 174, secs. 398, 399, 400, 401, 402, and sec. 461, sub-sec. 26; and 32–33 Vic. ch. 31, secs. 6, 8, 59, 73, D.

The defendant was in close custody in the gaol of the county for the period of four days, until he put in a recognizance to appeal from the conviction to the General Sessions of the Peace. He was arrested immediately after he was convicted, without any distress warrant against his goods having been issued, or any evidence taken to show that he had no goods and chattels whereon to levy a distress; or that the issuing of a distress would be ruinous to him and his family. The defendant swore he was handcuffed all the way from Tiverton to the goal; that he owned a young horse; and that when in gaol he was put to hauling in wood and water. There were two more persons in the same cell, and night and morning they would be sent to do the chores round, being ordered to do them. He did not break stones or do anything of that sort.

The conviction was as follows:

"*Canada, Province of Ontario, County of Bruce, to wit:* } Be it remembered that on the 21st day of January, 1881, at Tiverton, in the said county, Norman McLellan is convicted before the undersigned, two of Her Majesty's Justices of the Peace for the said county, for that the said Norman McLellan did on or about the third day of January, instant, write and post up, or caused to be posted up, certain indecent placards in public places in the Village of Tiverton, contrary to By-law No. 5, (*contrary to a by-law of the municipality of the*) said village, (*passed on the 28th day of April, 1879, entitled a by-law for the purpose of making certain rules and regulations for the government of the said Village of Tiverton, in the county of Bruce, Province of Ontario*); and we adjudge the said Norman McLellan, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law; and also to pay to Malcolm McKay (the complainant the) sum of five dollars for his costs in this behalf, and if the said several sums be not paid forthwith (we order the same to be levied by distress and sale of the goods and chattels of the said Norman McLellan, and in default of sufficient distress), we adjudge the said Norman McLellan to be imprisoned in the common gaol of the said county at Walkerton, in the said county of Bruce, and there to be kept at hard labor for the space of thirty days, unless the said sums and (all) costs and charges of conveying the said Norman McLellan to (such) the said common gaol (are) shall be sooner paid.

"Given under our hands and seals, the day and year first above mentioned, at Tiverton, in the county aforesaid.

"M. L. McKINNON, J. P.
"J. J. FEE, J. P."

Leaving out the portions between brackets, and leaving in the portions struck out, the above was the conviction as made by the Justices. As it above appears, it is as amended by the General Sessions of the Peace, and affirmed in appeal.

The warrant of commitment followed the conviction as it was before amendment by the Sessions, and directed the imprisonment of the plaintiff *at hard labour* for the space of thirty days.

The by-law, so far as important, under which the conviction took place, was as follows:

BY-LAW No. 5.

"A by-law for the purpose of making certain rules and regulations for the government of the Village of Tiverton, in council assembled, and it is hereby enacted by virtue of the Acts respecting municipal institutions, as follows: * * 19, that no person or persons shall, in the Village of Tiverton, post any indecent placards, writings, or pictures, or write inde-

cent words, [or make indecent pictures or drawings on walls or fences, streets, or public places. [48—And be it further enacted that any person failing or neglecting or refusing to comply with and strictly observe any of the foregoing provisions of this by-law, or who shall be guilty of any breach or default of the same, where there is no special penalty prescribed for such breach, default or non-observance, shall for each offence or omission, upon conviction thereof before any one or more Justices of the Peace, in and for the county of Bruce, having jurisdiction in a summary way, forfeit and pay a sum of not exceeding forty dollars as to such justice may seem meet, to be levied off the goods and chattels of such person, and in default of payment of any such penalty and the lawful costs of collection thereof, or in case of no sufficient distress, such person shall be by such Justice or Justices forthwith committed to the common gaol of the county of Bruce for such period, not exceeding thirty days, as such Justice or Justices shall adjudge, unless such penalty or sum, together with costs, be sooner paid."

The case was tried at the last Fall Assizes at Walkerton, before Patterson, J. A., without a jury, and the learned Judge, having reserved his judgment at the trial, afterwards, on the 2nd December, 1881, directed judgment to be entered for the defendant, and dismissed the plaintiff's action, with costs. The reasons for this judgment, as given by him in writing, were as follow:

"No question is raised respecting the validity of the by-law, and no room for question seems to exist, even if it would have been competent to raise it in this action, except perhaps in regard to the imposition of thirty days imprisonment, where the statute appears to make twenty-one days the limit. There is power, under sec. 400 of the statute, given to a Justice of the Peace to imprison for thirty days by way of enforcing a fine or penalty imposed by or under the authority of the Act, unless where other provision is specially made. This does not extend the power of a corporation to exceed the limit of twenty-one days in any by-law; and I apprehend that when a by-law is authorized and passed the jurisdiction of the justice is regulated by the by-law, and not by sec. 400. The by-law makes 'other provision.'

"The defendant and another Justice convicted the plaintiff on 21st of January, 1881, for having, in breach of the by-law, posted indecent placards in Tiverton, and adjudged that he should pay a fine of $20 and $5 costs; and that if those sums were not paid forthwith that he should be imprisoned in the common gaol and there kept at hard labour for thirty days, unless those sums and costs and charges of conveying him to the said common gaol should be sooner paid.

"Upon the same day the defendant issued a warrant reciting the conviction, and that the moneys had not been paid, and directing the imprisonment of the plaintiff at hard labour for thirty days unless the said

several sums, and costs and charges of carrying him to the said common gaol, amounting to $12.25, should be sooner paid. Upon this the plaintiff was arrested and taken to gaol. Four days afterwards he gave bail, for an appeal to the General Sessions of the Peace, and was liberated. The appeal was heard at the Sessions in June. The plaintiff was found guilty by the jury, and the conviction was therefore affirmed; but it was amended by the Court by making imprisonment only consequent on default of sufficient distress, and by erasing the imposition of hard labour.

"Evidence was given to shew that the plaintiff, who lived with his sisters, had property which might have been distrained, viz., a house which had belonged to one of his sisters, but which had always remained on the place where it was raised, and which became the property of the sister again about the first of February. It also appeared that no minute of the conviction had been served upon the defendant before the warrant was issued.

"For the defence Mr. *Dixon* objected that no want of reasonable and probable cause had been shewn; that the defendant had jurisdiction to issue the warrant; that no complaint was made of the conviction, and the conviction had not been quashed, citing *Graham* v. *McArthur*, 25 U. C. 478; *Sprung* v. *Anderson*, 23 C. P. 152.

"Mr. *Shaw*, for plaintiff, contended that, as the defendant did not comply with sec. 52 of 32-33 Vic. ch. 31, by serving the plaintiff with a copy of the minutes of the conviction, or giving him notice that he was required to pay the amount, he could not set up that he had reasonable and probable cause for issuing the warrant for imprisonment; that for the same reason he had not jurisdiction over the person of the plaintiff, because he had not done what was necessary before issuing the warrant, and therefore was not protected by the first section of R. S. O. ch. 73; that the fourth section did not apply, as it referred to actions under the first section; and that at all events the conviction had been virtually quashed by being amended at the sessions in the particular now in question, viz., the requisite of distress before imprisonment. He referred to *Moffatt* v. *Barnard*, 24 U. C. 492; *Connors* v. *Darling*, 23 U. C. 541; *Re Bates*, 40 U. C. 284.

"In reply Mr. *Dixon* called attention to the amendment of sec. 4 by 41 Vic. ch. 8, sec. 10, and referred also to the Dominion Act, 32-33 Vic. ch. 31, sec. 59. He also urged that under sec. 17 of R. S. O. ch. 73, the plaintiff could not recover damages beyond three cents, because he was shewn to be guilty of the offence for which he was convicted. It was agreed that I should read the notes of evidence given at the Sessions upon the appeal as evidence upon the question of the plaintiff's having been guilty of the offence. I have read those notes, and am of opinion that the plaintiff was guilty of the offence. At the same time I do not think the section available for the defendant's protection in this case.

"The provision appealed to is contained in the words: 'And with respect to such imprisonment, that he has undergone no greater punishment than that assigned by law for the offence of which he was so convicted * * he shall not be entitled to recover * * any sum beyond three cents as damages for such imprisonment, or any costs of suit whatsoever.'

"If it is the law, as contended by the plaintiff, that imprisonment could only be imposed after the issue of a distress warrant, and failure by the officer to find goods to distrain, then the imprisonment, without any attempt to distrain, was a punishment greater than that assigned by law for the offence; and so sec. 17 does not help the defence.

"I think, however, the other objections are fatal to the plaintiff's recovery.

"I do not take the amendment of the conviction to be equivalent to quashing it.

"The power to amend a conviction by the Court of Quarter Sessions was given in 1866, by the statute of the Province of Canada, 29 & 30 Vic. ch. 50, without any change being made in the language of the clause now represented by section four of chap. 73; and although the Legislature of Ontario made many changes in view of the revision of the statutes, both shortly before and shortly after the revision took place, no modification of the language of sec. four has been made, to suggest the recognition of an amendment of a conviction as being included in the term 'quash.' Besides this, it would, as it seems to me, be an enterprise of a rather uncertain character to undertake in every case to say to what extent a conviction, which has been amended and confirmed, should be deemed to have been quashed, especially as under the Act of 1866 the charge is tried *de novo* by a jury.

"In my opinion the fourth section applies and protects the defendant.

"Mr. Shaw's point, taken under sec. 52 of the Act 32-33 Vic. ch. 31, rests on a misconception of that section. It provides that when authority is given to commit a person to prison or levy a sum upon his goods by distress, for not obeying *an order* of a Justice, the defendant shall be served with a copy of the minute of the order before any warrant of commitment or of distress is issued in that behalf.

"It does not refer to convictions. The statute preserves the distinction between convictions and orders, and never confounds them together, so far as I have noticed. See secs. 19, 24, 25, 37, 38, 41, 42, 53, 57, &c., and forms I. and K.

"In what cases orders are made under our law I do not at present pretend to say. The law on the distinction between convictions and orders will be found in *Burn's* Justice, under title "Orders of Justices."

"But while I hold that the defendant had jurisdiction, and that he is within the protection of the statute, I am not to be understood to hold that the conviction as originally made, or the warrant as issued, was not warranted by law, except in the matter of the award of hard labour. The by-law did not authorize a sentence of hard labour; but then the plaintiff was not put to hard labour.

"The warrant alone is the subject of complaint. Section 59 of the statute provides that whenever it appears to any Justice of the Peace, to whom application is made for any warrant of distress, that the issuing thereof would be ruinous to the defendant or his family, or wherever it appears to the Justice, by confession of the defendant or otherwise, that he hath no goods or chattels whereon to levy such distress, then the Justice, if he deems

it fit, instead of issuing a warrant of distress, may commit the defendant, &c. The forms (O 1 & 2,) given under that section contain no reference to distress, but recite just such a conviction as that in this case.

"The cases to which I have been referred, to which I may add *Dickson* v. *Crabb*, 24 U. C. 494, fully sustain the contention on the part of the defendant."

February 9th, 1882.—*H. J. Scott* obtained an order *nisi* to set aside the judgment for the defendant, and vary the same, or for a new trial between the parties, or to enter judgment for the plaintiff for such sum as the Court should think fit, on the grounds that the judgment was contrary to law and evidence and the weight of evidence, in this, that the conviction did not protect the defendant from liability in having the plaintiff arrested without first issuing a distress warrant, and that if the amendments made in the convction related back to the time of the conviction, the subsequent acts of the defendant did not follow it, and the said amendments amounted to a quashing of the original conviction, and that it was not necessary under the circumstances to quash the conviction before action. The plaintiff also gave notice that he would move against the judgment, stating in his notice the same grounds.

May 25th, 1882. *H. J. Scott* supported the order *nisi*. If the amendment of the conviction by the Sessions relates back to the original making the action will lie, as the issuing of the warrant without first issuing a distress warrant, and the imprisoning with hard labour, were both unauthorized by the conviction, and therefore acts of trespass: *Paley* on Convictions, 6th ed., 483; *Leary* v. *Patrick*, 15 Q. B. 266; *Moffat* v. *Barnard*, 24 U. C. R. 498; *Connors* v. *Darling*, 22 U. C. R. 541. The amendment by the Sessions was a quashing of the conviction, and an action will lie for the proceedings under that part of the conviction which was struck out.

Beaty, Q. C. No action can be brought against a magistrate for anything done under a conviction, until such conviction has been quashed: R. S. O. ch. 73, sec. 4; *Dickson* v.

Crabb, 24 U. C. R. 494; *Graham* v. *McArthur*, 25 U. C. R. 478. The conviction has not been quashed here, and even if the Sessions had power to amend it in the way they have done it would not amount to a quashing.

June 24, 1882. CAMERON, J.—I am unable to concur in the decision of the learned Judge who tried the action, and think the judgment entered by him should be set aside, and a new trial had between the parties.

I am of opinion that the conviction of the plaintiff, as amended by the General Sessions of the Peace, did not warrant or authorize the imprisonment of the plaintiff *at hard labour*, and that is the only conviction put in evidence, and therefore the warrant of commitment issued by the defendant, assuming that he had a right to issue it in the first instance, without a distress warrant against the plaintiff's goods and chattels, was in excess of the defendant's jurisdiction, and he is liable in trespass, and is not within the protection of sec. 4, ch. 73, R. S. O., or section 7 of the same statute. The conviction, as a whole, has not been quashed, but there has, by the amendment, been removed from it that which made it an act in excess of the magistrate's jurisdiction, and it was in effect quashed in so far as it authorized the wrong the plaintiff complained of. If the warrant of commitment had not been issued till after the confirmation of the conviction, the defendant could not have justified the imprisonment of the plaintiff at hard labour, and I do not see on what principle that which is unlawful now, and unprotected by the conviction, can be held lawful by reason of its having been done at a period before the conviction was amended, unless it can be held there are two existing convictions, that is to say, the conviction as it was before amendment, and the amended conviction; or, in other words, that on production in evidence of the amended conviction the Court can eliminate the amendments and read it as it originally stood.

The plaintiff proved his arrest and imprisonment

under a warrant illegal unless supported by a conviction. Were it not for the statutory plea of not guilty, the defendant would have been bound to plead and prove a conviction authorizing the warrant under which the plaintiff was arrested. The burden of showing an invalid conviction, and that it was quashed, was not cast upon the plaintiff by reason of the defendant being allowed to plead not guilty by statute. The effect of that plea is, as mentioned in sec. 11 of the said ch. 73 R. S. O., to allow the defendant to give any special matter of defence, excuse or justification, in evidence under such plea at the trial, not to change the order of the proceedings or the burden of proof. The defendant then, to justify the imprisonment of the plaintiff, was bound to establish an existing conviction —was bound to show a conviction authorizing the commitment, and, as I have already pointed out, the conviction he produced failed to do so.

In *Rogers* v. *Jones*, 3 B. & C. 409, it was held that the commitment must be warranted by the conviction. In *Barton* v. *Bricknell*, 13 Q. B. 393, a justice had convicted for Sunday trading in a penalty and costs, to be levied by distress, and the conviction directed that in case of non-payment of the several sums, and if there should not be sufficient distress, the plaintiff should be set publicly in the stocks for two hours. The plaintiff's goods were distrained. The conviction was afterwards quashed on account of the illegal provision as to confinement in the stocks. An action of trespass was brought for the distress, and it was held that the defendant was protected by the Imperial Act 11 & 12 Vic., ch. 44, sec. 1, which is similar to ch. 73 R. S. O. sec. 1, and section 2 did not apply, the act of distraining being one which the defendant had jurisdiction to order, though, if the illegal alternative had been acted upon and plaintiff had been put in the stocks, trespass would have lain for that. Coleridge, J., said: "Section 2 enacts that 'for any act done by a Justice of the Peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded

his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such Justice in any such matter, may maintain an action against such Justice in the same form and in the same case as he might have done before the passing of this Act' after the conviction has been quashed. I am not prepared to deny that the present case falls within the literal meaning of those words, for this is an act done under a conviction in a matter in which the defendant has exceeded his jurisdiction. But if we give these words their full literal meaning they contradict the first section. We must then try to construe them so as to give effect to the whole of the Act; and I think we do this if we confine section 2 to cases in which the act by which the plaintiff is injured is an act in excess of jurisdiction; for instance, if the plaintiff, in the present case, had been put in the stocks under the illegal alternative, and the action had been brought for that; in which case probably trespass might have lain: as it is, I think it does not."

Wightman and Erle, JJ., concurred in the above view, The latter said: "I think the case is precisely that which section 1 is intended to protect. Then I think the construction of section 2 must be so controlled by section 1 as to be consistent with it, and that is done by so construing section 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction. as it would have done in this case if the plaintiff had been put in the stocks, and he had brought the action for that."

In *Leary* v. *Patrick et al.*, 15 Q. B. 266, Lord Campbell, C. J., at p. 272, said that "stat. 11 & 12 Vic. ch. 44, sec. 2, leaves the remedy of a party injured the same as it would have been before that Act, in cases in which Justices have acted without jurisdiction, or have exceeded their jurisdiction, provided that the conviction has been quashed before action. In the present case the conviction has been quashed, and I am of opinion that in doing the acts complained of these Justices have exceeded their jurisdiction; for whether they had jurisdiction to adjudge the plaintiff should pay

costs or not, they did not in fact adjudge that he should pay them. The distress warrant recited an adjudication to pay costs, but that was contrary to the fact."

The action was brought to recover damages for the seizure of his goods under a distress and the detention of the plaintiff by the verbal order of the defendants, Justices of the Peace, after a conviction, adjudging the plaintiff to pay a penalty of £5 for an offence under 6 & 7 Vic., ch. 68, keeping an unlicensed theatre. The conviction was silent as to costs, and a warrant of distress not returnable on a day certain was issued by the defendants. It recited a conviction adjudging the plaintiff to pay a penalty of £5 and 12s. costs. Under the distress warrant the plaintiff's goods were seized. The conviction was quashed. The defendants contended, as to the imprisonment, they were justified under 5 Geo. 4, ch. 18, which authorises the detention of a convicted offender, unless he gives security to appear on the return day of the warrant of distress, which was required to be within eight days. The defendants did not require the plaintiff to give security, but detained him as above mentioned by their verbal order for a day and a night. The plaintiff was held entitled to recover on both grounds.

These cases clearly establish that a committal to hard labour, if hard labour could not legally have been imposed upon the plaintiff in this case, was an excess of jurisdiction for which trespass will lie, unless, upon the facts disclosed in evidence, the defendant can successfully contend his original conviction, erroneous though it was, can be evoked in his favour, and he has the right to protection under section 4 of ch. 73, R. S. O., on the ground that the conviction has never been quashed. If he had produced that conviction his contention might have been of more weight; but, as I have already said, I think he is bound by the conviction that was produced, and the erroneous part of the original conviction, which sanctioned the wrong complained of, does not appear in the conviction that was put in evidence in fact, and the defendant is, by reason thereof, as effectually placed without

the protection of section 4 as if the whole conviction had been quashed, instead only of the illegal portions having been eliminated.

It is a rule of law that a conviction returned in obedience to a *certiorari* cannot be quashed in part, but being an entire judgment it must be quashed generally: *Rex* v. *Catherall*, 2 Str. 900. By the special provisions of the statute allowing appeals to the Sessions a conviction may be amended, and I take it for all purposes the conviction as amended by that Court must supersede the original conviction, and the Justice will not be entitled to shelter himself under his original erroneous judgment, where the error was in acting without or in excess of his jurisdiction. If the amendment only relates to something over which the Justice had jurisdiction, though he may not be protected by the terms of the amended conviction, he will come within sec. 1 of ch. 73, R. S. O., and will not be liable for anything done under his original conviction unless he has acted maliciously and without reasonable or probable cause.

I have thus far considered the objection to the commitment on the ground of the total excess of jurisdiction by the defendant in awarding the imprisonment of the plaintiff at hard labour. The further objection remains to be noticed, that the arrest of the plaintiff was without a distress warrant having been issued and returned *nulla bona*, and without its having been made to appear by the plaintiff's confession, or otherwise, to the defendant, that there was no sufficient distress. The conviction was not under the provisions of a statute, but under a municipal by-law; and this presents the important question, can the Act of the Dominion Parliament apply so as to interfere with the express provision of the by-law, and to relieve a Justice convicting under the by-law from the necessity of following the course directed by the by-law in the enforcing of the payment of any penalty imposed by him, and allow him at his discretion to follow the provisions of the Act relating to summary convictions? The by-law directs the penalty "to be levied of the goods and chattels of the person con-

victed, and in default of the payment of any such penalty and the lawful costs of collection thereof, or in case of no sufficient distress, such person shall be by such Justice or Justices forthwith committed to the common gaol."

This language leaves the duty of the Justice, in reference to the imprisonment of the person convicted, involved in considerable doubt. The first means of collecting the penalty is by levying the amount of the goods and chattels; but immediately follows the provision that in default of payment of the penalty and the lawful costs of collection thereof, or in case of no sufficient distress, such person shall be by the Justice or Justices forthwith committed to the common gaol. Now does this mean that at once upon the conviction of a person for an offence against the by-law, the Justice may issue his warrant of commitment, on such person refusing to pay the penalty and costs of collection, or his having no effects whereof the amount may be levied; or does it mean that if after the issuing of the distress warrant he does not pay or has no sufficient distress, then he shall forthwith be committed? If the first view is taken, it is difficult to see what is meant by the lawful costs of collection. There could not be any costs of collection unless some proceedings were taken after the conviction. Costs of collection of the penalty and costs of the prosecution are different things, and the use of the former term would seem to indicate the framers of the by-law contemplated some proceeding to be taken to collect the penalty before a commitment would be authorized. Athough the language of the by-law, interpreted literally, would lead to the conclusion that it was intended to give to the Justice a discretion to commit in the first instance, if defendant omitted to pay at once, or it appeared there was no sufficient distress, a reference to the provisions of the Municipal Act, under which the by-law was passed, will show that the former is the proper construction of the provision. If not, this part of the by-law would be void, as contrary to the statute. Section 454, sub-sec. 12 (*b*), empowers, among others, village councils to

pass by-laws for inflicting reasonable fines and penalties, not exceeding $50, exclusive of costs, for breach of any of the by-laws of the corporation. Sub-sec. 13: "For collecting penalties and costs by distress and sale of the goods and chattels of the offender." Sub-sec. 14: "For inflicting reasonable punishment by imprisonment, with or without hard labour, * * for any period not exceeding twenty-one days, for breach of any of the by-laws of the council in case of non-payment of the fine inflicted for any such breach, and there being no distress found out of which such fine can be levied." Section 461, sub-sec. 26, contains the provision under the authority of which the council of the corporation of the village of Tiverton assumed to act in passing clause 19 of the by-law for breach of which the plaintiff was convicted; and that sanctions the passing of by-laws, &c., "for preventing the posting of indecent placards, writings, or pictures, or the writing of indecent words, or the making of indecent pictures or drawings, on walls or fences in streets or public places." From the language of sec. 454, sub-sec. 14, it is manifest the council of the village of Tiverton did not by the by-law in question intend to give a justice of the peace the power to imprison as a direct punishment, but only as a means of enforcing payment of any penalty imposed under it. Therefore the directing an imprisonment, under the circumstances in evidence in the present case, was an excess of jurisdiction on the part of the defendant for which he would be responsible in trespass, as well as for imposing in addition to imprisonment the punishment of hard or enforced labour; as, until the return of no distress to the warrant against goods, the defendant had no jurisdiction over the person of the plaintiff, unless his act can be held to be covered and authorized by sec. 59 of ch. 31 of 32-33 Vic. or sec. 59 ch. 103 Con. Stat. of Canada, if still in force. That section provides "Whenever it appears to any justice of the peace, to whom application is made for any warrant of distress, that the issuing thereof would be ruinous to the defendant and his family, or whenever it appears to the justice, by

the confession of the defendant or otherwise, that he hath no goods and chattels whereon to levy such distress, then such justice, if he deems it fit, instead of issuing a warrant of distress, may commit the defendant to the common gaol, house of correction, or lock-up house in the territorial division, there to be imprisoned, with or without hard labour, for the time and in the manner the defendant could by law be committed in case such warrant of distress had issued and no goods or chattels had been found whereon to levy the penalty or sum and costs aforesaid."

Assuming, for the present, that this provision of the Act of the Parliament of the Dominion—which can have no jurisdiction over the matter, unless the breach of a municipal by-law is in the nature of a crime, for the punishment of which the procedure in criminal cases can be applied—is available to the defendant, the question is, do the circumstances shown in evidence bring the defendant within the clause? In *Moffat* v. *Barnard*, 24 U. C. R. 498, this Court held, under the circumstances of that case, trespass would not lie against a justice of the peace for issuing a warrant of commitment in the first instance, it appearing from the evidence that the offender was a boy living with his parents, without property, and well known to the justice; but the learned Judge who delivered the judgment of the Court, at page 502, said: "I am not prepared to say, and I wish to guard myself from holding, that if a justice of the peace should issue a warrant to commit in the first instance, upon a charge such as was alleged against this plaintiff, without it appearing to him that the person convicted had no goods, or taking some means to ascertain the fact, that he would not be liable in trespass for exceeding his jurisdiction, and that it would not be incumbent on him in an action like this to give some evidence to that effect, the statute under which he convicts expressly declaring that he shall first issue a distress warrant, and the statute ch. 103, Con. Stat. C., only dispensing with that proceeding under certain circumstances." The provision in this respect of chap. 103,

C. S. C., is the same as in 32-33 Vic. ch. 31, from which I have extracted sec. 59.

From the plaintiff's evidence he knew very little of the defendant, and it did not appear the defendant knew him, and the plaintiff had property that might have been levied under a distress warrant. It cannot be said that the decision in *Moffatt* v. *Barnard* is an authority against the plaintiff's right to maintain trespass under these circumstances, as the defendant has not shewn, as in that case, that it was highly improbable that the plaintiff was possessed of any goods or chattels that the penalty and costs might have been levied of. If the plaintiff had applied by *habeas corpus* after his imprisonment to have been discharged, the decision of the present learned Chief Justice of this Court, in Chambers, in *re Slater*, 9 U. C. L. J. 21, and of Mr. Justice Galt, in the *Queen* v. *Blakely*, 6 P. R. 244, shews he would have been successful. It does not necessarily follow from this, as was put by Mr. Justice Gwynne, in *Sprung* v. *Anderson*, 23 C. P. 16, that the committing Justice would be liable to an action of trespass. The question must always depend upon the fact, whether the conviction and commitment were not defective for want of or an excess of jurisdiction on the part of the Justice; and in my opinion, until a distress warrant, in a case like the present, has been issued and returned that no goods of the offender can be found on which the distress can be levied, the Justice exceeds his jurisdiction in causing the offender to be committed to gaol; and as the defendant so acted, he cannot shelter himself under the conviction in evidence, as that required him to proceed to enforce the penalty by distress. If this view be right, the plaintiff would be entitled to recover as well for the imprisonment alone, as for the imprisonment and imposition of hard labour. But by reason of the latter he is entitled for that clear excess of jurisdiction.

The learned Judge, in his reasons for dismissing the plaintiff's action, says, though he has not found as a specific fact that it was so, that the plaintiff

was not put to hard labour; but the evidence would not support such a finding, as the plaintiff swears, and he is uncontradicted, that he was put to hauling in wood and water, and was ordered to do chores. This was compulsory labour, which I take to be meant by hard labour. This would seem to have been the view of this Court, in the case of *Graham* v. *McArthur*, 25 U. C. R., as expressed by Draper, C. J., at page 484, in the following language: "The warrant, as already pointed out, only directs that the plaintiff shall be imprisoned and kept at hard labour. The evidence of the turnkey, that the plaintiff did no hard work in gaol, is not to my mind a sufficient negative that he was put to some compulsory work * * * If the defendant relied on the 17th sec. of Con. Stat. U. C., ch. 126, he should have taken care, where the adjudication was manifestly illegal, to establish that the plaintiff had undergone no greater punishment than that assigned to the offence of which he was convicted."

This language seems clearly to indicate that in the opinion of the Chief Justice labour such as the plaintiff swore he performed was in excess of the punishment that could be imposed upon him for the offence of which he was convicted, and it sustains the opinion of the learned Judge that the defendant did not bring himself within the protection of section 17 of ch. 126 Con. Stat. U. C., which is the same as section 17 of ch. 73 R. S. O.

Section 7 of the latter Act, however, requires to be considered, as the defendant by the marginal note to his plea claims to come within its terms. This clause is as follows: "In case a Justice of the Peace has granted a warrant of distress, or a warrant of commitment, upon any conviction or order, which either before or after the granting of the warrant has been confirmed upon appeal, no action shall be brought against such Justice, by reason of any defect in such conviction or order, for anything done under the warrant."

The language used would seem to cover the present case; but I take it to mean, where a warrant legal in form and

within the jurisdiction of a Justice has been issued and acted upon, no formal defect in the conviction after confirmation shall make the Justice liable for doing that which under the warrant would be authorized, and also by the conviction as affirmed.

It seems to me, as to this clause as well as to clause four, the defendant is not in a position to shew a conviction that justified the imprisonment of the defendant at hard labour, and so uphold the warrant under which the plaintiff was imprisoned.

The by-law under which the conviction took place seems to go further than the section of the Act under which it was passed warrants. The Act authorizes a by-law for preventing the posting of indecent placards, writings, or pictures, or the writing of indecent words, or the making of indecent pictures or drawings, on walls or fences in streets or public places.

The by-law, clause 19, is, that no person shall post any indecent placards, writings, or pictures, or write indecent words or make indecent pictures or drawings on walls or fences or public places, making a more extensive prohibition than the words of the Act would sanction; as under the by-law the posting of an indecent picture or placard in a public hall, though not on a public street, would be an offence, whereas under the Act no authority is given to prevent the posting of an indecent picture or placard except on a wall or fence in a public street. The conviction, it will be noted, is not merely for posting an indecent placard, but for writing it. The latter is not an offence under the by-law, and perhaps it may be rejected as surplusage; or the defendant may, as to this, come within the protection of section 328 of ch. 174, as having acted under the authority of a by-law, that section, if applicable, requiring the action to be brought against the corporation only and only after the by-law has been quashed and notice of action to the corporation given. It is not necessary to the decision of the present case to determine how that would be, and I refer to the matter simply to call attention to

the by-law, so that the corporation may, if so disposed, remove any doubt in the future by amending the by-law, so as to correspond with the power conferred by the statute. There is no doubt the placard which the plaintiff was convicted of posting or writing was a criminal libel. It is a grave question with me whether a municipality has power to make a new offence and award a new punishment or add an additional one to that which is a criminal offence, and may be punished as such under the criminal law. The learned Judge who tried the case thought the plaintiff was guilty of the charge alleged in the conviction. If the charge was writing or publishing a libel, or exhibiting the placard in a bar-room, there would be abundance of evidence of the plaintiff's guilt, but I entertain very great doubt as to whether it was established that he was guilty of posting the placard in a place which the statute enabled the corporation to prohibit its being posted in.

HAGARTY, C. J.—It is conceded that the magistrate had no power to award hard labour. The plaintiff was sent to gaol, and he had ample means to obtain redress. He could have at once applied to quash the conviction, or he could have been discharged on *habeas corpus*.

He elected to appeal to the Sessions. That Court thought proper to amend the conviction by striking out hard labour, and I incline to think, with my brother Armour, that their so doing was a material alteration of the sentence or adjudication of the justice, which as a general rule cannot be interfered with by them, although they can amend matter of form. But I reserve any express decision on this narrow point till it may become necessary to decide it.

The Sessions affirmed the conviction and did not quash it. That it now presents itself with "hard labour" struck out, does not displace the fact that the justice of the peace did award hard labour, and the action of the Sessions, warranted or unwarranted, cannot alter that fact. It was not at defendant's instance or procurement that his original

conviction was thus altered, and it seems to me that he has the right to say now that his conviction did award hard labour, and that his conviction has not been quashed but upheld.

Of course, if, as my learned brother holds, the Sessions could not legally amend it, the case is still clearer for the defendant.

If on the evidence here a jury had found as a fact that the plaintiff was not put to hard labour, I do not think we should interfere with such a finding. The learned Judge here has held that he was not, in fact, put to hard labour, and I do not feel disposed to interfere with his view.

On the whole, I do not feel warranted in interfering with the judgment of Mr. Justice Patterson. I think the appeal, therefore, should be dismissed, with costs.

ARMOUR, J.—I am of opinion that the conclusion arrived at by the learned Judge who tried this cause is correct, that the conviction has not been quashed, and that this action will not therefore lie.

The record of conviction may be said generally to consist of two adjudications; the one the adjudication of guilt, or conviction properly so called; and the other the adjudication of punishment, or sentence properly so called.

From the conviction, properly so called, there is an appeal to the General Sessions of the Peace, who may amend such conviction; but from the sentence, properly so called, there is no appeal to the General Sessions of the Peace, and they have no power to amend such sentence.

32-33 Vic. 31, sec. 65 (D.) provides that, unless it be otherwise provided in any special Act under which a conviction takes place, any person who thinks himself aggrieved by any such conviction may appeal, in the province of Ontario, to the next Court of General Sessions of the Peace.

The person aggrieved shall give to the prosecutor or complainant, or to the convicting Justice, or one of the convicting Justices for him, a notice in writing of such appeal

within four days after such conviction. He shall also either remain in custody until the holding of the Court to which the appeal is given, or shall enter into a recognizance with two sufficient sureties before a Justice or Justices of the Peace conditioned personally to appear at the said Court and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded, &c.

And the Court to which such appeal is made shall thereupon hear and determine the matter of appeal, and make such order therein, with or without costs to either party, including costs of the Court below, as to the Court seems meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as may be awarded, and shall, if necessary, issue process for enforcing the judgment of the Court, &c.

Section 66 provides that "the Court of General Sessions of the Peace may, at the request of either appellant or respondent, empanel a jury to try the facts of the case, and shall administer to such jury the following oath: 'You shall well and truly try the facts in dispute,' &c. And the Court, on the finding of the jury, shall give such judgment as the law requires; and if a jury be not so demanded, the Court shall try and be the absolute judges as well of the fact as of the law in respect to such conviction," &c.

Section 68 provides that "in all cases of appeal from any summary conviction had or made before any Justice or Justices of the Peace, the Court to which such appeal is made shall hear and determine the charge or complaint on which such conviction has been had or made upon the merits, notwithstanding any defect of form or otherwise in such conviction; and if the person charged or complained against is found guilty, the conviction shall be affirmed, and the Court shall amend the same, if necessary; and any conviction so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed in appeal."

Section 70 provides that "in case an appeal against any conviction be decided in favour of the respondent, the Justice or Justices who made the conviction, or any other Justice of the Peace for the same Territorial Division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought."

Section 71 provides, that "No conviction, or order, affirmed or affirmed and amended in appeal, shall be quashed for want of form, or be removed by *certiorari* into any of Her Majesty's Superior Courts of Record; and no warrant or commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

I am of opinion that none of these provisions confer any right to an appeal against the adjudication of punishment, or sentence, properly so called, but only an appeal against the adjudication of guilt or conviction, properly so called. For the provision of section 65 is, that the Court shall hear and determine the matter of appeal, and in case of the dismissal of the appeal or the affirmance of the conviction, shall order and adjudge the offender to be punished *according to the conviction;* and the provision of section 68 is that the Court shall hear and determine the charge or complaint, on which such conviction has been had, upon the merits, and if the person charged or complained against is found guilty the conviction shall be affirmed and the Court shall amend the same, if necessary; and any conviction so affirmed or affirmed and amended shall be enforced in the same manner as convictions affirmed in appeal; and the provision of section 70 is, that in case an appeal against any conviction be decided against the defendants a warrant of distress or commitment may be issued for execution of the same as if no appeal had been brought.

I am of opinion, therefore, that the Court of General Sessions of the Peace had no power or authority to alter the adjudication of punishment made by the Justices of

the Peace, and that their assuming to amend the record of conviction in this regard was a void act, and was not therefore a quashing of the conviction.

But even if an appeal would have lain to that Court against the adjudication of punishment, and if they had the power to amend it as they did, I do not think that such an amendment would have been a quashing of the conviction within the meaning of R. S. O. ch. 73, sec. 4.

I think also that this Court has the power to quash a conviction for an illegal adjudication of punishment notwithstanding such conviction has been appealed against in respect of the adjudication of guilt, and has been affirmed or affirmed and amended in appeal; and that sec. 71 does not take away the writ of *certiorari* in the case of an illegal adjudication of punishment, because no appeal lies against such adjudication to the Court of General Sessions of the Peace.

I have only further to say that I must not be taken as agreeing with the views of the learned Judge who tried this cause as to the inapplicability of R. S. O. ch. 73, sec. 17, to the circumstances of this case.

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

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

GOODYEAR RUBBER COMPANY v. FOSTER ET AL.

Sale of goods—Acceptance—Waiver of excessive consignment.

The defendants, with the knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground, though negotiations took place for a reduction in price, on account of delay, &c., but took into stock 15 out of 25 cases sent. The other 10 cases remained in bond till they were sold to pay duties.

Held, that there was evidence on which a waiver of any objection as to the excess was properly found.

THIS action was brought by the plaintiffs to recover $1,209, being the price or value of certain rubber cloth shipped by the plaintiffs from New York to Toronto for defendants.

The case was tried at Toronto, on the 24th day of January, 1882, before Osler, J., without a jury.

The facts were as follow: In November or December, 1880, the defendants made a verbal contract with the plaintiffs' agent for the delivery to defendants of 2000 yards of tan back rubber drill, at 85 cents per yard, with certain discounts off, and 5 cents per yard extra for dyeing. The goods were to be shipped from New York, and delivered in Toronto; one half on 15th January, 1881, and the other half on 15th February, 1881. Plaintiffs' agent at the time such contract was made was aware that defendants required the goods to fill an order for that quantity given to them by a customer of theirs.

Defendants failed to deliver the goods at the dates specified; but on the 28th February, 1881, shipped to defendants ten cases containing 792½ yards; and on the 4th of March following five other cases, containing 496½ yards. These fifteen cases were taken by defendants from the custom house, and forwarded without being opened to their customer, who shortly afterwards returned them to defendants, alleging they were not equal in quality to the goods defendants had agreed to supply to him. On the 8th of March, 1881, after defendants had forwarded to

their customer the fifteen cases, they received from plaintiff an invoice of a third shipment of ten cases, containing 867 yards. This last shipment of ten cases defendants never took from the custom house, and the same was afterwards sold by the customs' authorities. Defendants stated that upon the fifteen cases being released to them, and, before they used any of the goods, they saw plaintiffs' agent and complained of the late delivery, and that the goods were not of the quality ordered, and told him they held them subject to plaintiffs' order, and that thereupon plaintiffs' agent requested them to take the twenty-five cases into stock and sell them, and that he would write plaintiffs' general manager, who would shortly be in Toronto, when any proper allowance would be made and a settlement effected. Defendants stated that upon this assurance they took the fifteen cases into stock, and at the same time told plaintiffs' agent they would not take the ten cases then in the custom house. The fifteen cases were afterwards sold by defendants at about cost price, and defendants paid into Court the full price thereof, and claimed by way of counter claim damages for late delivery, and also in respect of inferior quality; and with respect to the third shipment of ten cases claimed that there was no valid delivery, as the cases contained 156 yards in excess of the total quantity of 2000 yards originally ordered. It was shewn in evidence that it would be somewhat difficult for defendants to separate the goods in the ten cases so as to get the exact balance of the 2000 yards; and, further, that they could not get any portion of the goods without paying the freight and duty on the whole ten cases. Defendants further stated that they were not aware until after the action was commenced that there was an excess of 156 yards shipped, although they said they could, after receipt of the invoice of the third shipment, by adding up the number of yards contained in each case, as shewn by the invoice, have ascertained that there was such excess; but that as

at that time they did not expect to take the 10 cases, relying upon a settlement being effected, they paid no attention to the invoice.

With respect to the claim for damages owing to inferior quality of the goods, defendants claimed that at the time the order was given to plaintiffs' agent, they produced a sample sent them by their customer, and told him that the goods must be equal in all respects to the sample. Plaintiffs' agent admitted that such sample was produced and cut in two, one half being given to him, but he contended that the sample was only produced for the purpose of shewing the colour the cloth should be dyed, and claimed that the sale was by weight (22 oz.) and not by sample. It turned out that the sample was 25 ounces, although neither party was aware of this at the time the contract was made. The goods shipped by plaintiffs were 22 ounce, and were not equal in weight to the sample. Defendants' customer rejected them as not being heavy enough for his purpose.

The learned Judge, after hearing the evidence, reserved his decision, and subsequently found in favour of the plaintiffs, as set out in the judgment of the Court below.

February 9, 1882. *Ritchie* obtained a *rule nisi*, calling on plaintiffs to shew cause why the judgment for them should not be set aside and judgment rendered for defendants, on the grounds, amongst others, that the last shipment of goods did not contain the exact balance of 2000 yards ordered by defendants, and that there never was any valid delivery of such balance.

May 25, 1882. *Ritchie* supported the rule. The evidence clearly shews the last 10 cases contained 156 yards in excess of the 2000 yards ordered: that the pieces of cloth were of unequal length, and that defendants could not readily separate them so as to get the exact balance; and further, that defendants could not get any part away from the custom house without paying the freight and duty on the whole. It is an essential part of plain-

tiffs' case to shew a delivery or tender of the exact balance. A delivery of more or less than the contract requires is not good, and here there has never been any tender, nor even appropriation by plaintiffs for defendants of the balance of goods in dispute; and it is clear, upon the authorities, that the purchaser is entitled to insist upon a delivery of the exact quantity of goods ordered, and that he is not bound to select a sufficient quantity out of a larger shipment: *Benjamin* on Sales, 3rd Amer. ed., secs. 689, 690; *Campbell* on Sales, 179, 280; *Hart* v. *Mills*, 15 M. & W. 85; *Levy* v. *Green*, 1 Ell. & Ell. 969; *Tarling* v. *O'Riordan*, 2 L. R. Ir. 82. There never has been any waiver by defendants in respect of the excess. The invoice of the third shipment did not reach defendants until after they had forwarded the fifteen cases to their customer, and if such forwarding by defendants was a sufficient acceptance within the Statute of Frauds to render the contract binding on them, then the mere fact that defendants took the fifteen cases into stock after their customer returned them, cannot be relied upon as a waiver, for the goods being of the quality ordered, defendants would be bound to keep them. Further than this, the evidence shews that at the time defendants took the fifteen cases into stock, they did not know that the last shipment contained more than the quantity ordered, and it is submitted that there cannot be a waiver where the party had not knowledge of the facts. It will, no doubt, be contended that after the receipt of the third invoice defendants had the means of knowledge, and could then, by adding together the number of yards shown to be contained in each case, have ascertained the total quantity shipped; but this, it is submitted, is not, in the absence of knowledge in fact, sufficient to entitle plaintiffs to be relieved from the performance of an essential part of their contract.

Pearson, contra. The receiving from the customs and payment of freight and duties on part of the goods was a full and complete acceptance of that part of the goods by the defendants to satisfy the Statute of Frauds, and the

shipping of these goods was the exercise of an act of ownership over them by the defendants. Nothing further could have been done by the plaintiffs or defendants to make the receipt and acceptance of these goods more complete, and the defendants afterwards paid for the part of the goods so received. He cited *Robinson* v. *Gordon et al.*, 23 U. C. R. 143; *Scott* v. *Eastern Counties R. W. Co.*, 12 M. & W. 33.

As to over quantity, there was evidence that the excess was not unusual in this trade: that the pieces of cloth or drill composing the packages contained from 80 to 100 yards each, and it is not usual to cut them; and even if the defendants had the right to object to receive the balance of the goods on this ground, they waived it by retaining the first and second shipments of goods after receipt of the last invoice, which showed the excess in quantity; and also by making no objection on this ground, the objection being that the goods were not according to sample. He referred to *Richards* v. *Dunn*, 2 Q. B. 218.

June 24, 1882. HAGARTY, C. J.—I have read the evidence.

I think the learned Judge was right in holding that the true contract was not a sale by sample except as to shade and colours, and that it was 22 oz. goods, however defendant Davidson may say that he understood it; also, that after the time fixed for delivery had elapsed the defendants waived objections on that score, and received 15 out of the 25 cases and forwarded them to their customers in the country, who returned them to the defendants as not being up to the weight he required, viz.: 25 oz. goods. At that time defendants had the invoice of the additional 10 cases, and knew the quantities in number of goods. With this knowledge they took the 15 cases into stock, the remaining 10 cases being then in the Custom House.

I think there was sufficient evidence of delivery and acceptance to satisfy the Statute of Frauds. It was one contract, and the dealing with the 15 cases was, I think, sufficient.

The only doubt that I entertain in this case is, as to the excess of the 156 yards over the 2000 yards ordered.

The defendants might, it seems, have rejected the whole if sent together, on the ground of this excess, at least unless such excess could have been readily separated from the rest. In such a case as this, as the cases did not contain any specific quantity, the goods being in pieces of unequal length, the right to reject might exist.

The principle is laid down fully in such cases as *Levy* v. *Green*, 1 Ell. & Ell. 969, and *Tarling* v. *O'Riordan*, 2 L. R. Ir. 82.

But it is urged here that the defendants, with knowledge of the excess, made no objection on that score, and took the 15 cases into stock.

It was sworn that the defendant said he would sell all he could of the 15 cases, if the plaintiff would relieve him of the 10 cases in bond. He was then negotiating with the plaintiffs' agent, wanting an allowance for the goods not being delivered in time, and alleging that they had been thrown back on his hands by his country customer on that account.

This was clearly incorrect, as the customer testified. He also said he would not take the 10 cases out of bond until he heard from the plaintiffs' general manager in Montreal, as to some allowances he desired.

During all the negotiations the defendants made no objection as to any excess in quantity.

The defendant's testimony is to the effect that he would not take the 10 cases in any event, as they had come too late; and that his reason for taking the other into stock was that he supposed that the plaintiffs would make some satisfactory arrangement with him. He says he would gladly have taken the goods if they had suited his customer.

The goods were finally sold by the Customs, and the defendant got a customer of his to go and buy them, he agreeing to take of them what the customer did not require, and they were bought at a price (he says) a little less than the contract price.

It is not suggested that the defendant ever made any objection as to any excess of goods sent.

I think we cannot hold, on such evidence as is before us, that the learned Judge was wrong in holding, as he did, that the defendants had waived any objection as to the excess.

In *Levy* v. *Green*, 1 E. & E. the goods sent were articles of china and delf contained in a crate, and there were a number of china articles, which defendant had not ordered, sent with those he had ordered. He refused to receive the whole, alleging that they had been sent after the time fixed. It does not appear that he objected on the ground of excess.

The Court of Error held he had the right to refuse the whole. As Willes, J., says, "When the goods were all in one parcel and entered in one invoice, so that the purchaser, if he accepted his own goods, would incur the risk of being held to have accepted the whole, he was not bound to accept at all."

No notice is taken in the case in Error as to the objection not being taken by the defendant as to the excess. But this is explained in referring to the decision below, 8 E. & B. 578. It is pointed out that his assigning a different reason could only be evidence to go to the jury that he had waived the objection as to excess, and it was not asked to be left to them, nor was it in fact left. See judgments of Coleridge and Wightman, JJ.

Here the learned Judge finds a waiver, and I think he had good grounds for so doing.

ARMOUR and CAMERON, JJ., concurred.

Judgment for plaintiffs.

[QUEEN'S BENCH DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF THURLOW V. THE CORPORATION OF THE TOWNSHIP OF SIDNEY.

Municipal Act—Drainage—Award, validity of—Charging lands benefited.

The arbitrators appointed by the plaintiff and defendant municipalities, on an appeal by the defendants from the report of the surveyor, made an award pursuant to the Municipal Act, whereby they adjudged that the deepening of a creek, &c., benefited lands in the defendant municipality, and that the latter should pay therefor $350; but the award did not specify the lands which in their opinion were so benefited, nor charge such lands with a just proportion of the cost of the works.

Held, that for this reason the award was invalid.

DECLARATION. That prior to the making of the award sued on a majority in number of the owners, as shown by the last revised assessment roll to be resident on the property hereinafter set forth, being the property to be benefited, petitioned the municipal council of the township of Thurlow, praying that certain parts of lots number 1, 2, 3, 4, 5, 6, and 7, in the 4th concession, and part of lots 1 and 2 in the 5th concession of the township of Thurlow, should be drained and the creek thereon be deepened, said drainage and deepening not extending beyond the limits of the municipality of the township Thurlow, but benefiting lands in the adjoining municipality of the township of Sidney; and the said council thereupon procured an examination to be made by John D. Evans, a provincial land surveyor, of the said locality proposed to be drained, and creek proposed to be deepened, and procured plans and estimates of the work to be made by the said Evans, and an assessment to be made by him of the real property to be benefited by such drainage or deepening, as by the statute in that behalf provided, charging the lands in said adjoining municipality of the township of Sidney to be benefited by said drainage and deepening with such proportion of the costs of the said works as he deemed just: that the municipal council of the township of Thurlow, by by-law duly passed in pursuance of the statute in that behalf, on

the 12th day of November, 1877, and numbered 197, adopted the report, plans, and estimates made by Evans, and by said by-law enacted that the said drainage and deepening should be made and constructed in accordance therewith: that thereupon the council of the municipality of the township of Thurlow, in pursuance of the statute in that behalf, served the head of the corporation of the township of Sidney with a copy of the report, plans, and specifications of the said Evans; and the council of the said municipality of the township of Sydney thereupon appealed therefrom, and served upon the head of the corporation of the township of Thurlow a written notice of appeal, that the lands in the township of Sidney were not benefited by the proposed drainage, or were not benefited to the extent or ratably to the extent as shown by the report of the said surveyor, and which notice of appeal also named one John J. Hazlitt, P. L. S., as arbitrator on behalf of the township of Sidney, and called upon the corporation of the township of Thurlow to appoint an arbitrator on their behalf within the time appointed by law: that thereafter, the said John J. Hazlitt having become unable to act, the Judge of the County Court of the county of Hastings, in which county the said municipalities were situate, on the application of the corporation of the township of Sidney, appointed Thomas W. Nash, P. L. S., as arbitrator for the said township of Sidney in the room and stead of the said John J. Hazlitt, and the corporation of the township of Thurlow appointed one Onesiphorus Bartley arbitrator on their behalf, and the Judge of the County Court of the county of Hastings duly appointed Thomas Walker third arbitrator in the premises: that thereupon the said three arbitrators took upon themselves the burden of the said arbitration, and proceeded therewith; and all notices having been given and all necessary acts having been done within the time required by law in that behalf, the corporation of the township of Thurlow and the corporation of the township of Sidney appeared before the said arbitrators and produced their witnesses and evidence,

and made their statements before the said arbitrators: that thereafter, the time for making their award in the premises having been duly enlarged until the 30th day of May, 1878, by the said arbitrators, on said 30th day of May the said Walker and Bartley, two of the said arbitrators, duly made and published their award in writing under their hands, of and concerning the matters submitted to the said arbitrators, and by their said award did adjudge and award that the drain constructed by the corporation of the township of Thurlow under said by-law was a benefit to the corporation of the township of Sidney, and further, did adjudge and award that the said corporation of the township of Sidney should pay to the corporation of the township of Thurlow the sum of $300 in full compensation for the benefits derived by the said corporation of the township of Sidney from the construction of the said drain, said money to be paid on the completion of the drain west of the gravel road in the township of Thurlow, and in full of all claims for construction of said works so far as the corporation of the township of Sidney was concerned, and did further adjudge and award that each party should pay their own costs of the arbitration, and that the corporation of the township of Thurlow should pay the charges of the arbitrators Walker and Bartley, and the costs of the award, and that the corporation of the township of Sidney should pay the charges of the arbitrator Nash: that the corporation of the township of Thurlow did, before the commencement of this suit, complete the said drain west of the said gravel road, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to be paid the said sum of $300 by the defendants, yet the defendants, though requested so to do, refused to pay to the plaintiffs the said sum so awarded or any part thereof.

There was also a common money count for interest.

Pleas. 1. To 1st count—that the arbitrators did not enlarge the time for making their said award as alleged. 2. To 1st count—that the said Walker and Bartley did

not make any such award of and concerning the said matters so referred to them, as alleged. 3rd plea to last count—never indebted.

Issue.

The cause was tried at the Spring Sittings of the Court of Chancery, in 1881, by Proudfoot, V. C.

It appeared that the third arbitrator was appointed on the 21st of February, 1878.

On the 14th of May, 1878, the three arbitrators being present, the following instrument was drawn up and signed:

"In the matter of the arbitration between Thurlow and Sidney concerning the apportionment of expenses of the drain leading from Thurlow into Sidney between said townships.

I, Thomas Walker, referee, named in said arbitration, having examined the whole drain, and personally noted the whole evidence carefully, and considered the matter in dispute in this arbitration, have come to the following conclusion: 1st. That I cannot agree with either of the arbitrators associated with me as to the amounts to be borne by each township in this matter; 2nd. That the drain east of the gravel road will be of very little benefit to Sidney unless in time of extraordinary high water: that the ordinary outlet from Sidney, by the way of the old water-course, is sufficient in every respect to carry off the water required to drain the lands of Sidney in question; 3rd. That the drain west of the gravel road to the Sidney boundary is capable of containing and conveying off all water and draining all the swamp lands in question in Sidney; 4th. Taking into account all matters and things in question in this arbitration, I make this my award and umpirage as follows: I award and order that Thurlow shall pay all the costs of this arbitration, and that Sidney shall pay the sum of $350 in full of all claims from Thurlow, payable on completion of the works.

"Thomas Walker, Third Arbitrator.

"Belleville, 14th May, 1878."

"O. B. does not think the amount sufficient to be paid by Sidney, nor that the whole costs should be paid by Thurlow. I agree to abide by the decision of the third arbitrator, as expressed in his award annexed hereto.

"O. Bartley, Arbitrator for Thurlow."

Nash swore that this instrument was drawn up as a finality, the final conclusion at which Walker and Bartley had arrived: that it was to be embodied in a more formal instrument, but that it was their final determination: that no adjournment was made: that he went home; and he swore most emphatically that he never received any letter

notifying him of any further meeting, and that he never answered any such letter. Nash took a copy of this instrument and produced it on the trial, and it was referred to in the evidence as "L."

Referring to this document, Walker swore as follows:

"Before I signed that (the award sued on) I drafted a paper and I signed it, and Mr. Bartley, another arbitrator, signed it with me. I don't know where that paper is; I saw it last in Mr. Bell's office. I am the third arbitrator. I signed a paper, I and Mr. Bartley. My signature is to the copy. After that I signed another award. Paper 'L' was intended as a paper to try and bring them together. In the first place they could not agree within $800 in their views, and I drafted that 'L' to see how it would come, and that was my opinion; and this 'L' was signed by us as a memorandum of what we were prepared to do. It was signed by Bartley; also he made the memorandum at the foot of it. Mr. Nash was present when that was drafted, and we considered this 'L,' and talked it over with Nash, and I found none of them would assent at first, and at last Mr. Bartley assented, and then I took it in to a solicitor, and he thought an award should be prepared on it as a basis, and he prepared the award and we signed that, and that was our award; and 'L' was merely a memorandum upon which the award was to be made. Mr. Nash was present when that paper was drafted. He did not agree. That afternoon Mr. Bell, who it was agreed by the counsel was to draft an award, could not do it till ten o'clock next morning, so we adjourned to meet there again, and Mr. Nash left there that night."

Mr. Bell swore that Walker and Bartley brought "L" to him and, wanted to know what it was: that he advised them it was no award, and advised them to appoint a meeting and notify Nash: that he drew up a notice for them: that Bartley afterwards produced a letter from Nash, which he believed to be Nash's handwriting, to the effect that he considered they had made their award, and that there was no use wasting his time to come up to discuss it further, and intimating that he would have nothing further to do with it: that on the day and at the place named in the notice Bartley and Walker met, and he drew up the award sued on. Walker further swore that he and Bartley met at Mr. Bell's office on the day after signing "L," at ten o'clock.

"I and Mr. Bartley met," he swore. "Mr. Nash was not present then. We notified him next day of another meeting. I mailed the letter my-

self, addressed it to Kingston. A letter was written in Bell's office informing Nash of our last appointment, written by Bartley, and I mailed it myself. Mr. Bartley got the answer from Mr. Nash, and I expect it has been mislaid with the other papers. I don't remember the words of Nash in that letter. He said he wouldn't be here, and Mr. Bartley read the letter in presence of Mr. Bell."

The evidence showed generally that the arbitrators, or at least two of them, had adjourned their meetings from time to time down to the time of the making of the award sued on.

That award was as follows:

"Whereas, the corporation of the township of Thurlow did heretofore, under the provisions of the statute in that behalf, construct a certain drain shown on the plan annexed hereto, and marked A, leading from the township of Thurlow through part of the township of Sidney; and whereas, after taking the steps and proceedings required by the said statute in that behalf, they, the corporation of the township of Thurlow and the corporation of the township of Sidney, being unable to agree on the proportion of the cost of said drain to be paid by Sidney aforesaid, the said corporation of the township of Thurlow appointed Onesiphorus Bartley arbitrator on their behalf, and the township of Sidney appointed Thomas W. Nash; and afterwards in due form the Judge of the County Court of the county of Hastings, in which said two corporations are situate, appointed Thomas Walker, of the township of Rawdon, third arbitrator, and thereupon, all notices having been given, and all necessary acts being done within the time required by law in that behalf, the said parties appeared before the said three arbitrators, who having been duly sworn and all conditions being observed and made, done and kept, and the time for making the said award having been duly enlarged until the thirtieth day of May instant, and the said parties having adduced their witnesses and submitted all their facts and intentions to said arbitrators,—Now know all men by these presents that we, the said arbitrators named above, having taken upon ourselves the burden of the said arbitration and award, and having heard all the evidence laid before us by both the said parties, and having heard the counsel of both parties, and having in the first place been duly sworn as aforesaid, and having duly considered all the matters laid before us, do hereby order and adjudge and award of and concerning the premises so submitted as aforesaid as follows, that is to say, that the drain shewn on the said map, so far as the portion thereof east of the gravel road shewn on said plan is of no benefit to the corporation of the township of Sidney except in high water: that the said drain, west of the gravel road shewn on the said plan as aforesaid, we find and determine is a benefit to the said corporation of the township of Sidney; and we order, award and adjudge that the corporation of the township of Sidney do pay to the corporation of the township of Thurlow the sum of $300 of lawful money of Canada in full compensation on their part for the benefits they

derive from the construction by the corporation of the township of Thurlow of the said portion of said drain west of the gravel road as aforesaid, said money to be paid on the completion of the drain west of the gravel road in the township of Thurlow, and in full of all claims for the construction of said works so far as Sidney is concerned.

"We order and adjudge that each party shall pay their own costs of the said arbitration, and each shall pay as follows, that is to say, the corporation of the township of Thurlow shall pay the charges of the arbitrators Thomas Walker and Onesiphorus Bartley, and that the corporation of the township of Sidney pay the charges of the arbitrator named by them, Thomas W. Nash, and that the said corporation of Thurlow pay the costs of this award.

"In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this thirtieth day of May, 1878.

"THOMAS WALKER, [L.S.]
"O. BARTLEY," [L.S.]

"Signed, sealed, and published in presence of F. C. Ridley."

Bartley was dead at the time of the trial, and it was asserted that all the papers relating to the arbitration, including the letter from Nash, had been left with him and were not forthcoming. No plan was annexed to the award, nor was any brought before the Court as the plan annexed thereto at the time it was executed.

The learned Vice-Chancellor found a verdict for the plaintiffs for $355.50.

November 22, 1882. *Wallbridge*, Q. C., obtained an order *nisi* calling upon the plaintiffs to shew cause why the verdict obtained in this cause should not be set aside, and a nonsuit entered, or why a new trial should not be had, on the ground that the award was not final, not having disposed of all the matters submitted, and amongst them the maintenance of the ditch or drain in the award mentioned, or the proportions in which it should be kept in repair or maintained. 2. That the arbitrators made an award, and then had performed all their duties and were *functi officio*. 3. The corporation of the county of Hastings were interested as the owners of the gravel road, which was a county road, alongside of which and across which the said drain or watercourse was made, and were not parties to the submission or award—with leave to the defendant to put in the report, maps and evidence, shewing

the same to be a county road. 4. That the award was not made within a month after the third arbitrator was appointed.

May 30th 1882. *Wallbridge*, Q. C., supported his order. The proceedings are governed by the sections of the Municipal Institutions Act respecting arbitration, secs. 367 to 378 inclusive. And the provisions relating to drainage are found in sections 529 to 543 inclusive. The award is bad, because more than one month elapsed after the appointment of the third arbitrator. See sec. 377, which is imperative. The award sued upon is not binding, because two arbitrators previously made an award, and their powers as arbitrators ceased. The arbitrator Nash had no notice of the making of the award; and had no opportunity of consulting as to the terms of the award sued upon. The award should apportion to each of the lots in Sidney the amount of benefit such lot derives from the drain constructed by the plaintiff, and should also provide for keeping the drain in repair. He cited *Willoughby* v. *Willoughby*, 9 Q. B. 923; *Marshall* v. *Powell*, 9 Q. B. 779; *Creighton* v. *Brown*, 1 P. R. 331; *Duckworth* v. *Harrison*, 4 M. & W. 434; *Perry* v. *Mitchell*, 12 M. & W. 799; *In re Essex and Rochester*, 42 U. C. R. 533.

J. K. Kerr, Q. C., and *Holden*, contra. The grounds stated in the judgment of the learned Judge who tried the cause, and who having heard the evidence at the trial found in plaintiff's favour, are relied on by the plaintiffs. As to Nash having notice of the intention of the two other arbitrators to act and proceed to make the award, the defendants, by appearing before the arbitrators, and attending meetings after the expiration of the month, waived the objection, and each attendance was an enlargement by consent, or a fresh submission: *Russell* on Awards, 5th ed., 140, 141. The objections relied upon by defendants should have been made grounds of motion to set aside the award; and at the date of the writ the time for moving had elapsed: *Re Moyle and City of Kingston*, 43 U. C. R. 307; *Penchen* v. *Lamb*, 25 C. P. 588. As to the objection that the award should

specify the amount of benefit to each lot, section 535 provides that the amount agreed upon by the arbitrators shall be paid out of the general funds of the municipality.

June 24, 1882. ARMOUR, J.—The report of the surveyor has not been put in evidence, and we can only know what it contained by asssuming that he did what the law required him to do in making it.

The notice of appeal from his report given by the corporation of the township of Sidney has not been put in evidence, and we can only know what it contained by the allegations made in the declaration respecting it.

The deepening and drainage which has given rise to this controversy did not extend beyond the limits of the township of Thurlow, and the following are the provisions which require to be noticed, bearing upon the controversy.

R. S. O. ch. 174, sec. 535: "Where the deepening and drainage do not extend beyond the limits of the municipality in which they are commenced, but, in the opinion of the engineer or surveyor aforesaid, benefit lands in an adjoining municipality, or greatly improve any road lying within any municipality, or between two or more municipalities, then the engineer or surveyor aforesaid shall charge the lands to be so benefited, and the corporation, person, or company, whose road or roads are improved, with such proportion of the costs of the works as he may deem just, and the amount so charged for roads as agreed upon by the arbitrators shall be paid out of the general funds of such municipality or company."

We cannot say whether or not, in the opinion of the surveyor, the deepening and drainage greatly improved any road, for we have not his report, and all that is alleged in the declaration is that it benefited lands in the township of Sidney,

If the deepening and drainage did, in his opinion, greatly improve any road, and he so reported, then he ought to have charged the corporation, person, or company whose road or

roads were improved, with such proportion of the costs of the works as he might deem just.

In charging "the lands to be so benefited" under this section the engineer or surveyor must, in the same manner as required by sec. 529, charge each lot and portion of lot with its proportion of the benefit to be derived from such deepening and drainage, and I think we ought to assume that the surveyor did by his report so charge each lot and portion of lot.

By sec. 536 "the engineer or surveyor aforesaid shall determine and report to the council by which he was employed whether the deepening or drainage shall be constructed and maintained solely at the expense of such municipality, or whether it shall be constructed and maintained at the expense of both municipalities, and in what proportion."

We cannot say that the surveyor in this case did not do his duty in this behalf, and determine and report as to the maintenance of this deepening and drainage, and there is nothing to shew that any appeal was made against his report in respect of such maintenance. Secs. 537 and 538 appear to have been complied with.

Under sec. 540 the corporation of the township of Sidney appealed from the report. This section requires a written notice of appeal, and that such notice shall state the ground of appeal.

We may assume that such notice was given and that the grounds of appeal were those stated in the declaration, namely, "that the lands in the township of Sidney were not benefited by the proposed drainage, or were not benefited to the extent, or ratably to the extent, as shewn by the report of the said surveyor," but we cannot assume that any other grounds were stated in such notice.

It was contended before us that the award was invalid because it did not specify the lands in the township of Sidney which, in the opinion of the arbitrators, were benefited by the deepening and drainage, and did not charge the lands to be so benefited with a just proportion of the cost of the works.

I think this contention well founded, and that the award is invalid on this account.

By sec. 539 "the council of such last mentioned municipality shall, within four months from the delivery to the head of the corporation of the report of the engineer or surveyor, as provided in the next preceding section, pass a by-law or by-laws to raise such sum as may be named in the report, or in case of an appeal, for such sum as may be determined by the arbitrators, in the same manner and with such other provisions as would have been proper if a majority of the owners of the land to be taxed had petitioned, as provided in the 529th section of this Act." And if the arbitrators were not required to specify in their award the lands to be benefited by the deepening and drainage, and to charge the lands to be so benefited with a just proportion of the costs of the works, it would be impossible for the council properly to perform their duty under this section.

In re County of Essex and the Corporation of Rochester, 42 U. C. R. 547, Wilson, J., delivering the judgment of the Court, says: "In my opinion the engineer or surveyor must, in case land or roads beyond the municipality commencing the work are to be assessed, assess 'every road and lot or portion of lot' according to the proportion of benefit the same, in his opinion, derives from or will derive from the work. It must be done so that each municipality may understand for what and upon what the assessment has been made, in order to test its own liability, and to ascertain in like manner for what and upon what land or roads the other municipalities have been assessed, that the liability of these other bodies may be determined, in order that a just equalization may be made of the aggregate expense among them all.

It is neccessary also that should be done, because the municipalities which are so assessed, after arranging the amounts charged respectively against them with the municipality doing the work by agreement or arbitration, have to pass a by-law, under sec. 456," (sec. 539, above

quoted,) "in order to tax those persons whose lands have been so benefited within the respective municipalities."

I think that what the engineer or surveyor must do in his report, under sec. 535, must be done on an appeal from his report by the arbitrators in their award.

Having come to this conclusion it is unnecessary for me to deal with the other grounds of objection to this award, some of which, to me at least, seem very formidable.

In my opinion the order should be absolute for judgment for the defendants with costs.

HAGARTY, C. J., and CAMERON, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

HARGREAVES v. SINCLAIR.

Slander—Repetition—Privileged communication.

The plaintiff was assistant in the shop of C., a druggist, over which the defendant and her husband, a physician, lived, the latter being C.'s landlord and customer. The defendant having in the presence of a witness accused the plaintiff of having taken $4 from her trunk upstairs, her husband told C. that the plaintiff must be discharged, or he would send him no more prescriptions. A meeting was, however, arranged between the parties in the presence of the witness, for the purpose, as they said, of an investigation. On this occasion the slanderous words were repeated, and the plaintiff was discharged from C.'s employment. *Held*, that what was said at this meeting was privileged, and the case having been left to the jury generally a verdict for the plaintiff was set aside.

ACTION for slander, tried at Walkerton, before Burton, J. A., and a jury.

Defendant was the wife of Dr. Sinclair: the plaintiff, a young man (a minor), an assistant in a drug shop, kept by one Challoner. The shop was in the doctor's premises: defendant and her family living up stairs.

On one occasion the plaintiff and one Teasdale were talking at the back door of the shop, when defendant accused him of using insulting language to her, saying that she had stood it long enough, and would put a stop to it, and that he was not to forget the time that he was up in her room, and that she had seen him at her trunk: that before this she had missed a $4 bill, and she suspected where it had gone to.

Challoner, plaintiff's employer, was away from home at the time. On his return defendant's husband spoke to him, complaining of plaintiff. Challoner said he had always found him honest, &c., and could not believe these charges without giving him a chance to speak for himself. Sinclair said, "Well, bring them face to face." He said, "Very well." Then he went and brought defendant down, and he and plaintiff met them, and Teasdale was called in. She was asked to state what she had to say against plaintiff, when she told what she had overheard of the conversation between plaintiff and Teasdale. Teasdale denied the statement. After some little conversation defendant said she had missed a $4 from her trunk upstairs, and had afterwards seen plaintiff at her trunk, and it flashed through her mind where the money had gone. Dr. Sinclair appeared to have told Challoner the whole matter, as to the insulting language, and as to the $4.

The plaintiff and Challoner both spoke of this meeting as an investigation. About twenty minutes after this conversation Challoner said Dr. Sinclair told him he would withdraw his prescriptions from him as long as he kept plaintiff in his employ, and after endeavouring to induce him to change his mind Challoner did dismiss the plaintiff, as he could not afford to lose the doctor's prescriptions.

It was objected that what took place at this meeting or investigation was privileged.

The learned Judge declined ruling that it was privileged, and the case went to the jury generally, who found for the plaintiff, and $400 damages.

May 14, 1882. *Robinson*, Q.C., obtained an order *nisi* for a new trial.

May 31, 1882. *Robinson*, Q.C., supported the order *nisi*. What was said on the second occasion was clearly privileged. The parties present were all interested in ascertaining the truth or falsehood of the charge, and were called in to investigate it, and asked to say what they knew: *Folkard*, 4th ed. 92, 93, 514; *Odgers*, 182, 204, 234. The jury should have been told to leave out of consideration what was said then, but the whole case was left to them, and the damages, which are large, were probably given chiefly for the alleged slander, which should have been withdrawn from them, The defendant has thus been prejudiced, and is entitled to a new trial.

Bethune, Q.C., contra, urged that as defendant had previously uttered the slander she was not justified in repeating it, even on a privileged occasion.

June 23, 1882. HAGARTY, C. J.—I do not think any such rule as that contended for by Mr. Bethune prevails. I refer to the comments on the cases in *Odgers*, p. 231; also to *Folkard*, 297 (ed. 1869).

The case chiefly relied on for this view seems to be *Griffiths* v. *Lewis*, 7 Q. B. 60. Plaintiff used a steelyard in her trade. She asked defendant, "Did you say that my son used two balls to the steelyard?" and defendant answered, "To be sure I did—it has been carried on for two years;" or, as another witness stated, "You have done it for years. I have been told so." Lord Denman told the jury that the question put by plaintiff did not privilege the words uttered in answer, and if uttered deliberately and without justifiable occasion, that was evidence of malice. On motion in *banc* it was much discussed.

Patteson, J., says: "If a person is supposed to have used slanderous language, and the party aggrieved asks if he has done so, and he replies that he has, and repeats it, it is impossible to say that that communication is privileged. The case is quite different from that in which a person merely goes to another and asks him if he knows

anything on a particular subject. * * I grant that if the defendant had merely acknowledged a statement made by him formerly, that would not have sustained an action, except as evidence of such former statement; but it is different when he goes on to say, 'You have done it for years.'"

Lord Denman says, "The question is in reality whether the having uttered a slander once gives a privilege to repeat it." He refers to *Padmore* v. *Lawrence*, 11 A. & E. 380, which certainly does not support the doctrine contended for by plaintiff.

In *Force* v. *Warren*, 15 C. B. N. S. 806, defendant, a butcher, accused plaintiff of stealing meat from his shop. No one was present. Plaintiff went to the police office for a summons. On notice of this defendant went to one Herring, who had been in the shop, telling him of the summons, and asked had he not seen the theft. Then a person lodging in the same house with plaintiff went to defendant and asked, did he accuse plaintiff of this. Defendant said, "Yes; and I believe it is true."

Erle, C. J., held that the communication to Herring was privileged, but not the statement to the other, as he had neither interest nor duty to repeat the charge to her.

Kine v. *Sewell*, 3 M. & W. 297. A. was building a house for B., and employed plaintiff to do some of the woodwork. B. applied to defendant to recommend him a surveyor to measure the work, and defendant told B. he had seen plaintiff take away some timber. B. told A. of this, who went to defendant and asked him did he say so. Defendant answered, "Yes; I saw the man take two long pieces of quartering."

Parke, B.: "I cannot doubt that it is a perfectly privileged communication if a party who is interested in discovering a wrong-doer comes and makes enquiries, and a person in answer makes a discovery, or a *bonâ fide* communication, which he knows or believes to be true, although it may possibly affect the character of a third person." B., to whom defendant first made the statement, was not called.

I have no doubt but that had he been called and proved what defendant had said, the ruling would have been the same as to the statements made to the plaintiff afterwards said to plaintiff's employer.

Somerville v. *Hawkins*, 10 C. B. 590, may be referred to both as to privilege, and when the question of malice should be submitted to the jury, only where "the evidence raises a probability of malice and is more consistent with its existence than with its non-existence" (per Maule, J.)

The general law as to what is a privileged communication is very fully discussed in the text books, and in such cases as *Fryer* v. *Kinnersley*, 15 C. B. N. S. 422; *Whiteley* v. *Adams*, 15 C. B. N. S. 392; *Shaver* v. *Linton*, 22 U. C. 179; *Tench* v. *Great Western Railway Co.*, 33 U. C. R., and many other cases.

In the present case we find that after certain slanderous imputations were made against this plaintiff, a discussion as to their truth or falsehood begins between defendant's husband and plaintiff's employer, Challoner, both, as I consider, interested in the matter; the husband, on behalf of his wife, Challoner as to the honesty of his assistant The doctor was Challoner's landlord, and constantly brought into contact with the plaintiff.

What took place assumed the form of an investigation into the whole matter. The doctor directs his wife to come down, and Challoner brings in the plaintiff and Teasdale, the witness, and the whole case is discussed between them.

I entertain a decided opinion that the occasion was privileged, and that all that was said fairly bearing on the subject matter of the enquiry was *primâ facie* protected, and that the jury should have been so instructed; and to bring anything then said by defendant within the law of legal liability the plaintiff would have to shew malice, the privilege *primâ facie* rebutting any presumption of malice.

It would be for the Judge to decide whether the nature of the evidence made it proper for him to leave the ques-

tion of malice to the jury, as the law is stated in some of the cases cited.

There was in this case evidence for the jury as to the utterance of the slander on the first occasion, and it is possible that a direction as to privilege on the second occasion might not have substantially affected the result.

We do not see that the evidence of what was said to the plaintiff's mother, when she went to enquire as to the rumours against her son, was objected to.

If there should be another trial it may probably be necessary for the Judge to rule as to its being privileged under the cases cited.

ARMOUR and CAMERON, JJ., concurred.

New trial, without costs.

[QUEEN'S BENCH DIVISION.]

ROBINSON v. HALL.

Mortgage—Payment—Assignment of mortgage—Trespass—Excessive damages.

H. being seized in fee of certain lands mortgaged them to W., and subsequently sold the minerals thereon, with the right to mine, to the defendant. The mortgage being overdue, W. recovered judgment in ejectment and issued a writ of *hab. fac. poss.* Defendant hearing of this wrote to H. that the mortgage must be paid, and that he must give him an order to pay it and deduct the money so paid from the purchase money of the minerals. Thereupon a memorandum was drawn up that the defendant should either pay the mortgage in full discharge thereof, or take an assignment of it as a subsequent encumbrance, for the purpose of saving the interest of defendant as also of said H. in the said lands, the amount so paid to be credited and allowed to defendant upon his purchase money of the minerals. Defendant paid the amount due on the mortgage, though his purchase money was not due to H. Afterwards H. put the plaintiff in possession of the land to farm at a rental, and the defendant having obtained an assignment of the W. mortgage and judgment, evicted the plaintiff.

Held, ARMOUR, J., dissenting, that the payment by defendant was in effect a payment by H., whereby the mortgage was satisfied, and as that payment was made for the purpose of saving H.'s interest as well as his own, the defendant would not have been justified in equity in enforcing the mortgage against H. or his assignee, the plaintiff; and that the plaintiff was entitled to damages for the trespass.

Per ARMOUR, J.—The defendant was entitled either to pay the mortgage in discharge thereof, or to take an assignment of it as a subsequent incumbrancer; he did the latter; though he was to have been credited with this payment, his own payment to H. was not due, and the credit had not in fact been made; and he therefore had the right to enforce the mortgage.

The plaintiff claimed $500. The jury assessed the damages at $1,500, and the learned Judge at the trial amended the statement of claim accordingly.

Held, that the damages were excessive, and a new trial was granted.

DECLARATION. Trespass to the east half of lot 19, 1st concession of Madoc, and expulsion of the plaintiff therefrom.

Pleas. Not guilty, not possessed, and *liberum tenementum.*

Issue.

The cause was tried at the last Spring Assizes, at Belleville, by a jury, before Wilson, C. J., when it appeared that one Benjamin Hobson being, or pretending to be, seised in fee of the east-half of lot 19, in the first concession of the township of Madoc, on the 29th of January, 1879, mort-

gaged the same, with other lands, to one Thomas Bushby Wragge, for $1,770 and interest at 8 per cent., payable in instalments, viz.: $170 1st of January, 1880, $150 1st of January, 1881, and $150 1st of January, 1882, and the residue 1st of January, 1886, with the usual statutory covenants

On the 27th day of January, A.D. 1880, Hobson agreed in writing with the defendant for the sale to him of the ores upon the said east half, giving him all necessary facilities, powers, and authority for working the said ores upon said land, for the sum of $5,500; $1,000 to be paid at the time of the agreement, and the residue in two equal yearly instalments, in January, 1881 and 1882; Hobson covenanting with the defendant that on payment of said moneys he would convey said ores to him; and there was a provision that the defendant should at any time from the date of the agreement have the right to prospect the said land; and time was to be of the essence of the agreement.

Default having been made in the payment of money under the said mortgage to Wragge, Wragge on the 14th day of February, 1880, commenced an action of ejectment in the Court of Common Pleas against Hobson for the recovery of the said mortgaged land, and on the 2nd day of March, 1880, recovered judgment in the said action against Hobson for the recovery of the possession of the said lands, and on the 6th day of March, 1880, caused to be issued a writ of *habere facias possessionem* upon the said judgment, directed to the sheriff of the County of Hastings.

The defendant, having heard of this mortgage and of the proceedings thereon, made an appointment with Hobson to meet him on the subject thereof on the 10th day of March, 1880, and Hobson having failed to meet him the defendant wrote to him the following letter:

DAFOE HOUSE, Belleville, Ont., March 10th, 1880.

Mr. Benjamin Hobson—Dear Sir—I am obliged to leave for Buffalo in the morning, and your failure to meet me to-day per agreement makes it

necessary to write. This mortgage must be paid. Now, it is necessary for you to give me a written order to pay this mortgage, and state it shall be deducted from the money coming to you for the mine. I would advise you to retain Mr. Henderson as your attorney, and let him draw the order or contract in regard to the mortgage that we may have the matter disposed of.

I would also retain Mr. Henderson to defend your interest in the Chancery suit.

T. G. HALL.

After the defendant had written this letter Hobson arrived, and the defendant thereupon sent the following note to Mr. Henderson, a solicitor in Belleville:

DAFOE HOUSE, Belleville, 188 .

Mr. Henderson—Mr. Hobson is here, and I wish you would come to the hotel to night, in matters of importance that you should know.

T. G. HALL.

Mr. Henderson having arrived, the defendant and Hobson agreed upon certain terms, which were the next day embodied in the following memorandum:

"Whereas the said Hobson has sold to the said Hall all the mineral rights and right to mine for metals and valuable mineral products on the east half of lot number 19 in the first concession of Madoc, and which agreement is reduced to writing. And whereas there was at the time of said sale, and still is, a mortgage thereon, given by the said Hobson to Thomas B. Wragge for the sum of $1,770 and interest thereon, and the same must be paid and satisfied by reason that the said Wragge has commenced proceedings thereon to enforce a sale of said property under said mortgage. And whereas it has been agreed by and between the parties hereto, that the said Hall may and shall pay the said mortgage and interest in full discharge thereof, or take an assignment thereof by purchase, as a subsequent encumbrance, for the purpose of saving the interest of the said Hall, as also the said Hobson, in the said lands—Now, therefore, this agreement witnesseth that the said Hobson hereby covenants for himself, his heirs, executors, administrators, and assigns, to and with the said Hall, his executors, administrators, and assigns, that, in consideration of his, said Hall, either paying said mortgage and interest or purchasing the same and taking an assignment thereof to himself, to protect said property and their several interests therein, that he, Hobson, will credit, deduct, and allow to the said Hall the full amount of principal and interest due or payable thereon, together with all expenses connected therewith, out of and from the amount payable by the said Hall to said Hobson, under the agreement between them, for the sale of the mining and mineral rights in said east half of lot 19, 1st concession, Madoc, and will not make any claim against said Hall, his heirs or assigns, for said moneys so payable, to the extent of said mortgage, and interest and expenses thereon or connected therewith."

This memorandum was under seal, and was executed by Hobson, but not by the defendant, who had left Belleville before it was drawn.

On the 17th day of March, 1880, the defendant obtained from Wragge, in consideration of $2,051.80, an assignment of the said mortgage and also an assignment of the said judgment in ejectment.

On the 26th day of April, 1880, Hobson, without the knowledge or consent of the defendant, made the following agreement with the plaintiff:

"Article of Agreement made this day of April 26, 1880, between Benjamin Hobson, of township of Madoc and County of Hastings, of the first part, farmer, and Mark Robinson of the township of Madoc, County of Hastings, of the second part, blacksmith, witness that the said party of the first part agrees to give the said party of the second part the right to go upon the east half of lot number 19, in first concession of Madoc, to farm it; also the west half eighteen in the second concession of Madoc, for the sum of sixty-five dollars for one year; also the party of the second party agrees to leave the place peaceably at the end of the year; also the wood of either place for the use of the house, to burn in it; and he is to pay at the signing of the lease, and pay the taxes for the year 1880.

Witness. MARK ROBINSON,
ROBERT ROBINSON, BENJAMIN HOBSON.

The plaintiff proved that he paid the $65 in advance in this manner—that Hobson owed him $5 and his brother $50, that his brother owed him: that his brother released Hobson from the payment of the $50 and charged it against him; and that he borrowed $10 from his brother and gave it to Hobson.

The evidence shewed that the plaintiff was aware of the Wragge mortgage before he made this agreement.

The plaintiff's examination was put in at the trial in which the following appeared: "Hall told me he was going to sheriff me. I had some of the furniture in, but before the family came in I understood the sheriff was coming out to put any man out that went in. Hall told me that two or three days before the sheriff came."

The plaintiff commenced to move his goods on the land on the 3rd of May, 1880, and on the 4th of May he moved

his family on to it. On the fourth day of May the defendant placed the writ of *habere facias possessionem* in the hands of the sheriff; and on the 5th day of May the defendant went with the sheriff and ejected the plaintiff, and for this alleged trespass this action was brought. The plaintiff asked the defendant to pay him the $65 he had paid Hobson. The defendant refused, and the plaintiff proceeded against him, laying his damages in his declaration at $500.

Neither the plaintiff, nor any of his witnesses, placed the plaintiff's damages at a higher figure than $500.

The learned Chief Justice made the following memorandum on the pleadings: "The parties agree the evidence taken shall be the facts of the case, and the law upon these facts is to be argued. I shall state findings upon these facts if required by the Court, with the consent of parties;" and he asked the jury to assess the damages, which they did at $1,500, for which sum he entered the verdict, amending the plaintiff's claim of damages in his declaration by increasing it from $500 to $1,500.

May 18, 1882, *Bethune*, Q. C., obtained an order *nisi* calling upon the plaintiff to shew cause why the judgment rendered for the plaintiff in this cause, and the proceedings upon which the same was based should not be set aside, and a new trial had between the parties, on the ground that the findings of the jury were against law and evidence; and for misdirection on the part of the learned Judge, in telling the jury that notwithstanding the plaintiff's landlord had made default in payment of the mortgage to Wragge, and notwithstanding the defendant was the assignee of the mortgage and of the legal estate in the land, this action would lie; and in telling the jury that the relation of trustee and *cestui que trust* existed between the plaintiff and defendant, and that the defendant violated the terms of the trust in ejecting the plaintiff; and on the ground that the damages were excessive; and on the ground that no action would lie in this cause without enforce-

ment of the alleged agreement between the mortgagor and the defendant, and that the same could not be enforced, and if enforced would not be enforced in the absence of Hobson.

May 30, 1882. *Bethune*, Q. C., supported the order, and *Wallbridge*, Q. C., and *Henderson*, Q. C., shewed cause.

June 24, 1882. ARMOUR, J.—I think the damages excessive, and such as twelve reasonable men should not have given for the injury sustained by the plaintiff, and were it necessary to do so I would concur in granting a new trial on this ground. It is unnecessary to do so, however, for I am of opinion that the defendant is entitled, under the pleadings and evidence, to judgment, because in taking possession of the land and expelling the plaintiff therefrom he was only doing what he had a right to do, being entitled to the land and to the possession of it under the Wragge mortgage.

In *Harvey* v. *Brydges*, 14 M. & W. 442, Parke, B., says: "If it were necessary to decide it, I should have no difficulty in saying that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." See also *Taylor* v. *Cole*, 3 T. R. 292; *Newton* v. *Harland*, 1 M. & G. 644; *Davison* v. *Wilson*, 11 Q. B. 890; *Burling* v. *Read*, 11 Q. B. 904; *Meriton* v. *Combes*, 9 C. B. 787; *Pollen* v. *Brewer*, 7 C. B. N. S. 371; *Lows* v. *Telford*, L. R. 1 App. 414; *Stroud* v. *Kane*, 13 U. C. R. 459.

It was contended, however, that by the memorandum of March 11th, 1880, the Wragge mortgage was satisfied, and afforded therefore no justification to the defendant.

This contention is, I think, unfounded.

The defendant was obliged to make some arrangement with respect to the Wragge mortgage, in order to prevent Wragge turning him out of possession of the mines on the mortgaged lands, which he was then engaged in working, and his manifest object in procuring that memorandum was to prevent the possibility of his being obliged to pay the Wragge mortgage in addition to the price he had agreed to pay for the minerals.

By this memorandum he is expressly given the option either of paying the said mortgage and interest in full discharge thereof, or of taking an assignment thereof by purchase, as a subsequent encumbrance, for the purpose of saving his interest, as also the interest of Hobson in the said land. He adopted the latter option, and thus became entitled to the rights of Wragge, as mortgagee of the land.

It is true that by the memorandum Hobson covenanted that he would credit, deduct, and allow to the defendant the full amount of principal and interest due or payable thereon, together with all expenses connected therewith, out of and from the amount payable by the defendant to him under the written agreement between them of January 27th, 1880, and that he would not make any claim against the defendant for said moneys so payable to the extent of said mortgage and interest, and expenses thereon; but no such credit, deduction, or allowance had been made at the time of the alleged trespass, and money to the extent of the amount paid by the defendant to Wragge for the assignment of the said mortgage had not then become payable to Hobson under the said written agreement.

I think, therefore, that the said mortgage was not, at the time of the alleged trespass, a satisfied mortgage, and that the defendant was entitled to the possession of the mortgaged land thereunder.

Nothing whatever is said about the possession of the mortgaged land in the memorandum, nor, as far as the evidence shews, was anything said about it by either Hobson

or the defendant in the negotiation which led to the making of it.

The right of the defendant to the possession as assignee of and under the Wragge mortgage remained unaffected by anything that took place between him and Hobson, and there was nothing in the transaction from which a tenancy at will could be implied; but if such a tenancy could be so implied, it was clearly determined before the alleged trespass.

To test whether under the circumstances which occurred Hobson was entitled to the possession, let me assume that Wragge had been put into possession by the sheriff under the *habere facias possessionem*, upon his judgment; that then the memorandum of March 11th, 1880, had been made, and that then the defendant had taken an assignment of the Wragge mortgage and of the judgment in ejectment, and had received possession of the land from Wragge—could Hobson have brought ejectment against the defendant for the land by reason of anything contained in this memorandum, or by reason of anything shewn by the evidence to have taken place between them? I think clearly not.

In my opinion the plaintiff's action should be dismissed, with costs.

HAGARTY, C. J.—It may be that, speaking in a purely technical sense, the Wragge mortgage may not be considered as a paid mortgage; and it may be also that, under the former system the defendant, as assignee of it, might have successfully set it up as a bar to this action at common law; and the plaintiff, or Hobson, as his landlord, might have had to apply to equity to restrain defendant from using it to the disturbance of either.

But I think we are now bound to treat the parties and their rights as they would be either at law or in equity (*a*).

When defendant became the assignee of Wragge, whose mortgage covered the whole land, the contract of sale be-

(*a*) See *Pugh* v. *Heath*, L. R. 7 App. Cas. 237.

tween him and Hobson of the minerals was in force, and his purchase money considerably exceeded the amount due to Wragge.

The effect of the agreement between him and Hobson was, I think, distinctly to protect their respective interests, both jeopardized by Wragge's proceedings. Whatever money he should pay to Wragge was to be applied to and credited on his purchase money to Hobson, thus protecting Hobson's estate in the surface and his own in the minerals.

It seems to me that the Court of Equity would promptly interpose to prevent defendant from disturbing plaintiff's possession of his interest in the surface, and that we are bound to do the same, if necessary, or, what will amount to the same thing, to treat the Wragge mortgage as in defendant's hands merely for the purposes of the contract for the sale of the minerals, and incapable of being used in any way for any other purpose.

As to the damages, I consider them as indefensibly excessive, and such as no reasonable jury should have awarded.

I see no reason whatever for estimating the plaintiff's damages at a higher amount than he himself placed them at in advancing his claim against defendant, viz., $500, and I should have thought that amount most ample compensation for any damage he could have sustained; first, for the actual injury done to him, and secondly, for any reasonably temperate damages which it would have been proper to allow over and above the actual amount proved.

Nothing came to light which was unknown to the plaintiff when he first estimated his loss, and I have heard nothing that would have induced me to have allowed the amount claimed to be amended.

Men do not usually underestimate their own injuries, and I think in a case like this I hardly understand how a jury called to try the justice of a claim brought by one man against another are to award him threefold more than he asked.

In my opinion there should be a new trial without costs, unless the plaintiff elect to reduce his verdict to $500: if he do so, then rule discharged, with costs.

CAMERON, J.—I am of opinion that the payment by the defendant of the mortgage from Benjamin Hobson to Thomas B. Wragge was in effect a payment by Hobson, and that at the time of the alleged trespass, as between them, the mortgage had no more effect in giving title to the defendant than it would have done if Hobson with his own hand and money had paid it, and the defendant had taken an assignment of it from the mortgagee; and I think title cannot be made under a paid mortgage against the mortgagor or any one claiming under him: *Doe McKenny et ux.* v. *Johnson*, 4 U. C. R. 508.

It is impossible to read the defendant's letter of the 10th of March, 1880, and the agreement signed by Hobson based thereon, without coming to the conclusion that by paying Wragge the defendant paid in advance so much of the purchase money payable by him in respect of the minerals; and that it was not in the contemplation of either party that he should have the right to enforce payment of the mortgage money in any other way than by a credit on the purchase of the mining right, it being the clear and expressed intention of both parties that the mortgage should only be kept alive for the protection of the interests of both in the land. What can be clearer or more expressive than the defendant's language: "This mortgage must be paid. Now, it is necessary for you to give me a written order to pay this mortgage, and state it shall be deducted from the money coming to you for the mine?" And when he accepted Hobson's agreement containing the recital, "Whereas it has been agreed by and between the parties hereto that the said Hall may and shall pay the said mortgage and interest in full discharge thereof, or take an assignment thereof by purchase, as a subsequent incumbrancer, for the purpose of saving the interest of the said Hall as also the said Hobson, in the said lands; and Hobson covenants that in consideration of his, said Hall, either paying said mortgage and interest, or purchasing the same and taking an asssignment thereof to himself to protect said property and their several interests therein, that he, Hobson, will credit,

deduct, and allow to the said Hall the full amount of principal and interest due or payable thereon, together with all expenses connected therewith, out of and from the amount payable by said Hall to said Hobson, under the agreement between them for the sale of the mining and mineral rights in said east half of lot 19, 1st concession Madoc, and will not make any claim against said Hall, his heirs or assigns, for said moneys so payable to the extent of the mortgage and interest and expenses thereon or connected therewith," it would be depriving language of its force and import, to say the money paid to Wragge was not paid on Hobson's behalf and to discharge him from all liabilty on the mortgage to the extent of the amount paid. The very moment Hall paid Wragge he thereby paid so much of the amount payable by him to Hobson, and the moment he was so paid the mortgage was paid by Hobson.

There can be no doubt in law trespass cannot be maintained against the person having title to land and the right to possession by a person in possession and having no right to the possession, by reason of the entry by the former upon the land and the forcibly excluding him from such possession. But in the present case the plaintiff had a right to the possession as against the defendant, and the defendant had no right to enter upon him. The plaintiff's action is therefore well brought, and he is entitled to some damages for the trespass committed. The amount awarded him is greatly disproportioned to any injury he has sustained, and cannot be allowed to stand. I think therefore there should be a new trial on the ground of excessive damages, but it must be on payment of costs.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. THE CORPORATION OF THE COUNTY OF CARLETON.

River between municipalities—Boundary—Middle of main channel—Cummings' Island—County of Carleton—Bridge—Liability to repair.

The township of Gloucester and the city of Ottawa, which was part of the township of Nepean, are on the easterly and westerly sides respectively of the river Rideau, and both within the county of Carleton. In the river at this point is situate Cummings' Island, and a bridge extended from the Ottawa side to the Island, and from the opposite side of the Island to the Gloucester shore. A line drawn down the middle of the river, equidistant from the banks, without regard to any islands, would leave the greater part of Cummings' Island on the Gloucester side, but the channel between the Island and Gloucester, is the most navigable, while the largest amount of water passes through the other channel.

Held, that a line so drawn properly ascertained the limit between the adjoining municipalities, for the words "middle of the main channel," used in 14 & 15 Vic. ch. 5, sec. 11, and R. S. O. ch. 5, sec. 10, have their common law signification of the middle of the stream, and therefore the Island formed part of the township of Gloucester, and that part of the bridge from the Island to the latter township was wholly within that township.

Per ARMOUR, J.—If this be not the true construction, then, as the Legislature were dealing with territorial and proprietary rights, and not with navigation, the words "main channel" mean the widest and not the deepest or most navigable channel, in which case also the Island would be wholly within Gloucester.

The county was found guilty on an indictment for not keeping the bridge in repair, which had been removed into this Court, but the indictment described the bridge as being in the townships of Gloucester and Nepean.

Held, that by 12 Vic. ch. 81, sec. 201, schedule B 4, the easterly limit of Ottawa is the middle of the river, and is coincident with the westerly limits of Gloucester, and that no part of the township of Nepean lies between Ottawa and the river; and the bridge was therefore wrongly described as being in the two townships.

Held, also, that though this could have been amended at the trial, it could not be amended on this motion, and a new trial was ordered.

Per CAMERON, J.—The situation of the island in the river should not affect the liability of the municipality, for the bridge was evidently a county work, being intended to span the whole river and form a way from one bank to the other, the Island, which was out of the direct course that the bridge would otherwise have taken, being merely used for engineering purposes.

Held, also, that under R. S. O. ch. 174, sec. 495, the duty of maintaining the bridge was cast upon the city and county.

AT the Court of Oyer and Terminer for the county of Carleton, held on the third day of October, 1881, the defendants were indicted for the non-repair of "a certain public

wooden bridge, situate and being in the several townships of Gloucester and Nepean, in the County of Carleton, and crossing the main channel of a river, called the river Rideau, from said township of Gloucester to an island in said river, called Cummings' Island, which island is in and forms part of the said township of Nepean, the middle of said main channel of said river Rideau forming the boundary line between the said township of Gloucester and said township of Nepean." And the indictment averred that the said bridge was wholly within the said county of Carleton, and that no portion thereof was in any other municipality within the said county of Carleton than the townships of Gloucester and Nepean aforesaid, and was not over any river forming or crossing a boundary line between any city or separated town within said county of Carleton, or between said county of Carleton and any other county, and that the corporation of the county of Carleton were of right bound to maintain and repair the said bridge when and so often as it should be necessary.

This indictment was removed into this Court, and the defendants pleaded not guilty thereto, and the same came on for trial at the last Spring Assizes at Ottawa, and was there tried by a jury before Osler, J., when it appeared that under instructions from D. W. Smith, acting surveyor-general, dated September 1st, 1793, one Stegman, a deputy-surveyor, laid out four townships on the river Rideau, as appeared by his report of the survey thereof, dated October 28th, 1794, one of which, now named Gloucester, he laid out on the easterly side of and adjoining the river Rideau, and on the southerly side of and adjoining the river Ottawa, and another of which, now named Nepean, he laid out on the westerly side of and adjoining the river Rideau, and on the southerly side of and adjoining the river Ottawa.

The river Ottawa thus formed the northerly boundary of these two townships, the river Rideau the boundary between them; and the southerly boundary of each of

them, produced in a right line, formed the southerly boundary of the other.

No mention was made either in the instructions or report of any island in the river between them.

There was, however, a small island in the river Rideau between these two townships, situate opposite to lot letter C, in concession D of Nepean, afterwards and now called Cummings' Island.

This island was not, at the time of the passing of the Act 14 & 15 Vic. ch. 5, included in either of the said townships, or in any other township in the original surveys and plans thereof then remaining of record in the office of the Commissioner of Crown Lands.

A plan of this island was, however, afterwards and on February 9th, 1857, made for the Crown Lands Department by one Swalwell, a Provincial Land Surveyor; and on April 11th, 1864, the Crown granted it to one Robert Cummings, describing it as situate in the River Rideau, in the county of Carleton, and as being an island in the said River Rideau opposite to lot letter C, in concession D, of Nepean, and as containing by admeasurement three quarters of an acre, be the same more or less.

As long ago as 1833 a bridge was constructed, in continuation of a road known as the Montreal road, from the Gloucester shore to a point near the northerly end of Cummings' Island, and from a point near the northerly end of Cummings' Island to the Nepean shore, the site of which bridge is now occupied by the present bridge.

The length of the present bridge from the abutment on the Gloucester shore to the easterly abutment on Cummings' Island was proved to be 211 feet, and from the westerly abutment on Cummings' Island to the Nepean shore was proved to be 225 feet, and the distance between the abutments on the island to be eighty feet.

One witness proved that, in the natural condition of the island and the shores, the river at the point where the bridge crosses was a little wider between the Gloucester shore and the island than between the island and the Nepean

shore, but that at the southerly end of the island the river between the Gloucester shore and the island was but half as wide as it was between the island and the Nepean shore.

The weight of evidence also established that a line drawn along the middle thread of the river, equidistant from the Gloucester and Nepean shore, would divide this island, so as to leave the greater part of it on the Gloucester side of such line.

The jury found that the eastern channel was the most navigable channel in its natural condition, but that the largest amount of water passed through the western channel.

The learned Judge thereupon ruled that this finding was, according to the direction he had given them, a verdict of guilty, which verdict was accordingly recorded.

May 26, 1882. *Mosgrove* obtained an order *nisi* calling upon the Crown to shew cause why the verdict should not be set aside and a verdict of not guilty entered, or why a new trial should not be granted, on the ground that the verdict was not warranted by the finding of the jury, and that the finding of the jury amounted to a verdict of not guilty, inasmuch as the jury found the larger channel not within the indictment, and because in fact the jury did not find facts on which a verdict could be entered; and for misdirection and non-direction of the learned Judge, in not leaving the question of guilty or not guilty to the jury, and leaving them to find only certain questions on which no definite verdict of guilty or not guilty could be given; and on the ground that the verdict was contrary to law and evidence, there being no certain evidence offered on which the verdict of guilty could be rendered, and the defendants were therefore entitled to an acquittal.

May 29, 1882. *Bethune*, Q. C., (*Gibb* with him,) shewed cause.

Robinson, Q.C., (*Mosgrove* with him,) supported the rule. The arguments sufficiently appear from the judgments.

June 24, 1882. ARMOUR, J.—The limits of the city of Ottawa were, by 18 Vic. ch. 23, declared to be those assigned to the town of Bytown by 12 Vic. ch. 81, sec. 201. schedule B 4, which were as follow: "Commencing at the waters of the river Rideau, on the line which divides lots E and F, in concessions D and C, and thence in a continuous direct line across lot No. 40, to the side line dividing lots Nos. 39 and 40; thence following the said line northerly in the first concession to the line dividing concession A and the first concession, and in concession A embracing the whole of the broken lot No. 39 to the river Ottawa, including all the islands down to the southerly end of the chain bridge; thence following the waters of the Ottawa in the centre of the channel to the western branch of the waters of the river Rideau; thence against the stream up the river Rideau to the place of beginning."

By 14 & 15 Vic. ch. 5, sec. 11, it was enacted, "That the limits of the townships on the bay of Quinté, the river Trent and its lakes, lake Simcoe, the river Severn, the river Rideau and its lakes, the river Thames, the Grand river, and any other rivers, lakes, and bays not hereinbefore mentioned, shall in like manner extend to the middle of the said lakes and bays and to the middle of the main channels of the said rivers respectively, but shall also include all the islands not herein otherwise provided for, the whole or the greater part of which shall be comprised within the outlines of the said townships so prolonged; excepting always any islands or parts of islands which are townships by themselves, or which have been expressly included in other townships in the original surveys and plans thereof remaining of record in the office of the Commissioner of Crown lands, and which shall remain part of such townships."

I think it apparent from the language of the last mentioned Act, that the Legislature in therein providing for the limits of the townships were so providing for the limits of townships as originally surveyed and laid out, without regard to the fact that out of some of them cities, towns, and incorporated villages had been carved.

If therefore the easterly limits of the city of Ottawa, as above described, do not extend to the middle of the main channel of the river Rideau, the easterly limits of the township of Nepean do so extend, and in such case there would be a strip of the township of Nepean lying between the easterly limits of the city of Ottawa and the middle of the main channel of the river Rideau.

The indictment is framed upon the supposition that there is such a strip, and that Cummings' Island, which lies northerly of the southerly limits of the city of Ottawa, as above described, forms part of it.

I think this supposition erroneous, and that no part of the township of Nepean outside of the limits of the city of Ottawa lies between the easterly limits of that city and the township of Gloucester.

The legal effect of the description of the easterly limits of the city of Ottawa, as given in 12 Vic. ch. 81, sec. 201, Schedule B. 4., is, in my opinion, to make the middle of the river Rideau its easterly limit; and by the middle of the river I mean a line drawn through the middle of the river equi-distant from each shore, without reference to any islands that may be in the river. See *Re McDonough*, 30 U. C. R. 288.

I think also that a line drawn in like manner is the limit between the townships of Gloucester and Nepean, within the meaning of 14 & 15 Vic. ch. 5, sec. 11, and so the easterly limits of the city of Ottawa, so far as they extend, are coincident with the westerly limits of the township of Gloucester; but that Cummings' Island, being cut by a line so drawn, and the greater part of it being thus comprised within the outlines of the township of Gloucester, must be included within the limits of the township of Gloucester.

In my view the words in 14 & 15 Vic. ch. 5, sec. 11, "to the middle of the main channel of the river" mean nothing more than to the middle of the river, or to the middle of the bed or alveus of the river; for I do not think that the Legislature intended to make a different boundary

for a township bounded by a river, than it would have had at common law if bounded by a river.

The Crown had, no doubt, granted lands in the townships on each side of the rivers mentioned in that section, bounded by such rivers, the grantees of which would be entitled under their grants to the land to the middle of these rivers, to be ascertained by a line drawn in the manner I have above indicated; and it is unlikely therefore that the Legislature intended to make any other boundary for the townships on each side of these rivers, than what would have been the common law boundary of the lands granted in such townships on each side of the said rivers.

If, however, the words, "to the middle of the main channel of the river," are to have a different meaning from that which I have ascribed to them, and we must give some distinct and ulterior meaning to the words main channel, then I think that, as the Legislature were dealing not with navigation, but with territorial and proprietary rights, and were dealing not with the rivers but with the land under the rivers, we must hold the words main channel to mean the widest channel, and not that which is deepest or most navigable.

And as, according to this construction, the main channel of the river Rideau would be between Cummings' Island and the city of Ottawa, Cumming's Island would be included within the limits of the township of Gloucester, and no part of the township of Nepean would lie between the township of Gloucester and the city of Ottawa.

The effect of our decision as above expressed is, that the present indictment cannot be sustained, owing to the mis-desciption of the bridge mentioned in it.

This might have been amended at the trial: see *Regina* v. *Sturge*, 3 E. & B. 734; but I think it is too late to amend it now: see *Regina* v. *Harris*, 1 Dears. 344; *Regina* v. *Larkin*, 1 Dears. 365.

There must therefore be a new trial.

As the parties intimated a desire that we should determine

on whom the duty is cast of maintaining the bridge in question, we think we ought to yield to that desire in the hope of preventing further litigation. We all think that the duty of maintaining this bridge is cast upon the county of Carleton and the city of Ottawa under sec. 495 of R. S. O. ch. 174. The river Rideau—that is the whole river, without regard to the accident that Cummings' Island is in it, and notwithstanding that fact—forms, in our opinion, a boundary line between the county of Carleton and the city of Ottawa within the meaning of that section.

CAMERON, J.—By the operation of section 10, ch. 5, R. S. O., I am of opinion, on the evidence, the island called Cummings' Island is in the township of Gloucester, the greater part of such island being within the boundary of that township, as the same must be determined under that section; that is, by extending the side lines, or north and south boundaries, to the middle of the main channel, or, in other words, the middle thread of the River Rideau. Then, is the bridge in question a bridge over a river forming or crossing boundary lines between two municipalities? It is contended by the defendants that it is not, because by reason of this small island there are two channels at this point of the river; the deeper or more navigable channel, according to the finding of the jury, was the eastern, between the township of Gloucester and Cummings' Island, but the largest amount of water passed through the western, or channel between the city of Ottawa, otherwise the township of Nepean, and the island, and the bridge across such eastern channel was wholly within the township of Gloucester, treating the island as part of the township. This contention is to some extent correct, and if the scope and object of section 495 of ch. 174 were not clearly in favour of the view that a bridge such as this is should be kept in repair by a county alone, or by a county and city jointly, might be entitled to prevail to exempt the defendants from responsibilty, or to impose the burden of maintaining the bridge crossing the eastern channel upon the township of Gloucester alone.

But looking to the object of that clause, a bridge across the Rideau must be deemed a county work. A line drawn directly across the river from the abutment of the bridge on the main shore of Gloucester to the abutment in the city of Ottawa, would not cross more than one channel, as the river at the points indicated has only one channel, is a continuous uninterrupted expanse of water; and if the bridge had been constructed in such direct line there could be no room for questioning that the obligation of keeping it in repair would devolve upon the municipalities of the county of Carleton and the city of Ottawa. Then the defendants, as one of the municipalities charged with the duty of repairing it, would be liable to be indicted for its want of repair.

I do not think the fact that the bridge, instead of having been constructed in such direct line, has been diverted from that line in order to utilize a part of the island, and lessen the extent of the work to be done in the construction of the bridge, makes it less a bridge over the river Rideau, connecting the township of Gloucester with the city of Ottawa, than if it had gone in such direct line, the object of its construction being to connect the two municipalities, and not merely as a means of reaching the island. If, instead of a small island fit for cultivation, it had been a mere rock which was utilized in place of building an arch or pier for the bridge, I presume it could not sensibly be contended that the bridge would not be a continuous bridge across or over a river dividing two municipalities; and if not, I do not see any principle upon which the burden of its construction or repair should be shifted from the larger to the less municipality. It may be a question of fact for what purpose the bridge was built—that is, the connection of the island with the main shore, or the two main shores, the island being used as part of or in aid of the work.

In the view I take, the defendants would have been properly convicted; but the indictment incorrectly describes the bridge as being in the townships of Gloucester

and Nepean, while it is in fact a bridge between the shore of Gloucester and the city of Ottawa. This is a fatal variance, and, as my brother Armour has pointed out, this Court has no power to amend at the present stage of the proceedings.

The verdict of guilty must therefore be set aside, and a new trial had.

HAGARTY, C. J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

EDGAR V. MAGEE.

Bill of exchange—Statute of Limitations.

The bill of exchange in this action fell due on 1st December, 1875, and the writ issued on the 1st December, 1881.

Held, (CAMERON, J., dissenting,) that the statute began to run on the 2nd December, 1875, and therefore that this action was commenced in time.

Sinclair v. *Robson*, 16 U. C. R. 211, remarked upon.

Per ARMOUR, J.—Though the holder of a bill may put himself in a position to commence his action on the day the bill falls due by demanding and being refused payment, he is not bound to do so; and if he does not, the acceptor has the whole of the day of maturity in which to pay the bill, and the statute does not commence to run until the day after. *Quære*, whether even in case of such demand and refusal, the statute will begin to run on that day.

Per CAMERON, J.—Inasmuch as by C. S. U. C. ch. 42, sec. 15, the bill might have been protested at any time after three o'clock on the day it fell due it was then overdue, and the action was commenced too late.

Held, also, that the plaintiff, under the facts stated below, had established his right to sue upon the bill.

THE plaintiff's claim was on a bill of exchange, dated 28th September, 1875, drawn by D. Edgar & Co. on the defendant, and accepted by him, for the sum of $600, payable to the order of the drawers, two months after date. Averment, that the bill was endorsed to the plaintiff.

The defendant alleged, in his statement of defence, that one John J. Magee was indebted to D. Edgar & Co., in a large amount, and by arrangement between them the bill was drawn on the defendant and accepted by him for the accommodation of and as surety for the said John J. Magee, as collateral security for the indebtedness of the said John J. Magee to D. Edgar & Co., for which indebtedness the said John J. Magee continued liable; and, save as stated, there was no consideration for the defendant's accepting the bill; and the plaintiff, who was then a member of the firm of D. Edgar & Co., knew the said facts: that subsequently the said D. Edgar & Co., agreed with the said John J. Magee to extend and did extend the time for the payment of the bill, and accepted from the said John J. Magee other bills of exchange and promissory

notes for the amount of his indebtedness to them, including the said bill: that the said D. Edgar & Co. by deed released the said John J. Magee from his indebtedness, and agreed to accept from him a composition of fifty cents in the dollar on such indebtedness: that the defendant, except by the service of the writ of summons, was not required to pay the bill, and had no intimation that the said bill was outstanding: that the said D. Edgar & Co., by their dealings with the said John J. Magee, released the defendant from all liability on the said bill, if the same was not paid; but that the said John J. Magee had fully paid and satisfied the said bill to them.

There was also a plea of the Statute of Limitations. The plaintiff replied, denying the defendant's statement of defence, and alleged that D. Edgar & Co. became parties to certain deeds, extending the time for the payment of the indebtedness of the said John J. Magee, but each deed stipulated that until all persons who were creditors of the said John J. Magee over and above a certain amount should sign the said deeds, they should be of no force, and all the parties who were to sign them to make them binding did not sign them.

The case was tried at Stratford in May last, without a jury, by Burton, J. A.

From the evidence it appeared the plaintiff was the managing partner of the firm of D. Edgar & Co., which consisted of the plaintiff, John N. Tarbox and John Barry. The partnership was dissolved by the insolvency of Tarbox, whose assignee in insolvency assigned his interest in the partnership to the plaintiff and Barry, and the latter on 8th January, 1878, assigned his interest to the plaintiff, who thereby became sole owner of the assets of the estate.

The bill of exchange sued on was as follows:

"$600. Mitchell, Sept. 28, 1875.

"Two months after date pay to the order of ourselves at Merchants' Bank, London, Six Hundred Dollars, and charge to account of William Magee, London.

"D. EDGAR & Co."

It was accepted on the 27th October by William Magee, and was endorsed by D. Edgar & Co., to the order of the Merchants' Bank of Canada.

When produced in evidence the name D. Edgar & Co. appeared with a line drawn through it, and there was no endorsement by the Merchants' Bank, and there was stamped on it the words, "the property of the Merchants' Bank of Canada."

The plaintiff's firm retired the bill at maturity and received it from the bank, and the plaintiff then cancelled the name D. Edgar & Co., by running his pen through it, as was his practice.

The bill became due 1st December, 1875, and the action was commenced on the 1st December, 1881.

The defendant accepted the bill for the accommodation of his brother John J. Magee, and the plaintiff's firm drew the bill at the request of John J. Magee.

The learned Judge, after reserving judgment, found in favour of the plaintiff, for $816 and costs.

May 31st, 1882, *Bethune*, Q. C., moved, in pursuance of notice previously given, to set aside the judgment for the plaintiff, and to enter judgment for the defendant, on the following grounds:

1. The plaintiff was not the holder of the bill sued on at the commencement of this action, the same having been endorsed to the Merchants' Bank of Canada.

2. The cause of action did not accrue within six years.

3. The defendant, being only surety for John J. Magee, as the plaintiff knew, was discharged by the plaintiff agreeing to extend the time for payment to the said John J. Magee, and taking from him his notes for $750 and $1,050.50, and subsequent notes in successive renewal of the latter.

4. That the execution by the plaintiff of the two composition deeds of John J. Magee released the defendant.

5. That the plaintiff took the notes of John J. Magee in satisfaction of the bill sued on.

In support of the motion he argued: The statement of claim alleges that D. Edgar & Co. endorsed to plain-

tiff. The defence does not admit (and therefore denies) this. The bill is produced and is proved by plaintiff to have been discounted with the Merchants' Bank and specially endorsed to the bank by D. Edgar & Co., and there is no endorsement by the bank. The signature of D. Edgar & Co. on the endorsement is struck out. Plaintiff says he did it by mistake (or rather not knowing its effect) after he took it up at maturity, to prevent its re-issue. If the bank are holders they should be parties. If the firm of D. Edgar & Co. are holders then the individual partners should endorse, as the right of action on the bill cannot pass by separate assignment.

At the trial plaintiff's counsel applied for leave to add the bank, if necessary, and also for leave to strike out the special indorsement, which was opposed on the ground that it is only after a blank endorsement the holder can strike out; and also for leave for plaintiff to endorse in D. Edgar & Co.'s name to plaintiff; but the Judge pointed out that the insolvency of Tarbox worked a dissolution, and after dissolution each partner must endorse.

Then, as to the Statute of Limitations, the bill fell due 1st December, 1875; the writ issued 1st December, 1881. If the bank are holders and added now, it is too late.

He referred to *Chalmers* on Bills of Exchange, 106, 107; *Cuvillier* v. *Fraser*, 5 U. C. R. 152.

J. K. Kerr, Q. C., contra. As to the Statute of Limitations, the writ is issued in time under *Freeman* v. *Reed*, 4 B. & S. 174; *Garden* v. *Breese*, L. R. 3 C. P. 300.

Then, as to the objection to the endorsement, the bank has stamped above the signature "D. Edgar & Co." the usual special words, "pay the Merchants' Bank of Canada." It is proved that was done without the knowledge of the firm, and that on payment the bank handed the firm the bill just as it was. Then, the endorsement, "D. Edgar & Co.," is cancelled. This, however, was proved to have been done simply to guard against loss of the bill, and claim by a holder. At the trial leave was asked to strike out the special endorsement, as the holder had the right to

do, and for leave to have the bill properly endorsed, if required.

The equitable title of the plaintiff was also relied on by virtue of the assignment from the assignee of one partner, and from the other partner personally, of all the assets of all the firm to the plaintiff. This gave him the right to call upon all necessary parties to endorse, and thus establish a good equitable right to sue.

June 24, 1882. CAMERON, J.—The defendant's counsel has placed his defence on three grounds: first, that the bill produced does not support the statement of claim, as the bill was not endorsed by D. Edgar & Co. to the plaintiff, and appears to have been specially endorsed to the Merchants Bank, and was not endorsed by the bank; secondly, that the plaintiff's claim is barred by the Statute of Limitations, as an action might have been brought upon it on the 1st day of December, 1875, after the closing of the bank on that day, and so six years had expired on the night of the 30th November, 1881, and the claim was barred on the 1st December, 1881, when the suit was commenced; and lastly, that by the dealings between the plaintiff's firm and John J. Magee, the firm's principal debtor, the defendant was discharged from liability.

I will deal with the last ground first. [The learned Judge here reviewed the evidence at length, which was contradictory, and which it is thought unnecessary to set out here.]

I am, therefore, of opinion the defendant has established his defence as set forth in the fourth paragraph of his statement of defence, being the agreement by D. Edgar & Co. with John J. Magee for the extension of the time for payment of the bill, the amount of the defendant's bill being included either in the $750 note or the $1,050.50 note; and whichever way it was there was an extension of time to John J. Magee beyond the maturity of the bill, without the knowledge or consent of the plaintiff.

As to the objection to the plaintiff's recovery on the ground that the claim was barred by the Statute of Limitations, it is necessary to determine when the plaintiff's cause of action arose. The bill by its terms was payable two months after date; it was dated the 28th September, 1875, and so by force of its own terms it was payable on the 28th November, 1875. By operation of the law relating to bills of exchange and promissory notes the time for payment was extended for three days. The third day of grace was the 1st December, 1875, and no right to sue upon the bill—that is no cause of action—arose until the last moment of that day. A suit therefore commenced, as this was, on the 1st December, 1881, would be commenced within six years, as there was no cause of action till the 2nd December, 1875.

But the difficulty in the present case is caused by the Act. ch. 42, Con. Stat. U. C., by sec. 15 whereof it is enacted "all protests of inland or foreign bills of exchange or promissory notes, for dishonour, either by non-acceptance or non-payment, may be made on the day of such dishonour, at any time after non-acceptance, or, in case of non-payment, at any time after the hour of three o'clock in the afternoon;" and in *Sinclair* v. *Robson*, 16 U. C. R. 211, this Court held, under this provision, the maker of a promissory note could be arrested after three o'clock on the last day of grace; thus laying down the law in effect to be that the cause of action on the note was complete before the expiration of the day of maturity. Robinson, C. J., expressed an opinion that independently of the statute, the plaintiff was entitled to sue out process when he did: that was at five o'clock in the afternoon of the last day of grace; and this after consideration of the cases *Leftley* v. *Mills*, 4 T. R. 170, and *Wells* v. *Giles*, 2 Gale 209, the latter of which he distinguished, as being a decision in respect of a bill of exchange, and governed by 9 & 10 Wm. 3, ch. 17, under which the cause of action or right to sue was not complete till after the expiration of the third day of grace. McLean, J., in the same case,

said: "If a note is payable on a particular day at a bank, it must be paid before three o'clock, or it becomes dishonoured, and may be protested immediately after that hour. If *payable before* or at three o'clock, it must be due at that time, and any note which is overdue may be sued."

In *Leftley* v. *Mills*, referred to in the judgment of the Chief Justice, Lord Kenyon expressed the opinion that an acceptor of a bill of exchange had until the last moment of the day of grace to pay the bill, and was not chargeable with the expenses of noting for protest where he paid after such noting. He said: "The question here is, on what day and at what time the defendant was bound to pay this bill. According to the nature of the contract the acceptance was an undertaking to pay the bill on the last of the three days of grace. Now, unless there be something in this case to distinguish it from other contracts, it must be governed by the same rules. In the case of mortgages, bonds, and a variety of other instruments, whereby parties oblige themselves to the performance of certain duties, as to pay money within a certain time, we find the rule to be, without any exception, that the party bound has till the last moment of the day to deliver himself from the obligation by paying." Buller, J., while concurring in the result, that the action did not lie in that particular case, added: "I cannot refrain from expressing my dissent from what has fallen from my Lord respecting the time when the payment of bills of exchange may be enforced. The rule as to the time of paying rent or any of the other cases mentioned by my Lord cannot I think apply to this case. But one of the plaintiffs' counsel has correctly stated the nature of the acceptor's undertaking, which is, to pay the bill *on demand on any part of the third day of grace*; and the rule is now so well established that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace. Now, that supposes a default in the payment, for a protest cannot

exist unless default be made. But if the party has until the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore, the usage on bills of exchange is established. They are payable at any time on the last day of grace on demand, provided that demand be made within reasonable hours."

It seems to me that the language of both Judges will, read in connection with ch. 42 Con. Stat. U. C., sustain the judgment of this Court in *Sinclair* v. *Robson*; and while that judgment is not on the very point now in question, it is not in principle distinguishable, and should govern our decision. The bill in question is in terms payable at a bank, if that would make any difference, but I think it would not, as the statute permits the protesting of any bill after three o'clock on the last day of grace. The defendant is therefore entitled to succeed also on the paragraph of his statement of defence as to the Statute of Limitations.

The remaining objection to the plaintiff's right of recovery, namely, that the bill was not in fact endorsed to the plaintiff, is technically correct, but it was not raised in pleading, and if it had been, the plaintiff had a right in equity to sue on the bill, as one of the payees, having acquired the interest of his co-partners, the other payees, in the bill. In stating that the defence was not raised in pleading, I do not wish to be understood as determining that this is or is not a case in which the plaintiff was bound to prove, though not denied, the allegation that the bill was endorsed to him. Under the circumstances the objection is technical and one of form, and the plaintiff should be allowed to make any amendments necessary to remove the objection, but as on the merits the defendant is entitled to succeed, it is not of any importance.

HAGARTY, C. J.—The first question to be disposed of is that of the Statute of Limitations. The bill fell due on December 1st; it was payable at the Merchants Bank; the defendant is the acceptor, and did not pay. It was not protested.

It was contended before us that as an action accrued and could have been commenced after bank hours on that day, the statute began at once to run, and the claim is barred.

Unless absolutely required for the decision of the case I do not desire to decide whether the action could have been commenced any time that day. The law seems to me to be in a very unsatisfactory state on that point. In the view I take it is unnecessary to decide it.

It seems to me that the day on which an event happens, giving a cause of action, is not to be reckoned; in other words, that the second December was the first day to be reckoned in the six years of limitation.

Young v. *Higgon*, 6 M. & W. 49, decided where the act provided that no action should be brought until notice delivered at least one calendar month before the suing out of the writ, that when the notice was served on the 26th March and writ issued on the 26th April, the action was premature. The cases are fully considered. Parke, B., holds that "when time from a particular period is allowed to a party to do any act, the first day is to be reckoned exclusively;" and again: "The point may now be considered as settled by a course of recent decisions, all proceeding upon the same principle, that the day from which the computation is made ought, in cases like the present, to be excluded; and such appears to me to be the reason and good sense of the matter."

In *Russell* v. *Ledsam*, 14 M. & W. 582, the same learned Judge says: "The usual course in recent times has been to construe the day exclusively whenever anything was to be done in a certain time after a given event or date."

In *Webb* v. *Fairmaner*, 3 M. & W. 475, the same learned Judge says that he entirely concurs with Sir Wm. Grant's remarks in *Lester* v. *Garland*, 15 Vesey 248, viz., "Upon the technical reasoning I rather think it would be more easy to maintain that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The

effect is to render the day a sort of indivisible point; so that any act done in the compass of it, is no more referable to any one than to any other portion of it; but the act and the day are co-extensive; and, therefore, the act cannot properly be said to be passed until the day is passed."

Parke, B., also says that, "a very reasonable rule was laid down by Lord Tenterden, which is a very good test to apply, viz., by reducing the time to one day, in which case the party would clearly be entitled to the whole of the next day after the injury was done, otherwise he might have no time at all to give notice."

Applying this test here, if the statute required the action to be brought within one day after the accruing of the cause of action, he must surely have the whole of the next day.

If an assault were committed at 5 o'clock p. m. on the 1st, it would be startling to assert that the same day must be counted, and the action barred. I see no difference in principle between one day and one year, in deciding on the starting point.

I think here the action accrued on the 1st December, and that the 2nd December was the first day of the statutable period of six years. Some of the cases are collected in *McCrea* v. *The Waterloo Ins. Co.*, 26 C. P. 431.

The law does not generally notice the fraction of a day except where it is necessary to do justice between parties. This point was fully discussed in *Clarke* v. *Bradlaugh*, L. R. 7 Q. B. D., 151, and in App. 8 Q. B. D. 63.

As to the merits, the learned Judge who heard the witnesses found in favour of the plaintiff's statement. It was purely a question of fact and memory. I was impressed with the manner in which my brother Cameron states the case for the defence, with its probabilities and corroborative circumstances; and it is possible that if I had to form a conclusion in the first instance, I might adopt his view.

But I ought not unless on very clear grounds to reverse the learned Judge's finding, as a jury, on what I cannot help

regarding as wholly a question of fact depending on the accuracy of the plaintiff's evidence and that of John Magee.

The defence, at the best, is only that plaintiff by giving time to the principal has discharged the surety—in most cases a defence rested on a technical rule, having little to do with the merits of the case.

I think the appeal must be dismissed.

ARMOUR, J.—I think the finding of the learned Judge who tried this cause was right. A careful perusal of the evidence and an examination of the plaintiff's accounts have satisfied me that the bill sued on was never included, or intended to be included, in any bill or note subsequently taken by the plaintiff from John J. Magee, unless indeed a coincidence in figures is to override manifest intention and sworn testimony.

The bill sued upon was never, in my opinion, paid, nor did the plaintiff ever put himself in a position that debarred him from suing this bill at any time, nor was the defendant at any time placed by any action of the plaintiff in such a position that if he had paid this bill he would have been debarred from suing John J. Magee at any time for the amount so paid.

It is contended, however, that the remedy upon this bill was barred by the Statute of Limitations; that this bill having fallen due upon, and the last day of grace being, December 1st, 1875, and the writ commencing this action not having issued till December 1st, 1881, the six years had expired before the writ issued; because by what is called the logical result of *Sinclair* v. *Robson*, 16 U. C. R. 211, the statute must be held to have commenced to run as regards this bill on December 1, 1875.

It may be that *Sinclair* v. *Robson* is good law, but it is no want of reverence for authority to say that this is at least debatable, and I need only refer to the diverse decisions in different States of the United States, referred to in *Story* on Promissory Notes, 7th Ed., sec. 225, note 5,

and to what appears to be the tendency of authority in England on the subject, to show this to be the case.

Sinclair v. *Robson* need not, however, be quarrelled with in this case, for all that was determined by it was that after a note had been presented on the last day of grace at the place where it was made payable, and payment thereof demanded and refused, an action could thereafter, on the same day, be brought upon it by the holder.

And it may be that in respect of the note sued upon in *Sinclair* v. *Robson*, the statute would have commenced to run on the last day of grace, because upon that day payment of it was demanded and refused; but how can it be said that the statute will begin to run in respect of a bill or note on its last day of grace if payment has not been demanded on that day and refused?

The holder of a bill or note may put himself in a position to sue the acceptor or maker of his bill or note on the last day of grace by demanding payment of such bill or note and its being refused, and if he does so demand the statute may begin to run on that day; but if he does not choose to put himself in a position to sue such acceptor or maker on that day, how can it be said that the statute will nevertheless begin to run on that day?

If such holder does not choose to put himself in a position to sue on that day by demanding payment on that day, the acceptor or maker will have the whole of that day to pay the bill or note, and there will have been no default in payment until that day has expired, consquently the statute will not begin to run in respect thereof till the next day.

It is altogether optional with the holder of a bill or note whether he will put himself in a position to sue the acceptor or maker of such bill or note on the last day of grace or not, and if he does not choose to put himself in that position he is not bound by law to do so, and it lies upon those who assert that the statute did begin to run on the last day of grace to show that the holder of such bill or

note had put himself in a position to sue such bill or note on the last day of grace.

In the case in judgment there is no evidence whatever in my opinion that the plaintiff had put himself in a position to sue the bill in question on the last day of grace. It was never protested; there is no evidence that it was presented for payment on that day, or that payment was demanded and refused on that day; it was payable at the Merchants Bank, London; there was at that time a Merchants Bank of Canada, of which we can take judicial notice, but no Merchants Bank of which we can take such notice, nor do we know that it had at that time an office in London, nor what its office hours were.

In the absence of any evidence that the plaintiff put himself in a position to sue this bill on the last day of grace, I do not see how we can hold that the Statute of Limitations began to run in respect of this bill on the last day of grace, and the defence of the Statute of Limitations therefore, in my opinion, fails.

I am not to be understood as holding that, even if the holder of a bill or note is enabled by law to put himself in a position to sue such bill or note on the last day of grace and that he does put himself in that position, the Statute of Limitations will begin to run in respect of such bill or note on that day. See *Blackman* v. *Nearing*, 43 Conn. 56, where it is held that even under such circumstances the statute will not begin to run till the next day.

I think also that the plaintiff sufficiently established his title to sue upon this bill.

Appeal dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

LaRoche v. O'Hagan et al.

Sale of vessel—Written agreement—Admissibility of—Verbal warranty as to class—Breach—Measure of damages.

The defendants bought a vessel from the plaintiff, who, as the jury found, warranted her to class B. 1, and promised to get her insured in a company, of which he was agent, for $1.400. She would not class as B. 1, and no insurance could be effected under that class, but defendants sailed her uninsured until she foundered and was totally lost. In an action for the purchase money

Held, that the measure of damages to which defendants were entitled for breach of the warranty was not the $1,400, for which she might have been insured, but the sum which it would have taken to make her class B. 1, which it was for defendants to shew.

A mortgage was executed to secure the purchase money, and registered with the Customs, and annexed to it was an instrument of the same date under seal, executed by defendants, reciting the mortgage, and that the terms of payment were set forth therein for convenience of registry, and "this Indenture is executed for the purpose of evidencing the true agreement between the parties, which is hereinafter stated." The terms of payment were then stated, differing from those in the registered mortgage; and defendants covenanted to insure the vessel for $1,400, and assign the policy to plaintiff. The alleged warranty was verbal, and was not made out at the time of executing the writings, but defendants swore that they would not have bought without the warranty, and would not otherwise have given over one-third of the price for a vessel which could not be insured.

Held, that evidence of the verbal warranty was admissible: that it did not vary or alter the writings; and that the declaration that the instrument was made to evidence the true agreement referred merely to the terms of payment.

CASE tried at Belleville before Wilson, C. J., and a jury. Claim on a promissory note, made by defendants, payable to plaintiff's order on demand, for $1,800, dated the 7th of April, 1881; and also on a like note of $200, dated 5th April, 1881, payable 1st of August then next.

As to the $200 note payment was pleaded. As to the $1,800, the defendants said that it was given by them to the plaintiff in consideration of the sale to them by plaintiff of the Schooner "Ontario," and plaintiff promised and agreed with them at the time of the purchase, and as part of the agreement therefor, that the schooner was of the class known as Class B. 1, at the Canadian Lloyd's; and plaintiff further promised that he would cause her to be insured

against loss, &c., for $1,400, in an insurance company of which he was agent, for that season; and plaintiff, in pursuance thereof, drew up an application for insurance, which defendants signed and delivered to him: that plaintiff did not cause her to be insured according to his agreement, and during that season she was lost, &c., whilst following her trade, and defendants sustained damage to the amount of $1,400, at which the plaintiff agreed to have her insured. And for a further breach of agreement the defendant said that the vessel was not class B 1, according to promise, but of too low a grade to class at all, which plaintiff well knew, and defendants sustained damages thereby to $2,000.

The plaintiff joined issue, and replied that the agreement made between them as to the purchase of the schooner was in writing under hand and seal, and that the whole and every part of the bargain or agreement was evidenced and expressed in writing, and there was no verbal or other agreement expressed or implied between the parties in relation thereto, and that the same contained no allegations, stipulations, or warranty as set up by defendants; and plaintiff pleaded the Statute of Frauds as a defence thereto.

At the trial it appeared that the vessel stood in the name of Eugene MacMahon, who by bill of sale, dated 11th April, 1881, sold the vessel to Daniel and David O'Hagan for $1,800. On the same day Daniel and David O'Hagan executed a mortgage on the vessel to plaintiff, to secure $1,800 and interest at 7 per cent, payable on the 15th November then next. The other defendant, Susan O'Hagan, executed a mortgage of some real estate to further secure the plaintiff. Annexed to the mortgage, which was registered with the Customs, was an instrument of the same date, under the hands and seals of the two O'Hagans, made between them and plaintiff, reciting the mortgage, and that the terms of payment were set forth therein for convenience of registry only—"and this indenture is made and executed for the purpose of evidencing the true agreement between the parties, which is hereinafter stated"—and that the parties

agreed with each other that said principal moneys should be payable as follows, viz.: $200 1st August, then next, $125 1st October, $125 15th November, with interest on all unpaid; the balance to be in equal instalments of $125, except the last, which would be $100, on the first days of the months of June, August and September, and 15th November in each year, until all was paid. It also declared that this mortgage was given as collateral security for payment of the $1,800 note, and also as collateral for a mortgage by them to plaintiff on a schooner, the "*Nellie Teresa*," also for $1,800; and also for a mortgage for $1,800, made by Susan O'Hagan to plaintiff; and, lastly, as collateral for a $200 note made by defendants to one Mulholland and endorsed to plaintiff. The defendants then covenanted with the plaintiff that they would forthwith insure and keep insured during the currency of the mortgage the schooner *Ontario*, to the extent of $1,400, in a first-class insurance company, and forthwith assign the policy to plaintiff; and if they did not insure, then the mortgagee might insure her and charge the same to the mortgagors.

On the same day (11th April, 1881) another instrument was executed under seal by the two O'Hagans in the same words as that already described, except that it omitted any reference to the schooner *Nellie Teresa*, and did not contain the covenant as to insurance set out in the other. Plaintiff did not execute this, though named as a party. George Alcorn was subscribing witness to both deeds.

At the trial the main, in fact the only question, was as to an alleged parol agreement by plaintiff either that the vessel absolutely should and would class B. 1, or that she would so class after an expenditure upon her by defendants of about $150.

The plaintiff, besides denying that any such agreement was in fact made, objected to any evidence being given of it, as the whole agreement had been reduced to writing.

Plaintiff lived in Belleville, the defendants in Picton. The vessel at the time of the sale was at Deseronto, twenty miles from Belleville.

Defendant Daniel O'Hagan swore that he made the bargain with plaintiff for the vessel: that one Savage, his brother-in-law, was with him: that he had not previously examined the vessel: that they were in treaty for her two or three weeks before the writings were signed: that he questioned the plaintiff as to the qualities of the vessel: that plaintiff was agent for an insurance company, and he took down his book and said she was classed B. 1, and that he would warrant she would so class, and he would insure her for $1,400; and that he (defendant) took her on his recommendation as an insurance agent, and it was thus he took the vessel. As far as appeared defendant was to do certain work, caulking, &c. Plaintiff said that was necessary, as she had damaged some grain in the winter. After this defendant sent for the inspector, who came and said he could not class her till she was hauled out and her bottom caulked. After this had been done the inspector classed her as B. 1½. It seemed to have been conceded that they could not get insurance under B. 1. Plaintiff told him, he said, that he had better sign an application for insurance, which plaintiff would fill up as soon as she was classed. Defendant accordingly signed a printed form of the Western Insurance Company, wholly in blank. He told plaintiff that he could not get her classed B. 1. He said he would not give over $500 or $600 for the vessel unclassed and uninsured. The deeds were sent to Picton to Mr. Alcorn, and were there executed by defendants. Daniel said he told Alcorn at the time of execution that the vessel was to class B. 1. Alcorn read over the agreement to defendants. He said the plaintiff repudiated having made any agreement as to her classing when he applied to him. He made three trips before the inspector refused to class her B. 1. He went on running her during the summer uninsured, doing business for plaintiff. He made about twenty trips, and in September she sprang a-leak and foundered in deep water, becoming a total loss. He said the plaintiff was to to get her classed with the work done in getting her top sides

caulked. He said he did the extra work, hauling her out, because Captain Taylor, the inspector, ordered it to be done.

On the 16th of June he wrote to the plaintiff that Taylor had classed her B. 1½, and that she would require about $150 put on her yet to make her class B. 1. "We have had her horsed and caulked from keel to gunwale, which you said you would guarantee her to class B. 1, and we have put a pump in her. We hope you will deal fair with us in this matter, and allow us a fair average for classing vessel. You can have the work done yourself, or we will have it done and charge it to your account. Please answer me Desoronto and give your opinion in the matter. I enclose you a bill which was presented to the vessel in Oswego. I am loading for Charlotte; would like to have work done on vessel as soon as possible."

June 17th plaintiff wrote, "I received your letter of yesterday's date and note contents. I am not aware that I guaranteed to class your vessel for you, but I said if you put the necessary repairs to her she would class B. 1. Consequently, you will please make her class at your own expense, or take the chance of no insurance."

On June 24th, O'Hagan contracted with plaintiff to carry 400,000 bricks in this vessel from Belleville to Kingston, during July and August.

It also appeared that defendant made payments during the summer to plaintiff on account of the purchase. He said he thought it would be more convenient to settle with plaintiff after the vessel was laid up. He never made any effort to get her insured, nor did he ever offer to return the vessel to plaintiff.

The defendant David O'Hagan said that he did not see plaintiff till about the last of June: that plaintiff told him he had supposed she would class B 1, but that he and Daniel were getting the thing fixed, and they would have her classed to insure before the rough weather set in: that if she were lost before he supposed he would have to stand the loss, as he had guaranteed her to class B 1.

John Savage said that he was with Daniel at the agreement with plaintiff, who represented her to be a B 1 vessel, shewing his book: that she would have to be hove over and caulked, and after that she would be all right: that he guaranteed her to be a B 1 vessel, and to insure her for $1,400: that after inspection witness told plaintiff for defendants that she would not class, and that defendants would hold him responsible: that he did not deny that he had guaranteed her: that it was part of the bargain that she was to be hove over and caulked, which was done.

Alcorn, the subscribing witness, swore he had no recollection of hearing the guarantee mentioned, though the defendants might have said something of it.

The plaintiff swore that he gave no warranty, and that there was no verbal agreement: that he told defendant that if they put on some repairs, about $150, she would class B. 1, but he never agreed to insure her for $1,400: that defendant asked him for an application, which plaintiff gave him and he signed it: that it was to be filled up as soon as defendants wrote that she was classed: that he told them that she had been classed B 1 the year before. He denied any acknowledgment of liability to defendant David. He went on giving them freight.

Mr. McMahon said he acted as solicitor in drawing the papers: that plaintiff gave him instructions in presence of the two O'Hagans: that it was talked over, and nothing said of a guarantee, which he first heard of from Daniel in June.

It was urged that no verbal contract could be binding under the circumstances, and even if defendants had a claim it must be limited to $150, or such sum as would at the time of the contract have made the vessel B. 1. The plaintiff claimed two sums due on the 1st December and the 15th November, and interest on the whole unpaid purchase money.

The learned Judge told the jury that he considered the verbal agreement was admissible in this case: that though not usually permitted, because as a rule danger-

ous, yet in some cases it was allowable, and it appeared to him allowable here: that the plaintiff bound them to insure, and that seemed to imply that she could be insured; and that it was not inconsistent with the writing for defendants to say that if the plaintiff required them to insure, he must allow them to shew that she was of such a class that they could not insure her for plaintiff; and he left certain questions to the jury. He said defendants urged that the consequence was that they could not get insurance, and ran her uninsured, and at last she was lost, and they got no indemnity for the loss (about $1,400,) and that therefore they had sustained a much greater loss than the plaintiff had. The former objections were again taken to the charge. The learned Judge said in his notes that it was said it would take much more than $150 to make her class B 1.

The following questions were put to the jury and all were answered in favour of defendants.

1. Q. "Does the written agreement contain the whole agreement between the parties? A. It does not. 2. Q. Was there any agreement made between them, and if so, did it form any part of the written agreement, or was it collateral to it? A. There was a verbal agreement as well as a written agreement. 3. Q. If a verbal agreement was made did the plaintiff by it guarantee with the defendants that the vessel would then class as B 1, and be insurable for $1,400? A. He did. Q. Was there a verbal agreement that the vessel should class as B 1 if about $150 were laid out upon her as repairs by the defendants? A. The verbal agreement was without condition. 5. Q. Could the vessel have been made to class as B 1 by the outlay of about $150? A. It could not. 6. Q. If the answers are in favour of the defendants, what sum do you say they are entitled to by reason of the vessel not classing as B 1 and not being insurable? A. The amount of the insurance, $1,400. 7. Q. Did the defendants, by accepting the vessel and running her as they did until her loss in September, waive the plaintiff's guarantee, if one were given? A. They did not."

May 18, 1882. *Clement* obtained an order *nisi* to enter judgment for the plaintiff for $323.84, on the grounds that the evidence given at the trial of the alleged counter claim was inadmissible, and that the verdict was against evidence and the weight of evidence; or for a new trial on the

ground of excessive damages, and that the same were too remote.

Robinson, Q. C., and *Clement*, in support of the motion. The main question is, was the evidence of the warranty admissible? It is submitted that it was not. It is difficult to reconcile the authorities with each other, or with the general rule excluding such evidence. It is clear, however, that the verbal evidence must not contradict or vary the writing, and here it does so. The defendants covenant absolutely to insure, and by the verbal agreement this covenant was in effect made conditional. Moreover the warranty was not given when the writings were executed, nor as a condition precedent to such execution. The writing, too, expressly says that it is made in order to evidence the true agreement between the parties, and in no case has parol evidence been admitted in the face of such a written declaration. They referred to *Henderson* v. *Cotter*, 15 U. C. R. 345; *Morgan* v. *Griffiths*, L. R. 6 Ex. 70; *Evans* v. *Roe*, L. R. 7 C. P. 138. *Angel* v. *Duke*, 32 L. T. N. S. 330; *S. C.* 23 W. R. 548; *Mann* v. *Nunn*, 43 L. J. C. P. 241; *Fitzgerald* v. *Grand Trunk R. W. Co.*, 27 C. P. 528; *Mason* v. *Scott*, 22 Gr. 592, may also be referred to. Then, there is a variation of the writing. See *Benjamin* on Sales, 3rd ed., par. 621; *Gordon* v. *Waterous*, 36 U. C. R. 321.

Then as to damages, the true measure was not the insurance money. *Wigsell* v. *The Corporation of the School for the Indigent Blind*, L. R. 8 Q. B. D. 357; *Lock* v. *Furze*, L. R. 1 C. P. at p. 447, may be referred to. They also cited *Erskine* v. *Adeane*, L. R. 8 Chy. App. 756; *Walter* v. *Dexter*, 34 U. C. R. 426.

Wallbridge, Q. C., contra. The agreement does not profess to be set out in the writing drawn by Alcorn. The agreement was parol, and the written one was merely for the purpose of settling the dates of payment. As to the damages, the proper measure was the amount for which she would be insurable.

June 23, 1882. HAGARTY, C. J.—Two questions are presented for discussion: 1st. Whether evidence of the verbal promise or agreement was admissible. 2. As to the measure of damages.

Taking the last question first, I am strongly of opinion that the true measure of damage, assuming the verbal contract proved, was not the loss sustained by defendants by the sinking of a vessel which was to be capable of being insured for $1,400, but the amount which it would have taken to repair her so that she would have classed B. 1. It was for defendants to have given evidence on this point, either as to the amount required, or whether any and what expenditure would have brought her up to the class.

We have some guide in the letter of the defendant Daniel of June 16, where he informs plaintiff that the inspector had classed her B. 1½, and that she would require about $150 put on her yet to make her class B. 1.

The jury chose to negative the existence of any condition as to expenditure by defendants. But that seems hardly consistent with defendant Daniel's evidence, from which it would seem clear that some caulking, &c., had to be done. They also found that $150 would not bring her up to the class. I think the direction as to damage ought to have been that the expenditure, whether over or above that sum, would be the proper basis of damage. On this ground alone I think the verdict must be set aside. It cannot be that defendants without offering to return the vessel, or in any way shewing a readiness to rescind the bargain, could go on for the season running the vessel, receiving the profits made, making freight contracts with the plaintiff and others for her employment, and hold him in substance responsible as her insurer, and bound to reimburse them for her insured value. If the action lie it accrued at once on breach of the alleged contract that she would class B. 1. Her subsequent loss could not in my judgment increase the plaintiff's liability.

The first objection, as to the verbal contract, is not free from difficulty.

I fully agree with the learned Chief Justice as to the danger arising from the admission of any parol agreement where the parties have, as to the substance of their dealing, reduced the contract to writing. In the present state of the authorities it seems too late—at all events for a Court of first instance—to refuse wholly to admit any such agreement apart from the writings.

It seems clear, at least, that the verbal part must not vary, alter, or contradict the written.

As in *Evans* v. *Roe*, L. R. 7 C. P. 138, where the writing shewed a weekly hiring, the plaintiff was not allowed to recover on evidence that at the execution of the writing it was expressly declared by the hirer that it was to be for a year.

I agree with the learned Chief Justice that the verbal contract here sued upon does not vary or in any way alter the writings. The declaration in the mortgage, that it is made for the purpose of evidencing the true agreement between the parties, refers, I think, merely to the terms of payment, which are stated differently from the Ship Registry mortgage.

The first judgment in *Angel* v. *Duke*, L. R. 10 Q. B. 177, was on demurrer, the full facts not appearing. The plaintiff succeeded. Cockburn, C. J., says, that he thought the decision in *Morgan* v. *Griffiths* was right.

At the trial of *Angel* v. *Duke*, before Blackburn, J., 32 L. T. N. S. 320, April, 1875, it appeared there was a written lease of a house and furniture, and the promise relied on was, that the lessor, both before and after the lease, promised to put in more furniture. The Judge rejected evidence of the first promise, the agreement being conclusive as to the taking of the house and furniture, and as to the subsequent promise ruled that there was no fresh consideration therefor. A nonsuit was entered.

The Court in *banc* refused a rule, holding that the written agreement provided for the furniture; and that the plaintiff having once executed that, without making the terms of the alleged parol agreement a part of it, he could not afterwards set it up.

Blackburn, J., says, "As to the cases cited, I should decide *Morgan* v. *Griffiths* the same way.; the decision in *Mann* v. *Nunn* I am inclined to think wrong, but it is unnecessary to say how that may be."

In *Morgan* v. *Griffiths*, L. R. 6 Ex. 70, (1871,) there was a lease of grass land with a stipulation that the tenant should not shoot, hunt or sport on the land, or destroy any game, but would preserve the same and allow the landlord to sport. When the lease was offered to plaintiff to execute he refused, unless the landlord would promise to destroy the rabbits. The latter did expressly promise so to do, but objected to a clause being inserted to that effect; but repeating his promise, the plaintiff thereupon executed the lease. The action was brought for breach of this promise. The jury found that the plaintiff executed on this express promise. In Term Kelly, C. B., said the verbal agreement was collateral to the lease. The plaintiff recovered.

In *Mann* v. *Nunn*, 43 L. J. C. P. 241, (1874,) there was a written lease. The premises were in an unfinished state, and defendant promised plaintiff before, and at the time of signing, that if he would become his tenant proper drains should be put in, water laid on, and a water-closet built. The plaintiff had a verdict for breach of the parol promise. In Term a rule was refused. Lord Coleridge, Brett and Mellor, JJ., held that such a promise was admissible. The Chief Justice says: "How can it be unreasonable in law that there should be an additional contemporaneous promise by defendant at the time of signing the lease?" Denman, J.: "The written lease is conclusive as to all stipulations contained therein; but parties were at liberty to add verbally any term consistent with the written demise."

They also held that it was not void under the Statute of Frauds, as affecting an interest in land.

Mason v. *Scott*, 22 Grant 590, 1875, in our Court of Appeal, contains a very full review of the authorities, but I do not think that its decision governs this case. It calls attention clearly to the necessity of a consideration for the collateral promise.

In our case there was no evidence of the promise being made at the execution of the writings, which had been sent from Belleville to Picton to be executed by the defendants, the plaintiff not being present or any one apparently authorized to contract on his behalf. The point as to this does not appear to have been urged at the trial, and no question was asked in terms of the jury whether this verbal promise was a substantial consideration for the execution of the writings.

But I think it clear from the evidence that defendants swore in effect that they would not have thought of buying unless she was guaranted to class B 1; and that they would not otherwise have given over one-third of the stipulated price for a vessel that could not be insured, and therefore would not otherwise have executed the contract.

I doubt if the case could be made to depend on the absence or presence of the verbal promise at the moment of execution, if it were made clear that it was expressly on the faith of it that defendants did execute when the writings were presented to them.

Erskine v. *Adeane*, L. R. 8 Chy. 765, (1873,) is a very important case, and the observations of two such Judges as James and Mellish, L.JJ., are much in point. Nothing there seemed to turn on what was said at the time of executing the lease.

We think there must be a new trial, and without costs, on the question of the measure of damages. Even without that objection, I would think we should have to direct another trial in a case so peculiar.

If the parties accept our view of the measure of the damages, they may be able to settle possibly without the cost of another trial. Taylor, the Inspector, could perhaps say what expenditure would have satisfied him as to class B 1.

ARMOUR, J.—I think the jury ought to be directed that the proper measure of damages is the difference in value between the schooner as it was and as it was war-

ranted to be; and I cannot say, as a matter of law, that the defendants were bound to spend any more money than they had agreed to expend in making it what it was warranted to be.

CAMERON, J.—I concur in the opinion that there should be a new trial, on the ground of excessive damages, and that the true measure of damages was not given to the jury in the charge of the learned Judge. The measure I take to be the difference between the value of the thing sold as represented and its value in its defective state. In the present case the measure of damage would be what it would cost over $150 to make the vessel class as B 1, assuming she can be made so to class for a reasonable amount, as that cost would show the difference between the value of the vessel as she was and what she would have been if she had answered to the plaintiff's alleged description of her. I do not wish to be taken as holding that the evidence given in this case was such as to make out in law a valid and binding agreement on plaintiff's part that the vessel would class B 1, and so for the present give no opinion upon that point.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

BENINGER V. THRASHER.

Insolvent Act of 1864—*Personal wrong—Discharge—Seduction—Ca. Sa.—Return.*

Held, affirming the judgment of Cameron, J., that under the Insolvent Act of 1864, sec. 9, sub-sec. 5, a discharge in Insolvency would form no answer to proceedings upon a judgment against the defendant for seduction.

Held, also, that where a *ca. sa.* had been issued upon the judgment within the year, it was not necessary to return and file the same within the year.

THIS was an appeal from an order of Cameron, J., dismissing an appeal from the order of the Master in Chambers discharging an application to set aside the writs of *fieri facias* issued in this cause. The application before the Master in Chambers was made upon the grounds: 1st, that the judgment on which the writs were issued was entered up in 1866, more than fifteen years ago, and had never been revived, and no previous writs of *fi. fa.* upon such judgment had ever been issued; and 2nd, that subsequently to the recovery of the judgment, and prior to the issue of the writs of *fieri facias*, the defendant had made an assignment in insolvency for the benefit of his creditors, and duly obtained his discharge thereunder.

The case is reported in 9 P. R. 206.

May 19, 1882. *Bethune*, Q.C., and *Clute*, in support of the appeal. The Insolvency Act of 1864, sec. 9, subsec. 5, clearly referred to claims in the nature of damages for personal wrongs. Here the claim for damages had passed into a judgment, and then became of a different nature, and was purely a debt which the defendant was entitled to be discharged from under the provisions of the Insolvency Act. The writ of *ca. sa.* originally issued had not been returned and filed within six years, and the judgment had not been revived: *Johnston* v. *McKenna*, 3 P. R. 229.

Holman, contra. The judgment was obtained in 1866, and *ca. sa.* issued on the 29th May, 1866. The sheriff duly

made his return, and it was not necessary to file the same. See *Simpson* v. *Heath*, 5 M. & W. 631; *Wilson* v. *Wilson* and *Jamieson*, 6 O. S. 481; *Hall* v. *Boulton*, 3 P. R. 142; *Franklin* v. *Hodgkinson*, 3 D. & L. 554. The term "personal wrongs" includes seduction: *Rogers* v. *Spence*, 13 M. & W. 571; *Howard* v. *Crowther*, 8 M. & W. 601. The insolvency proceedings were void. The defendant had no estate to assign, and the proceedings were taken purely to avoid payment of his only two creditors. The judgment in this suit and the damages for breach of promise of marriage recovered by the daughter, were the only debts set out in the schedule: *Thomas* v. *Hall*, 6 P. R. 172; *Ex parte Morrison*, 10 Jur. N. S. 787.

May 20, 1882. HAGARTY, C. J.—I entertain no doubt whatever but that the statute of 1864, which declares that the discharge shall not apply to "any debt due as damages for personal wrongs," prevents such discharge from affecting a judgment recovered by this plaintiff in an action for seduction.

I find it impossible to narrow the expression "personal wrongs," as Mr. Bethune urges, to claims for direct injuries to the plaintiff's person, as in assault, &c.

All the books, in my opinion, treat such an action as seduction as a personal wrong to the plaintiff. It is an action for a tort, an action *ex delicto*, or an action of or for a wrong.

Every trespass may be called a wrong. As is said in *Bacon's Ab.* "Trespass," p. 640, a trespass not accompanied by force is called "a trespass on the case, and the method of proceeding against the wrong-doer is by an action of trespass upon the case." Both are actions *ex delicto*.

See Com. Dig. "Trespass," (A 3.): "So trespass lies for a general wrong to another; as if a man takes the servant of another out of his service, and keeps him."

A good deal of learning bearing on the point may be found in *Broom's* Legal Maxims, p. 904, 5th ed.: *Actio personalis moritur cum persond.*" At p. 912, he speaks of

torts "committed to a man's person, feelings, or reputation, as for assault, libel, slander, or seduction of his daughter," &c. See, also, *Cameron* v. *Milloy*, 22 C. P. 333, and the language of some of the authorities there cited.

I do not know what more explicit general words than "personal wrongs" could have been used by the Legislature, and in every view of the language, I think "debt due as damages for personal wrongs" must be held to include the debt created by this judgment.

As to the other point, the *ca. sa.* was issued within the year. I think that *Simpson* v. *Heath*, 5 M. & W. 631, is a well considered judgment of the full Court that, the proper continuances being added, it was no fatal objection that the writ had not been returned and fyled within the year. *Hall* v. *Boulton*, 9 U. C. L. J. 213, a decision of Wilson, J., may be also referred to.

ARMOUR and CAMERON, JJ., concurred.

Appeal dismissed, with costs.

MEMORANDA.

During Hilary Term the following gentlemen were called to the Bar:—

EDWIN TAYLOUR ENGLISH, ADAM JOHNSTON, DANIEL JOHNSON LYNCH, JOHN ARTHUR MOWAT, GEORGE JAMES SHERRY, BENJAMIN FRANKLIN JUSTIN, THOMAS AMBROSE GORHAM, CHARLES RANKIN GOULD, JAMES LANE, WILLIAM JAMES COOPER, ROBERT MCGEE, HENRY MASON, WILLIAM JOHNSTON, ALBERT EDWARD WILKES, GEORGE FREDERICK JELFS, HENRY JOSEPH DEXTER, STEWART MASON, DONALD MCMASTER, HENRY GORDON MCKENZIE.

During Easter Term the following gentlemen were called to the Bar:—

GEORGE S. LYNCH STAUNTON, ARTHUR O'HEIR, THOMAS HENRY LUSCOMBE, JAMES LEAYCROFT GEDDES, DAVID HENDERSON, JOHN WILLIAMS, THOMAS ALPHEUS SNIDER, DENNIS J. DONAHUE, JOHN TRAVERS LEWIS, WILLIAM STEERS, ALEXANDER AIRD ADAIR, ANDREW TAYLOR G. MCVEITY, ALEXANDER HOWDEN, GEORGE WILLIAM MEYER, WILLIAM ALEXANDER MACDONALD, JOHN DICKINSON, HUGH BOULTON MORPHY, JOHN VASHON MAY.

During Trinity Term the following gentlemen were called to the Bar:

J. D. CAMERON, J. C. F. BOWN, C. J. LEONARD, E. E. KITTSON, V. A. ROBERTSON, L. E. DANCY, C. W. OLIVER, J. H. INGERSOLL, H. W. HALL, R. D. PRINGLE, J. C. ALGUIRE, FRED. A. KNAPP, J. A. ROBINSON, J. M. ASHTON.

RULES OF THE SUPREME COURT OF JUDICATURE FOR ONTARIO.

17TH MARCH, 1882.

The following rules or orders were proposed and adopted by the Supreme Court :—

514. Rule 462 shall apply to all rules relating to time.

515. In all actions which (before the passing of the Ontario Judicature Act, 1881, and the Law Reform Act of 1868,) might have been brought under the equity jurisdiction of the County Court, and which are now carried on in the High Court of Justice, such fees and disbursements may be charged as are fixed by the lower tariff referred to in Order 553 of the General Orders of the Court of Chancery, and for all fees and disbursements not provided for in the said lower tariff, may be charged the amounts allowed in like cases by the tariff of the 10th September, 1881, subject, however, to the same proportion of reduction as exists between the said lower tariff and the higher tariff of the Court of Chancery.

516. So much of Rule 419 as applies to sec. 302 of the Common Law Procedure Act is hereby rescinded, and judgments of the High Court of Justice shall not be minuted and docketed as required by said section 302.

517. Rule 508 is hereby rescinded, and the following substituted therefor :—

It shall not be necessary for any deputy clerk of the Crown, deputy registrar or local registrar to transmit to the registrars of the several divisions of the High Court at Toronto the original roll, and the papers of or belonging to the same, pursuant to section 303 of the Common Law Procedure Act and Rule 419 of the Judicature Act : but instead thereof, every deputy clerk of the Crown, deputy registrar and local registrar shall once in every

three months transmit to the registrar of each Division at Toronto a list, in the form hereinafter mentioned, of all judgments which have been entered into by him in such Division during such period, and from the said lists the registrars of the several Divisions shall prepare, and from time to time keep up a general index or list of judgments which shall be open to inspection by all persons interested upon the payment of the usual fee.

FORM.

List of judgments entered in the office of the deputy clerk of the Crown (or deputy registrar or local registrar, as the case may be) of the county of during the three months ending the day of , 18 .

(1) Plaintiff. Defendant.
(2) Date of entry of judgment.
(3) The amount recovered, or other relief given, exclusive of costs.
(4) The amount of costs taxed.

518. Rule 114 is to extend to proceedings in the Master's office, and the Master is to have the same power as the Judge.

519. Every bond or recognizance required by the practice of the Court for the purpose of security is, unless otherwise ordered, to be taken in the name of the accountant of the Supreme Court, his executors, administrators or assigns.

520. Where the action is in respect of a mortgage, and the plaintiff claims foreclosure, or sale, or redemption, and an appearance has been entered, but default has been made in delivering a defence or demurrer, the plaintiff shall be entitled to a judgment on *præcipe* as provided in Rule 78.

521. Whereas, by the Act 35 Victoria, chapter 83, (Ontario), the Toronto General Trusts Company was incorporated, and thereby empowered to act as agents for the transaction of business as therein mentioned. And whereas, by the Act of 45 Victoria, chapter 17, the said company may be accepted by the High Court of Justice as a Trust Company for the purpose of the said Court, in case the Lieutenant-Governor-in-Council shall approve thereof as therein set forth. And whereas the said company has been so approved of by the Lieutenant-Governor-in-Council, by order dated the 10th day of March, 1882. And whereas the expenses

of the accountant's office have been, by the Ontario Judicature Act of 1881, declared to be a first charge upon the income arising from the funds in Court, and it is not desirable to reduce the interest payable to suitors to a less rate than four per cent., and it is necessary to procure the investment of moneys in court in order to raise a sufficient income to keep up this rate, and provide for the expenses of the accountant's office. Therefore *it is ordered* that the Judges of the Chancery Division may arrange with the said company to make investments, and to take the securities in the name of the accountant of the Supreme Court of Judicature, of moneys in Court upon first mortgages of lands, and may direct the issue of cheques therefor upon condition that the said company do, by proper instrument, guarantee the sufficiency of such securities, and the due payment of interest at the rate of 4½ per cent. per annum, half yearly, on the moneys so invested from the date of the receipt by the company of the money for each investment, and also the due repayment of the principal moneys so invested; and upon further condition that in case the said company makes an investment as aforesaid at a higher rate than six per cent., then the said company is to pay interest thereon to the court at the rate of 4¾ per cent.; and upon further condition that the said company is to satisfy the official guardian of the said High Court of the sufficiency of the security as to value, and who is to certify the same to the Court before the cheque issues for each investment.

522. All appeals, proceedings, and matters to be brought before the Divisional Court of the Chancery Division are to be entered with the Clerk of Records and Writs at least seven days before the day fixed for the sittings of the Court, and seven days' notice thereof is to be served upon the parties entitled to notice.

523. An application to the Divisional Court of the Chancery Division, to change or reverse any judgment shall be made at the first sittings of the Divisional Court, which begins not less than ten days after the pronouncing of the said judgment.

524. After the sittings in June next of the Chancery Divisional Court the said Divisional Court will hold its sitting on the first Thursday in September, the first Thursday in December, and the third Thursday in February in each year.

525. Rule 308 is hereby amended by substituting the words "four days, both days inclusive, from the service of the order," for the words "eight days from the date of the order," in the third line of the said rule.

526. Rules 309 and 310 are hereby rescinded.

527. In the Queen's Bench and Common Pleas Divisions all applications under Rules 307 and 308, and under Rule 510 when made to a Divisional Court, shall be made within the first four days of the sittings of the Divisional Court for hearing such applications, which may take place after the trial or judgment complained of.

(*a*) In case the decision of a question raised at the trial, or the judgment, is reserved, and is not given until the sittings aforesaid, or in case of a trial during the sittings of the Divisional Court, any motion or application respecting the same shall be made within six days after the day on which the verdict or judgment is given, if so many days expire in such sittings, and if not, then within the first four days of the ensuing sittings.

(*b*) In cases tried by a jury, judgment shall not be signed until the time for making such motion or application as aforesaid has expired, unless the judge shall certify under his hand that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification.

528. It shall be sufficient if the notice of any application under Rule 510 is served within the time hereinbefore limited for making the same, provided that the day named in such notice for hearing the motion is not more than two clear days from the last day of the time so limited, and falls within the sittings of the Divisional Court in which such notice is given, otherwise such notice may be given for the first day of the following sittings.

529. The party who obtains any order *nisi*, or who serves any notice of motion, may, on or after the fourth day inclusive after the serving such order *nisi* or notice, file the same, together with an affidavit or admission of service, with the Registrar of the Divisional Court.

530. The party served with any such order *nisi* or notice of motion may (if the same has not been already filed by the party who obtained or served the same), on or after the fifth day, both days inclusive, after the granting of the order or service of the notice, file the same, together with an affidavit of the fact and time of such service with the said Registrar.

531. In case the party to whom such order *nisi* is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after granting such order, and upon filing with the Registrar an affidavit that the order has not been served, enter a *ne recipiatur* with such Registrar, after which the Registrar shall not receive or enter such order; and such order shall be deemed to be abandoned, and the opposite party may proceed as if no such order had been moved for or granted, unless the Divisional Court shall otherwise direct.

In pursuance of the powers conferred upon them by the 20th section of the Judicature Act of Ontario, 1881, the council of Judges of the Supreme Court of Judicature for Ontario recommend that the following orders regulating the Vacations to be observed by the High Court of Justice and the Court of Appeal shall be made by the Lieutenant-Governor in Council pursuant to the said Act:—

The Long Vacation is to commence on the 1st day of July, and to terminate on the 1st day of September in each year.

(1) The Christmas Vacation is to commence on the 24th day of December in each year, and to terminate on the 6th day of the following January.

(2) The days of the commencement and termination of each Vacation shall be included in and reckoned part of the Vacation.

[CHANCERY DIVISION.]

WOLFFE v. HUGHES.

Contract of purchase—Construction—Pleading.

An agreement for the purchase of certain land, after providing for the payment of a certain portion of the purchase money, continued as follows: "The remaining $1,900 (after deducting the amount due to the Crown), payable in instalments of $100 each, without interest, on April 1st in each year during nineteen years," and the purchaser to secure by mortgage "the residue or sum of $1,900 (less the amount due to the Crown), payable as aforesaid." It was not then known exactly how much was due to the Crown, but it was soon after ascertained to be $364.

Held, the true meaning of the above agreement was that the amount due the Crown was to be substracted from the $1,900, and the balance paid in instalments of $100 each on April 1st in each year until the whole of such balance should be paid.

Semble: It does not follow because a plaintiff asks in his bill for reformation of a document, that therefore a defendant is entitled to claim the same relief, though he has not asked for it.

By his bill of complaint in this cause the plaintiff prayed that an account might be taken of the amount due to him from the defendant under a certain agreement, the terms of which sufficiently appear from the judgment, and that the defendant might be ordered to pay the amount so found due, with the costs of the suit, and might also be ordered to pay forthwith the amount which should be found due to the Crown; and that the defendant might be ordered to execute to the plaintiff a mortgage in accordance with the terms of the said agreement.

The defendant in his answer disputed the correctness of the construction put upon the agreement by the plaintiff in the manner stated in the judgment.

The case came on for hearing on February 20th, at Toronto, having been adjourned from the sittings at Hamilton.

S. H. Blake, Q. C., for the plaintiff.
McMichael, Q. C., for the defendant.

March 31st, 1882. FERGUSON, J.—This suit is brought upon an agreement for the purchase and sale of 200 acres of land, being lot 17, in the 14th concession of the Township of Luther. The agreement is in writing, and bears date the 28th day of September, 1872. The dispute is as to what the meaning of this document is, and as to what the real agreement was. The document recites that the plaintiff had agreed to sell and the defendant had agreed to buy this land at and for the price and sum of $2,200, payable $20 on the day of the date of the agreement, and $280 on or before the first day of April, 1873. The recital then proceeds: "The remaining $1,900 (after deducting the amount due to the Crown) payable in instalments of $100 each, without interest, on the 1st day of April in each year, during nineteen years, the first of the said instalments to become due and be made on the 1st day of April, 1874, the said party of the first part" (the plaintiff) "to make the deed hereinafter mentioned on payment of the sum of $300 hereinbefore mentioned, and on the said party of the second part" (the defendant) "securing by mortgage on the said premises the residue or sum of $1,900" (less the amount due to the Crown) "payable as aforesaid." This recital may be said to set forth the agreement, for the operative part, so far as material, merely binds the parties to do what is there mentioned.

At the date of the agreement it was known that the amount owing to the Crown upon the lands was somewhat over $200, but there had been a re-valuation by the Crown of lands in the neighbourhood, and it was expected that there would be a re-valuation of these lands and the price fixed at one dollar per acre. This re-valuation, it appears, did take place, and a statement from the department dated 19th October, 1872, is put in, which shows that the land was sold in August, 1854, and that the principal money unpaid is $174, which appears to be the one dollar per acre less an instalment that was paid, but there is charged $190 for interest, shewing the whole amount due the Crown to be $364. This $190 appears to be somewhere about the

interest upon the $174 from the date of the sale to the date of the statement, and for this it is no doubt intended.

The contention of the plaintiff is, that under this agreement he was entitled to be paid annually on the 1st day of April $100, until the $1,900, less the amount due the Crown should be paid, and that the defendant should pay the Crown. Counsel for the defendant contended that the defendant had under the agreement the whole of the nineteen years to pay the $1,900, and that the defendant was entitled to deduct from the instalments to be paid to the plaintiff this sum of $364 due the Crown at any time, that is to say, apply instalments as they fell due in payment of the Crown, and so postpone the payment to the plaintiff.

It was not contended that the larger sum owing to the Crown at the date of the agreement should be deducted, both parties apparently anticipating the re-valuation which took place. No conveyance of the land has been made, nor has the mortgage mentioned in the agreement been executed. The defendant refused to pay the first instalment, and was sued for it in the County Court of the County of Wentworth, and a judgment obtained against him. An exemplification of this judgment is put in, and it is contended that this is cogent evidence in favour of the plaintiff. However this may be, I do not see that it is conclusive against the defendant. The instalments were subsequently paid by the defendant, up to the one mentioned in the bill as being unpaid.

There is in evidence a draft agreement bearing the same date as the agreement in question. This was prepared by the defendant, but, not being satisfactory, the parties went to a solicitor to have an agreement drawn. The solicitor did draw it but has since died. According to this draft the price of the land was the same as in the agreement, but the defendant was to pay $200 on the 1st day of January, 1873, $300 on or before the 1st day of April, '73, and the balance in seventeen annual instalments of $100 each, without interest, these instalments and the $300 to be secured by a mortgage on the land. In this draft nothing

is said about deducting the amount due to the Crown, but the plaintiff according to the draft was at the time of the payment of the $200 to execute a deed free from all incumbrances and accept the mortgage.

Each party sought to avail himself of the benefit of this draft as throwing some light upon the agreement favourable to his contention.

It was stated and not denied that the parties on their way to the solicitor to have the agreement drawn made material changes in their agreement, and to me the draft casts no light upon the agreement actually made. The affidavits of the parties used upon an application in the case were read by consent as evidence, and these are very conflicting. No oral evidence was given. By the amended bill the plaintiff asked for a reformation of the document, but this was not contended for in the argument. The defendant, though he had not asked for any reformation, contended that he was entitled to it because the plaintiff had asked for it. In this I do not think the defendant was right, but I do not think that either party had a case upon the evidence sufficiently strong to reform the agreement.

It appears to me that the case must be determined upon the construction of the document, and that alone, and I think its meaning so far as the points in dispute extend is this. The amount due the Crown (the $364) was to be subtracted from the $1,900, and the balance paid in instalments of $100 each on the 1st day of April in each year until the whole of such balance should be paid, the first instalment to be paid on the 1st day of April, 1874. The purchase money was a fixed sum, the $20 and the $280 were certain sums, the balance $1,900 was also a fixed sum, and it was this less the amount due the Crown that was to be paid by instalments, and it was this less the amount due the Crown that was to be secured by mortgage upon the land. The price of the land was $2,200. This included the amount due to the Crown. The plaintiff was not, after having received the $300, to be paid the whole balance of

$1,900, but only this sum "*after deducting* the amount due to the Crown," and the sum to be secured by mortgage was the "residue or sum of $1,900, *less* the amount due the Crown," so that the plaintiff could not get the whole balance of $1,900 at all; and I think it reasonably clear that the defendant was to pay the Crown, and I cannot think that upon the true reading of the agreement he had any right to apply the instalments or any of them in payment of the sum due the Crown or postpone payment to the plaintiff, as he contended he had; and I think the words "during nineteen years" were employed either by error or because it was not known how much was due the Crown, This, I think, is the meaning of the document, and I am of the opinion that the plaintiff should succeed.

There will be judgment for the plaintiff to have it declared that he is entitled by the agreement to be paid $100 per year until the whole sum, ($2,200) after deducting the $364 due the Crown and the sum paid at the time shall be paid, the payments to be made annually regardless of any sum owing to the Crown, and an order that the defendant pay to the plaintiff the amount unpaid and in arrear, an order that the defendant pay the plaintiff's costs of suit, and an order that the defendant execute a mortgage, to be settled if the parties disagree about it.

[CHANCERY DIVISION.]

TOWN v. BORDEN.

Will—Vesting—"Worldly Estate."

A testator, by his will, "as touching his worldly estate," gave to his wife the use of all his personal property and of his farm and buildings for her support and the bringing up of his children,—"and at her decease the whole of the personal and real property to be equally divided between my six children;"

Held, that the shares of the children vested on the death of the testator. *Baird* v. *Baird*, 26 Gr. 367, explained and reconciled.

Held, also,—"worldly estate" includes, not only the corpus of the testator's property, but the whole of his interest therein.

THIS action was brought by certain persons interested under the will of one John G. Borden, for a partition or sale of the lands comprised in the said will, and a division of the lands or a distribution of the proceeds of sale among the parties entitled thereto. The defendant was the wife of one of the sons of the testator, who had gone into possession of the lands in question on the death of his mother, and had remained in possession until shortly before his death, when by deed of June 26th, 1876, he purported to convey the said lands to one Mary Howard, who by deed of even date therewith purported to convey the same to the defendant; and the plaintiffs claimed a fair occupation rent from the defendant for the time she had been in possession.

The testator died in or about the year 1823. The terms of the will, and the other circumstances of the case are sufficiently set out in the judgment.

The case came on for hearing at the Chancery Sittings at Brockville, on April 6th, 1882.

J. F. Wood (*Webster* with him) for the plaintiff, cited *Sanders* v. *Janette*, 3 C. P. 292; *Holtby* v. *Wilkinson*, 28 Gr. 550; *Smith* v. *Coleman*, 22 Gr. 507; *Keefer* v. *McKay*, 1 C. L. T. 611; *Dumble* v. *Dumble*, 2 C. L. T. 44.

J. Reynolds for the defendant, cited *Baird* v. *Baird*, 26 Gr. 367.

April 12, 1882. PROUDFOOT, J.—John G. Borden by his will, made on 25th October, 1823, "as touching his worldly estate," desired his debts to be paid out of the debts due and his property. 2. He gave to his wife Orilla, the use of all his household together with the rest of his personal property for her support and the bringing up of his six children, the property to be placed in the situation thought best by her and his thereafter named executors for their best use and advantage. Likewise he gave her the full use of his farm and buildings, being the half of lot 25 in the 5th concession of Elizabethtown, during her natural life, for her support and the bringing up of the family, "and at her decease the whole of the personal and real property to be equally divided between my six children."

The wife lived till 1871, four of the children having predeceased her, and the only question discussed at the hearing was, whether the shares of the children vested on the death of the testator, or not till the death of the tenant for life.

The testator disposes of his worldly *estate*, and that has been long settled to include not only the *corpus* of the property, but the whole of his interest therein, (see the cases collected in 3 *Jarm.* on Wills 31, 5th Am. ed., by Randolph & Talcott,) and if he were seized in fee the fee passes. The devise on the death of the wife of the whole of the real *property*, is plainly conterminous with the *estate* mentioned in the earlier part of the will. The testator was seized in fee, and the fee therefore passes by the devise.

At the hearing I thought it clear that the interests of the children were vested at the testator's death. The general rules upon this subject may be found in 2 *Jarm.* on Wills 406, *ib.*, where it is stated that in the case of a devise of lands "to A. for life and after his decease to B. in fee, the respective estates of A. and B., between whom the entire fee simple is parcelled out, are both vested at the instant of the death of the testator, the only difference

between the devisees being, that the estate of the one is in possession, and that of the other is in remainder." But I was referred to the case of *Baird* v. *Baird*, 26 Gr. 367, as deciding otherwise; and this being upon a rehearing the decision of the full Court would be binding upon me. I therefore delayed giving judgment until I had an opportunity of consulting the report.

I have referred to the report and find that, as reported, the case is an apparent authority for the position for which it was cited. But I have also ascertained that the report is defective. The will in that case did not simply direct that upon the death of the wife the real and personal estate should be equally divided among the children; but the whole of the real and personal estate was to be valued on the death of the wife, in a manner pointed out in the will, and an apportionment of it was to be made "to each of our children *alive at the time* an equal part thereof share and share alike." The decision, therefore, was not at all at variance with the general rules on the subject. Indeed there was no decision that the interests were not vested until the death of the tenant for life. It was rather assumed that they were vested, but liable to be divested in case of not surviving the tenant for life. The Chancellor says, p. 368, "The widow of the testator was and is still living, and at that date John had precisely the same interest in the estate real and personal of his father as his brothers and sisters had. Afterwards John died, leaving his mother and the brothers and sisters, who are plaintiffs, surviving him."

There will, therefore, be a declaration that the shares of the six children vested upon the death of the testator, and that the estate is now divisible into thirds, one-third to the plaintiff Town, one-third to the children of Matilda Thomas, and one third to the defendant; and usual decree for sale and partition.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF OAKLAND v. PROPER ET AL.

Treasurer's bond—Construction — Clergy Reserve moneys—Provincial surplus—R. S. O. ch. 180, *sec.* 213 ; ch. 204, *sec.* 221.

Where a township treasurer was, by his bond, dated 6th October, 1874, bound to duly account for all moneys coming into his hands, and applicable to the general uses of the municipality," *Held*, that Clergy Reserve moneys, and money derived from the distribution of the Provincial surplus, which had, by by-law, been specifically appropriated to educational purposes, were not within the condition of the bond, and that the operation of this bond was not extended to school moneys by the R. S. O. ch. 180, sec. 213, and ch. 204, sec. 221.

THE bill of complaint in this cause, was filed by the corporation of the township of Oakland, upon a bond given by one O. H. Lawrence, then deceased, and by the defendants John Proper and A. N. Smith, as sureties, to secure the proper performance by the said O. H. Lawrence of his duties as treasurer of the said municipal corporation. The other defendant, Henry Key, was the duly appointed administrator of the estate of the said O. H. Lawrence, who died intestate on October 13th, 1880. The bond was dated October 6th, 1874, and by it the two first named defendants to the present suit, and the said O. H. Lawrence became jointly and severally bound to the plaintiffs in the sum of $2,000, for the due performance of the said office, the condition being—that if the said O. H. Lawrence, should well and truly pay or cause to be paid according to law for the use of the said plaintiffs, upon the order or orders of the reeve of the said plaintiffs, all moneys coming into the hands of the said O. H. Lawrence by virtue of his said office "applicable to the general uses" of the plaintiffs, "and deliver the remainder," if any, together with all books, records, and papers belonging to the plaintiffs in connection with the said office as treasurer, into the hands of his successor in office, as the law directs, the said bond should be void, otherwise that the said bond should be and remain in full force. And the bill alleged

that it had been ascertained that at his decease the said O. H. Lawrence had in his hands $300 of moneys of the plaintiffs: that the said balance had been duly demanded from the defendants, but they had refused to pay it; and the plaintiffs prayed for an account of what was due by the said O. H. Lawrence as township treasurer, and for payment thereof by the defendants.

The two sureties put in separate answers to the plaintiffs' bill, but they both agreed in admitting for the purposes of this suit, the allegations therein, and also in setting up as a defence thereto, that the said moneys so appropriated by O. H. Lawrence to his own use were moneys received by him for the use of the plaintiffs and known as the Municipal Loan Fund moneys: that the said moneys were not covered by the said bond; and that the said moneys were by a certain by-law of the plaintiffs, passed on February 25th, 1875, set apart for Public School purposes, to be invested as therein provided.

The rest of the facts of the case and the evidence adduced are sufficiently set out in the judgment.

The case was heard at the Chancery Sittings, at Brantford, on March 20, 1882.

R. C. Smyth, for defendant Proper, who was first called on. The bond is to account for all moneys coming to his hands "and applicable to the general uses" of the municipality. This does not apply to Clergy Reserve moneys, which these moneys were. Under R. S. O. ch. 28, sec. 7, Clergy Reserve moneys can only be appropriated for special purposes, which would create a special fund. In this case the municipality in 1859, appropriated the moneys for school purposes, by a by-law still in force. The money was thus applied to a particular purpose. I refer also to note to R. S. O. ch. 180, sec. 206, *Harrison's* Mun. Man. 4th ed., p. 775.

A. S. Hardy, Q. C., (*Wilkes* with him), for the plaintiffs. The words "and applicable," should be construed "or applicable": at all events the words "and deliver the remainder"

cover the matter. Sections 220 and 221 of the Public School Act, R. S. O. ch. 204, extend the bond so as to make it apply to school moneys. See also section 213 of the Assessment Act, R. S. O. ch. 180. This money was applied for general uses, because all the municipality gets the benefit of it. Moreover the moneys were all mixed, and the treasurer kept account with "Clergy Reserve and Surplus Funds"; see 36 Vict. ch. 48, O; 37 Vict. ch. 29, O. Default was made in this joint account.

R. C. Smyth, in reply. The words are unusual and cannot be treated as surplusage. A surety is entitled to the benefit of them. School sections are corporations, and have the right to raise moneys for themselves; therefore this money was applied to the purposes of another corporation, and so was special. R. S. O. ch. 180, sec. 213, is not applicable, and refers to the security to be taken by the officers; besides the statute cannot extend the words of the bond.

April 22, 1882. BOYD, C.—The condition of the bond is, that the treasurer shall well and truly pay over for the use of the municipality all moneys coming into his hands, by virtue of his office, and applicable to the general uses of the municipality. The date of the bond is the 6th of October, 1874. By the law then in force, the security is directed to be for the faithful performance of the treasurer's duties, and "especially for duly accounting for and paying over all moneys which may come into his hands:" 36 Vict. ch. 48, s. 195 Ont. The bond in this case does not follow this simple and comprehensive form of words, but limits the responsibility to moneys coming into the treasurer's hands applicable to the general uses of the municipality. These words cannot be rejected or explained away, but must have a fair and reasonable meaning given to them for the benefit of the sureties. As was admitted the deficit arose in Clergy Reserve moneys, and in moneys derived from the distribution of the Provincial surplus. As to the Clergy Reserve moneys a by-law had been passed

in 1859 setting apart moneys arising from that source for common school purposes, providing for its investment from time to time in debentures, and for the payment of the interest therefrom "amongst the several school divisions, as the township council shall direct." As to the provincial surplus moneys, these were also set apart for educational purposes by a by-law passed on the 25th of February, 1875. The by-law provided for the fund being invested in debentures or mortgages, and that the interest accruing should be divided in each year among the different school sections as the council might thereafter direct.

Throughout municipal legislation there is a plain distinction made between moneys or funds specifically appropriated and those unappropriated, between moneys applicable to special purposes and those applicable to general purposes; and it may also be taken that in these acts the terms "purpose" and "use" are synonymous. Of the statutes then in force reference may be made to 37 Vict. ch. 28, ss. 152 & 153; 36 Vict. ch. 48, s. 324; 32 Vict. ch. 36, ss. 17 & 190; all of the provisions of which have been continued in the present law. *Primâ facie* the funds in question being appropriated to educational purposes ceased to be applicable to the general use or purposes of the corporation. But it is argued that the money set apart for public schools is for the benefit of the public, and so is for the general uses of the municipality. But this is employing the language *diverso intuitu* from that in which it is used in the bond. The distinction intended in the instrument is as between moneys applicable to the general purposes of the corporation and moneys specifically appropriated to a particular purpose. The funds in question were devoted to education, and could not be diverted to any other purpose or used by the council as a general fund. Besides, it does not follow that these moneys will be applied for the general benefit of the municipality, as the distribution is left to the discretion of the council, who may aid one section to a greater extent than another.

The Clergy Reserve Fund was dealt with under the

authority of C. S. C. ch. 25, s. 11, which gave power "to set apart for any special purpose, to be mentioned in the by-law." Having been thus set apart, can it be successfully argued that it was still (in the language of the bond) "applicable to the general uses of the municipality?"

It was again argued that the operation of the bond was enlarged to cover "school moneys" by the effect of the statute (R. S. O. ch. 180, s. 213, and ch. 204, s. 221), which in terms declares that "the bond of the treasurer and his sureties shall apply to school moneys." But a reference to earlier statutes shews that the term "school moneys" is here somewhat technically used, as referring to public moneys provided by the Legislature for the support of public schools: see C. S. U. C. ch. 55, s. 195; 32 Vict. ch. 36, s. 199, Ont. And it further appears from a consideration of the earlier statutes and the collocation of the sections in the Revised Statutes, as well as internal evidence, that the term "treasurer" applies to treasurers of counties, cities, or towns, who deal directly with the Crown in respect to these moneys, and not to treasurers of townships, who deal with the Crown through the medium of the counties in which they are: 37 Vict. ch. 28, secs. 139, 162–164 Ont. Even if the sections did apply to these moneys and to township treasurers, I think the argument of the defendants well founded, that the statutory extension of the liability of the sureties should not obtain, where the condition of the bond indicated by the statute has been departed from and limited, as in the present case.

There will be a declaration in accordance with this judgment, and, if the plaintiff desires it, a reference to the Master. In any event, the costs up to the hearing should be paid by the plaintiff, further directions and defendants' costs of reference reserved. If no reference is asked, judgment for defendants with costs.

[CHANCERY DIVISION.]

SPROULE V. STRATFORD.

Party wall—Adjoining proprietors.

Where the defendant raised the height of a party wall beyond that of the building of the plaintiff, the adjoining owner, with the latter's consent, and subsequently opened a window through the said wall, so raised, so as to overlook the plaintiff's premises:

Held, that by piercing the window defendant had distinctly given notice that he ceased to regard the wall as a party wall; that it was an unauthorized user of the party wall; and the plaintiff was entitled to an injunction to restrain the further continuance of such window.

THIS was an action for an injunction. The plaintiff, Robert Sproule, by his statement of claim, delivered on January 18th, 1882, alleged that he was on May 29th, 1851, and had ever since been seized of the westerly part of a certain lot of land in the city of Brantford, while the defendant was the owner of the other part of the said lot, immediately adjoining on the easterly side: that about the year 1868, he, the plaintiff, erected upon the portion of the lot so owned by him a brick building, and with the consent of one Brandon, then owner of the said adjoining easterly part of the said lot, the easterly wall of the said building was erected on the division line between the plaintiff's land and the land of the said Brandon, upon the understanding and agreement that in case the said Brandon or his assigns should at any time thereafter wish to erect a building on his part of the said lot, he should have the right to use the said wall upon paying a fair proportion of the cost thereof: that about 1870, one James Ker, who had become the owner of the said easterly part, erected thereon a building, using the said wall, and paying therefor according to the said agreement: that the said James Ker continued the said wall beyond the height of the plaintiff's building a distance of about twenty feet, without the consent of the plaintiff, and without any agreement or arrangement with the plaintiff with respect thereto: that the defendant, one Joseph Stratford, had

become the owner of part of the building so erected by the said Ker, and the said wall so continued beyond the plaintiff's building as aforesaid, and was at the time of the present action using the said building as a theatre, and on or about August 30th, 1881, opened a window through the said wall overlooking the premises of him, the plaintiff: that the said window was so opened without the consent or knowledge of the plaintiff, and the defendant refused to close the same; and the said window greatly increased the plaintiff's risk in the event of a fire occurring in the defendant's building: that he was willing to allow the portion of the said wall upon his premises to remain thereon upon the said window being closed, and upon the defendant agreeing to allow the plaintiff at any time to use the said wall upon paying his proportion of the costs of the erection thereof: that the roof of the defendant's building overhung his premises and occasioned injury and loss by discharging snow, ice, and water upon his buildings and premises; and he claimed, in default of the defendant closing the said window and agreeing to allow the plaintiff to use the said wall, an injunction to compel the defendant to remove that portion of the said wall upon his, the plaintiff's premises; an injunction to compel the defendant to restore the said wall to its original condition; and an injunction to restrain the defendant from permitting water, snow, and ice to be discharged from the roof of his building upon the plaintiff's building; and for the costs of this suit.

By his statement of defence, Joseph Stratford alleged that it was in 1866 that James Ker, being owner of the easterly part of the said lot, in pursuance of an agreement with the plaintiff, and in the manner prescribed by the said agreement, put up the building referred to in the statement of claim, contiguous to the plaintiff's building, the westerly wall whereof he raised to a greater height than the height of the easterly wall of the plaintiff's building, and, pursuant to the said agreement, the portion of the said westerly wall which over-topped the easterly wall of

the plaintiff's building, was made of equal thickness with and formed a continuation of the brick work which formed the walls of the building of the plaintiff and the said Ker, up to the height of the plaintiff's wall; and under the said agreement, he, the said Ker, was to be entitled to the subjacent support of the plaintiff's said wall, for the portion of his said wall which should rest thereon, and the said portion of the said wall was accordingly so built: that about March, 1881, the defendant purchased and had since owned a portion of the building so erected by Ker, now known as the Opera house, and that at the time of the present action, he owned the portion of the westerly wall of the said Opera house, a part whereof was the portion of the said wall over-topping and built upon the plaintiff's wall. The defendant claimed the benefit of the said agreement with Ker, and also claimed a declaration that he was entitled, as an easement, to the subjacent support of the plaintiff's wall, for the portion of his wall resting thereon: that he had been in uninterrupted and undisputed possession of the said wall for more than ten years, prior to the issue of the writ in this action, and claimed title thereto under the Statute of Limitations: that the complaint of the plaintiff in respect of discharges of ice, snow, and water from the defendant's roof upon the plaintiff's buildings or premises, was not founded on fact; and, moreover, that in August, 1881, the plaintiff agreed with the defendant to permit such discharge, if defendant would put galvanized iron sheeting along the roof of the plaintiff's building in such places as would prevent any dampness arising from such discharges penetrating the plaintiff's building; and the defendant had accordingly so done; and the said agreement and license had never been revoked. And the defendant also pleaded acquiescence and delay.

The effect of the evidence given is sufficiently stated in the judgment.

The case was heard at the sitting of this Court, at the city of Brantford, on March 20, 1882.

Bethune, Q. C., for the plaintiff. The line was in the middle of the wall in question, Over-lapping the wall was only an easement, and did not operate as a taking possession, so there was no divesting of the fee: *Ross* v. *Hunter*, 2 Nova Scotia 44.

Hardy, Q. C., (*Wilkes* with him,) for the defendant. In the absence of any specific agreement that the wall was to be used in common, the over-lapping was a taking of possession. *Washburn* on Easements, 3rd ed. pp. 568, 577, 584, 585; *Burlock* v. *Gordon*, 2 Duer (N. Y.) 90. The property in the wall is in the person who built it: *Cubitt* v. *Porter*, 8 B. & C. 257; *Matts* v. *Hawkins*, 5 Taunt. 20.

April 22, 1882. BOYD, C.—It is conceded that the wall first put up between the adjoining properties was built one-half on each; and the evidence shews that it was agreed it should be paid for, and was paid for by the adjoining owners in the same proportion. The conclusion is plain, that this first wall was a party wall within the rule in *Matts* v. *Hawkins*, 5 Taunt. 20, and with the right of cross easements for support. Afterwards, and some seventeen years ago, the wall was heightened by the person under whom the defendant claims, by extending his half of the wall and over-lapping on the plaintiff's half, with the consent and license of the plaintiff, so as to form the side wall of what is now an opera house. Lately, the defendant who purchased the property, has pierced the side wall for the purpose of ventilating the opera house, and has put in a circular window which overlooks the plaintiff's premises. It is said this opening would be likely to endanger the plaintiff's buildings, if the opera house should take fire. The question thus arises, which was somewhat considered by Mellish, L. J., in *Weston* v. *Arnold*, L. R. 8 Chy. App. 1091. He says, "The question to be decided is, whether if there is a wall which in part is unquestionably a party wall because it separates one building from another, and in part is an external wall because it does not separate one building from another,

the whole of that wall is to be considered a party wall. * * It is unnecessary to say what the case would be if a person who is the owner of a house which is separated by a party wall from an adjoining house, raises the party wall for the purpose of making his house a story higher than the house of his neighbour. It is obvious that when he does that, his neighbour has the same right, whenever he pleases, to raise his house to the same height as the first owner; and then, whether it was so or not before, it would become a party wall."

When the defendant pierced an aperture for the circular window, he distinctly gave notice that he ceased to regard the wall as a party wall, for as said in the same case by the same Lord Justice, "of course party walls cannot have windows which open to the external air and admit light and air." The plaintiff was content to let the defendant build a solid wall in prolongation of the party wall which he could at any time utilize as a party wall by raising his building, but he would have and could have efficiently objected had it been originally constructed with a window such as this. In effect, the placing of the window is an attempt to change the character of the wall in question, and to acquire rights therein on the part of the defendant, which would by lapse of time prejudicially affect the plaintiff.

In the case of a party wall there is the right on the part of one owner to heighten that wall within certain limits. In this case the heightening of the wall was not objected to by the plaintiff. For his own purpose the then adjoining owner raised the wall, but this he did subject to the right of the plaintiff to use the new part as a party wall, probably upon reasonable terms as to contribution towards the expense. In *Brooks* v. *Curtis*, 50 N. Y. 639, the Court, in a carefully considered judgment, held that the easement of support in case of a party wall necessarily includes the right of either of the adjacent owners to increase its height, when it can be done without injury to the adjoining building, and the wall is of sufficient strength

to bear the addition. This was followed in 1878, in the case of *Sherwood* v. *Musgrove*, 54 How. Pr. R. 338. This is an exposition of the law practically the same as expressed by Mellish, L. J., and accords with the French law as found in *Pothier Traitè du Contrat*, (vol. ii. p. 612, ed. 1781): "La coutume accorde indistinctement à chacun des voisins la faculté de faire cette élévation ..... si l'élévation du mur et l'obscurité qu'elle cause à la maison voisine, étoient si grandes qu'elles renduisent cette maison inhabitable sur-tout si'l y avait bien de croire que cette élévation se faisoit *animo nocendi*, il pourroit y avoir bien à reduire cette élévation." To the same effect is the Civil Code of Quebec: See Art. 515.

My conclusion is, that the making of the window in the wall was an unauthorized user of it by the defendant, and that the plaintiff has the right to enjoin him against its further continuance, and to a declaration that the extension in height of the wall in question, is a continuation of the party wall between the adjoining properties of the plaintiff and defendant.

It is not a case for costs, as the plaintiff failed to establish any case in regard to the injury complained of from snow and ice.

[CHANCERY DIVISION.]

GILL V. THE CANADA FIRE AND MARINE INSURANCE COMPANY.

Insurance by vendor—Insurable interest—Misrepresentation—Assignee in bankruptcy—"Change of risk."

A vendor, who has agreed to sell for full value, has nevertheless, pending the contract of sale, a perfect right to insure the premises sold.

If such a vendor insures the premises, describing them as "his," this is no misrepresentation, for pending the contract he remains the legal owner.

The fact of the vendor insuring under such circumstances, being an assignee in bankruptcy, makes no difference from the case of an ordinary vendor.

Where the words in a condition in a policy are, "if the risk be increased or changed by any means whatever," the term "change," must be held to be used rather as a synonym of "increase," than as a word of different signification. *Ottawa Co.* v. *Liverpool Ins. Co.*, 28 U. C. R. 522, approved of.

THIS action was brought by William D. Gill against the Canada Fire and Marine Insurance Company to recover the amount due under a certain policy of fire insurance, executed by them, on a certain frame turning and sawing mill, situate in Preston County, West Virginia, together with the machinery, saws, lathes, gearing, belting, tools, and steam engine contained therein.

The writ was issued on September 17th, 1881, and by his statement of claim the plaintiff set out that the defendants were incorporated under certain Ontario and Dominion Acts for the insurance of fire risks in Ontario, the Dominion, and foreign countries: that prior to September 4th, 1880, and at the time of the present action, he, the plaintiff, was the duly appointed assignee of the real and personal property, rights and corporate franchises of the Rowlesburg Lumber and Iron Company, a bankrupt corporation of the State of West Virginia, United States of America, in course of being wound up under the Bankruptcy Act lately in force in that State: that among the property of the said bankrupt corporation was the mill and the contents thereof above mentioned, which, on or about September 30th, 1880, the defendants insured against

loss or damage by fire, to the amount of $1,750, during the period of one year from September 4th, 1880, in consideration of $87.50: that on or about May 25th, 1881, the said mill and contents were accidentally destroyed by fire, in consequence of which he, as assignee as aforesaid, had sustained loss greatly in excess of $1,750: that immediately after the said fire he gave the defendants proper notice and proofs of loss in accordance with the requirements of their policy: that the defendants did not, within a reasonable time, notify the plaintiff in writing of any objections to the said proofs; and the plaintiff claimed the amount insured.

By their statement of defence the defendants set out several of the conditions in the policy sued on, amongst which were the following:—

Condition 1.—If any application, survey, plan, or description of the property herein specified is referred to herein, it will be considered a part hereof and the basis of insurance under this policy, and a warranty by the assured: Provided, however, this company will not be liable under and by virtue of this policy, if there shall be any false representation by the assured of the condition, situation, location, or occupancy of the property, or if he shall omit to mention anything relating thereto material to be known in estimating the risk; or if the title of the assured in the property be not truly stated.

Condition 2.—Without written permission of the company on this policy, it will not be liable for loss or damage * * if the above-mentioned premises shall be occupied or used, or cease to be used, so as to increase or change the risk; or if the building stands on leased ground, or becomes vacant, and so remains more than ten days; or the risk be increased or changed by any means whatever within the control or knowledge of the insured; or if it be a manufactory running extra time or at night, or if it shall cease to be operated; or any change takes place in the occupation, location, title, or position of the property herein specified. * * In every case without such permission this policy is

void, and all insurance thereunder immediately ceases and determines.

Condition 14.—Unless and until the assured shall have complied with the requirements of the preceding conditions and paragraphs hereof the loss shall not be payable.

Condition 17.—All fraud or attempt to defraud, by false swearing or otherwise, shall vitiate the claim, and shall be a complete bar to any recovery for loss under this policy.

Condition 19.—The insurance under this policy is made subject to the foregoing conditions, limitations, and requirements, which are hereby made a part of this policy.

After setting out the above conditions, the defendants went on to allege that the plaintiff, on his application for the said insurance, misrepresented his title to the said insured property, by stating that he was the owner of the said property, without mentioning or disclosing to the defendants, what he then knew to be the fact, namely, that there was at the time of the making the said application, an existing contract made by the plaintiff with a firm or co-partnership, trading under the name and style of "Lynch, Winslow & Co." for the sale of the said property to them, and that L. P. Brown and other persons claimed title to the said property by purchase from the plaintiff; and also without mentioning or disclosing that the property was before and at the time of effecting the said insurance, and until the loss by fire, the subject of litigation as to the ownership thereof between the plaintiff and the said Lynch, Winslow & Co., and one S. P. Brown, or between the plaintiff and some or one of them who claimed title to the said property by purchase from the plaintiff under contract with him; yet that these and other facts were material to be known by defendants in estimating the risk; and the title to the said property was changed, and the risk was changed and increased without the knowledge or written permission of the defendant, whereby the said policy is void, and the defendants are not liable for any loss or damage thereunder.

The defendants also alleged that the risk was changed,

and increased without the knowledge or written permission of the defendants by the position of the property being changed, and by the introduction into the said insured building of other property and machinery, not the property of the plaintiff, or covered by the said policy; that the plaintiff in his proof of loss had not stated his interest in the said property destroyed and the interest of other persons therein, but had fraudulently misrepresented his interest therein by stating that the property belonged to him, when in fact he was not the owner thereof by reason of the above mentioned facts; and, also, by reason of a certain decree, made on June 17, 1881, by the United States District Court at Parkersburg, West Virginia, whereby the contract of sale of the property insured to Lynch, Winslow & Co., was confirmed and allowed, and whereby, as the defendants alleged, the title to the said property, and all the claims of the plaintiff for insurance moneys for the loss occasioned by the said fire, were vested in Lynch, Winslow & Co., without notice to the defendants, and the loss by the said fire was declared to be and was the loss of Lynch, Winslow & Co., and not of the plaintiff.

By his reply, the plaintiff asserted that the true condition and situation of the property insured was not withheld from the defendants, but they were made aware of all matters and things material to be known in estimating the the risk assumed by them; that the plaintiff had no power, or authority to sell, or to contract to sell, excepting at public auction, and that any agreement or arrangement which may have existed with Lynch, Winslow & Co., in respect of a sale to them amounted only to a proposal on their part to purchase, and was not without the sanction of the proper Court in that behalf binding upon the plaintiff, and did not operate to pass or transfer to said firm any title to or interest in the said property, either at law or in equity, and did not give to the said firm the possession or control thereof, or any right to the possession or the control thereof: that he did not withhold material information from the defendants, as mentioned in their defence, and

the title was not changed, and the risk was not increased, without the knowledge of the defendant: that he did not in his proof of loss fraudulently misrepresent his interest, and it was not incumbent on him to state anything more than he did state: that at the time of the fire no person, other than himself, had any interest in or title to the property, or any right to the possession thereof; that any arrangement with Lynch, Winslow & Co., had been, on April 21, 1881, set aside, and cancelled by the order of the District Court of Virginia, and that he was at the time of the fire, and still was the proper person to collect, and receive the moneys sued for herein.

The case was heard at the Sittings of this Court at Hamilton, on the 13th April, 1882.

Among the witnesses examined was one Randolph Barton, who was examined as an expert in United States law, and who gave evidence to the following effect:

An assignee in bankruptcy is authorized to sell the real and personal estate at public auction, that is the extent of his jurisdiction. Acting under the authority of the Court, he can sell at private sales, and then he has to follow rigidly all that the Court prescribes, otherwise his proceeding is invalid. It is the constant practice of the Court to impose restrictions on the power of the assignee in selling privately, conditions precedent, and otherwise; he is a *fiduciary* selling under the direction of the Court. The instructions of the Court are embodied in the order of the Court under which the assignee acts. If he follows the instructions of the order, and there is no further qualification, he can carry out the sale; but if subject to ratification, or adoption by the Court, nothing would pass till the Court had favourably considered and approved of his action. The Court has power till the last moment to supervise, and change, and stop the transfer, till the deed is delivered and the purchase money paid; and this even after the ratification of the contract of sale, and the Court will, in some cases, set it aside entirely even at that stage. I have formed my view after speaking to Mr. Bump, and

after conference with other counsel, and I believe the authorities support me.

The following documents, proceedings, and dates were also proved:—Appointment of plaintiff as assignee by the District Court of West Virginia, in 1872; order of the said Court of May, 1876, ordering him to proceed to sell; agreement of sale to Lynch, Winslow & Co., dated May 20, 1880; policy of insurance sued on, dated September 30, 1880; order of the said Court, dated January 3, 1881, allowing the sale, and directing the plaintiff to carry it out in accordance with the agreement; order of the said Court of April 21, 1881, rescinding the sale, and directing the plaintiff to sell by public auction; fire to the premises insured, May 25, 1881; order of the Appellate Court of West Virginia, dated June 21, 1881, made on appeal from the above order of April 21, 1881, and restoring Lynch, Winslow & Co. as purchasers, and directing credit of the insurance moneys to them, as the result of a compromise.

The remaining facts of the case sufficiently appear in the judgment.

C. Moss, Q.C., (*Muir* with him) for the plaintiff. Gill had unquestionably an insurable interest; he was asked for no details; he said the property was "his;" and there is an absence of fraud: *Hartford Ins. Co.* v. *Harmer*, 2 Oh. 452; *Morrison* v. *Tennessee Ins. Co.*, 18 Miss. 262; *Butler* v. *Standard Fire Ins. Co.*, 26 Gr. 341; *S. C.* 4 App. R. 391; *Niblo* v. *North American Ins. Co.*, 1 Sand. 551; *Fletcher* v. *Commonwealth Ins. Co.*, 18 Pick. 419; *Curry* v. *Commonwealth Ins. Co.*, 10 Pick. 535; *Strong* v. *Manufacturers' Ins. Co.*, 10 Pick. 40. Condition No. 1 relates to "title," not "interest;" the title was ours, we had the legal estate, if it was necessary to go so far as this; and the answer is true that the property was "his;" the material point is the power of the assignee over the property.

W. Cassels, (*Laidlaw* with him), for the defendants. The plaintiff has no interest in the property, and no right to

recover; the insurance money goes to the purchasers, Lynch, Winslow & Co., by order of the Court, and conveyance to the purchasers; *Rayner* v. *Preston*, L. R. 18 Chy. D. 1. The risk, moreover, was changed, even if it was not increased, by the putting in of further machinery. As to the title, the question is not whether the plaintiff had an insurable interest, but whether he made a true statement of his title; an assignee can deal as fully as the insolvent could, and the power of the Court is merely supervisory; he had the legal power to sell and convey: *Crowley* v. *Hyde*, 116 Mass. 589. By the order of June 17th, 1881, the contract of May, 1880, was revived; it in effect ratifies the sale as from its date. When the policy was obtained there was a valid contract of sale, and possession was taken under it by the purchaser; *Stephenson* v. *Bain*, 8 P. R. 166.

Moss, Q. C., in reply. The order of April 21st, 1881, swept away all previous matters, and left the assignee completely the owner at the date of loss. In *Rayner* v. *Preston*, the vendor insured before the agreement to sell. There is no evidence that the introduction of new machinery caused any increase of the risk. The question as to title is the main one. He also cited *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421; *Laidlaw* v. *Liverpool Ins. Co.*, 13 Gr. 377; *Jarvis* v. *Cook*, 29 Gr. 303; *Gould* v. *British America Ass. Co.*, 27 U. C. R. 473, 478.

April 22, 1882. BOYD, C.—The chief question discussed was, whether a vendor who had agreed to sell for full value could effect an insurance upon the premises sold. The dictum of the Lords Justices in *Rayner* v. *Preston*, L. R. 18 Chy. D. 1, was relied on, in which they intimated an opinion in the circumstances of that case that the insurance company could recover the money from the vendor. It is to be observed that this dictum actually put the insurers in action to recover from the vendor, but Mr. Justice Chitty, in *Castellain* v. *Preston*, L. R. 8 Q. B. D. 613, held that the action failed, and dismissed it, with costs. However, the

language of the Lords Justices is quite inapplicable to this case; and I have no doubt that the plaintiff, pending the contract of sale, had a perfect right to insure; and as his interest remained, certainly not less than before, at the time of the fire, he had a perfect right to recover the amount of the insurance.

The next question is, could he insure the premises describing them as "*his*," though he had contracted to sell? There was no application and answers in this case by the person seeking insurance, no inquiries being made by the company as to the nature or extent of his interest. I see no misrepresentation or misstatement in the plaintiff insuring the mill as "his." Pending the contract he remained the legal owner, and before the fire the contract was annulled by the Bankruptcy Court. On this ground of defence the defendants fail.

The third contention is, that the position of the plaintiff as assignee in bankruptcy makes a difference from the case of an ordinary vendor, and that having contracted to sell the property he ceased to have any interest or be the owner. So far as I can come to a conclusion on the evidence and authorities cited as to the state of the law on this point in the United States, I think the objection is unfounded, and should be overruled: *Insurance Company* v. *Updegraff*, 21 Pa. St. 513. The insurable interest of such an assignee who contracts to sell is not less at all events than that of an ordinary vendor.

The last contention of moment was, that there was a change of risk and a change in the occupation or possession of the premises. I see no evidence of a change of occupation or possession; the same person was there as caretaker, and the premises were not used otherwise than as a mill. Nor do I think there was a "change of risk" within the meaning of these words. The only alteration was changing old machinery for new, which it is not shewn increased the hazard or changed the character of the insured premises. The connection of these words in the condition is: "If the risk be increased or changed by any means whatever." The

construction put upon analogous words by Wilson, C. J., in *Ottawa Forwarding Co.* v. *Liverpool, &c., Ins. Co.*, 28 U. C. R. 522, commends itself to me as shewing that the term "change' is used rather as a synonym of "increase" than as a word of different signification. The judgment is for plaintiff, with costs.

[CHANCERY DIVISION.]

VANKOUGHNET V. DENISON.

Sale of land—Restrictive covenant—"Assigns"—Evidence—Innocent purchaser—Acquiescence.

Where D., the owner of certain lands on selling part to B., inserted this clause in the conveyance: "Bellevue Square is private property, but is always to remain unbuilt upon except one residence with the necessary outbuildings, including Porter's Lodge," and the purchaser on his part covenanted not to allow any business of a certain kind to be carried on on the part conveyed.

Held, that the benefit of the restriction passed to the assignee of the purchaser, as one of the advantages and privileges appurtenant to the land, though the word "assigns" was not there, and though the benefit of it was not formally transferred to him.

The locality and extent of this square being in question—*Semble*, that this being a matter of a *quasi* public nature in which a class of the people in the neighbourhood would be concerned, evidence of reputation was admissible; and under the circumstances set out below, it was held that the square was sufficiently defined by such evidence.

Where it is clearly intended to give some tangible benefit to a grantee by such a covenant in the conveyance to him, and it formed a part of the consideration which induced his purchase, the Court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement.

Where the person who was building the house objected to, held under an agreement for a lease, but had made no outlay on the property till after notice was served on her, nor paid any rent,

Held, she was not in the same position as an innocent person holding for value under a completed instrument, and the erection of the house must be stopped.

Where the square had been built upon for years without objection by purchaser or his vendee, the plaintiff; but the building had been done by certain purchasers under a mortgage executed by D. before he conveyed to B.:

Held, no proof of acquiescence, as they could not have objected with effect.

The bill in this case as amended was filed by Salter J. VanKoughnet, Agnes VanKoughnet, his wife, and Arthur T. H. Williams, a mortgagee of the interest of the said Salter J. VanKoughnet in the land conveyed to him by one James Bovell, as hereinafter mentioned, against Robert B. Denison, Ellen Winn, John H. Winn, James Browne, Laura Browne, Ellen L. Denison, and Edith M. Denison, praying an injunction to restrain the said defendants, their servants and agents from proceeding with the erection of a certain building on Bellevue Square, a piece of land adjoining the land of the plaintiff, and from permitting to remain so much of the said building as had been already erected, and from erecting any other building on the said Bellevue Square, and from opening or keeping open any street through the same, and selling building lots thereon, under the following circumstances:

The defendant R. B. Denison took the land in question and other land adjoining it by devise from his father, who died in 1853, up to which time it had been occupied as a farm, and called "Bellevue." In the year 1860, R. B. Denison, in pursuance of a contract entered into by him with one Dr. Bovell, had a certain indenture of conveyance prepared, which was dated August 15, 1860, but not registered until July 19, 1864, and which purported to convey the land at the time of suit occupied by the plaintiff, but then part of the Bellevue estate, to Dr. Bovell for £350. In this conveyance the following clause was inserted by way of parenthesis: "Bellevue Square is private property, but is always to remain unbuilt upon except one residence with the necessary out-buildings, including Porter's Lodge;" and this was the covenant, or contract, in reliance on which the plaintiff brought the present suit. On the other hand, Dr. Bovell covenanted on his part that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law, to be carried on upon the land conveyed to him.

Soon after the date of this purchase Dr. Bovell built

upon and improved the land in the said conveyance comprised, but the conveyance itself was not executed until three years after its date, and was then executed by Denison under certain special circumstances, as to which he sought to give unsupported parol testimony of his own, and which he thus set out in the joint and several answer put in by himself and the defendant Ellen Winn, after stating in the preceding paragraph that the conveyance was prepared by a friend of his who was an unprofessional man, and sent to Dr. Bovell for approval.

14. Between the time when the said indenture was prepared and sent as aforesaid to the said Bovell, and the date of its execution, I had sustained great pecuniary loss, and had, in fact, become insolvent and unable to pay my debts in full.

15. When the said Bovell became aware of my altered circumstances he became anxious to have the said indenture immediately executed, and for the first time approved of the conveyance in the form in which it had been prepared as aforesaid, and he caused the same forthwith to be brought to me for execution.

16. Upon reading the said indenture and finding it to contain the said alleged covenant, I declined to execute the deed on the grounds that my property then belonged to my creditors, and that I could not make such a covenant respecting it, but the solicitor for Bovell represented to me that if the deeds were altered in any way from that in which it was sent to Bovell for his approval as aforesaid, it could not be the same deed, and Bovell would lose the land and the improvement on it.

17. Being anxious to protect said Bovell from loss, and believing that the said alleged covenant was only retained in the deed because the conveyance would not have been a protection to him against my creditors if altered, and upon the understanding that the said alleged covenant was not otherwise considered a part of the contract, I executed the conveyance, and not otherwise.

Prior to the time of the execution of the said convey-

ance to Bovell, Denison had mortgaged all that remained to him of Bellevue, as well as the land sold to Dr. Bovell, to the Canada Permanent Building and Savings Society to secure a large sum of money. The portion purchased by Dr. Bovell was released by the Company when sold to him, but the remaining land, including the alleged square, was subsequently sold by the society under the power of sale contained in their mortgage to one F. W. Coate, and conveyed to him by indentures bearing date respectively August 9th and November 10th, 1866.

In the year 1868, one Shirley Denison, son of the defendant Denison, purchased back from Coate the portion of the land so sold to him which had constituted the family residence of the Denisons; and on the occasion of the marriage of the said Shirley Denison in 1869, he conveyed this land to his father.

The defendant Denison strove to shew also on his own unsupported parol evidence that though this conveyance from his son was absolute in form, it was really subject to certain trusts in favour of his (defendant's) daughters.

In the year 1870, the defendant Denison, when about to contract a second marriage, by deed dated April 30th of that year, reconveyed about half of the land to his said son, and one John H. Winn, on certain trusts in favour of his daughters, amongst whom was the defendant Ellen L. Denison.

By indenture of June 8th, 1871, Bovell conveyed the land by the indenture of August 15th, 1860, conveyed to him, to the plaintiffs Salter VanKoughnet and Agnes VanKoughnet for valuable consideration.

Shirley Denison having previously died, J. H. Winn, the surviving trustee under the last mentioned deed, and in pursuance of its trusts, on September 21st, 1880, conveyed to the said Ellen L. Denison the land upon which the house complained of in this suit was being erected.

On October 30th, 1880, Ellen Louisa Denison entered into an informal agreement in writing with the defendant Ellen Winn, a spinster, whereby she agreed to lease the

land so conveyed to her for a term of years, and Ellen Winn went into possession of the said land, and began the erections complained of.

The other defendants, James Browne, Laura K. Browne, and Edith M. Denison, had also, since the making and registration of the above mentioned conveyance of August 15th, 1860, acquired and at the time of suit held a title to some parts of what the plaintiff alleged and sought to shew to be the "Bellevue Square," affected by the restrictive covenant in question.

The defendants Denison and Ellen Winn sought to shew amongst other things acquiescence and delay, as a defence against the plaintiffs' claim, on the ground that Bovell lived on the land now claimed by the plaintiffs for several years after the execution of the deed to him of August 15th, 1860, and during that time had full knowledge that the land, called by the plaintiffs Bellevue Square, was being divided into lots and sold for building purposes, but never objected to such building or complained of it in any way.

To shew the position of the land in question, the plaintiffs produced at the hearing a general map of the city of Toronto, published in the year 1857, which is the plan referred to in the judgment. Amongst other letters and documents produced at the hearing was a letter, dated March 26th, 1872, from the plaintiff Salter VanKoughnet, to the defendant R. B. Denison, or Major Denison as he is there called. This letter is specially referred to by His Lordship, and was as follows:—

"TORONTO, March 26, 1872.

"MY DEAR MAJOR,—Understanding that you have it in contemplation to alien portions of the remaining part of the old Bellevue estate still under your control, I think it right to remind you, as you must have forgotten it, of the covenant contained in your conveyance to Dr. Bovell (whose title has passed to me) that the plot in question was always to remain unbuilt upon, except one residence with the necessary out-buildings, including Porter's Lodge. This no doubt has escaped your memory. Yours, etc.,

"S. J. VANKOUGHNET."

On the back of this letter there was an endorsement which is set out in the judgment.

The defendants in the first instance demurred to the statement of claim, and the hearing on demurrer is reported 29 Gr. 485.

The case now came on for hearing and examination of witnesses on May 3, 1882, at the Spring Sittings, at Toronto, when judgment was reserved.

Maclennan, Q. C., for the plaintiffs. The defendant Denison having given a covenant, was bound to pay off the mortgages on the property so as to protect the covenant. The writing of October 30, 1880, is not under seal, and is merely an agreement, and does not put Ellen Winn in the position of a purchaser for value without notice: *Tulk* v. *Moxhay*, 11 Beav. 571; *S. C.* 22 Phill. 774.

Blake, Q. C., for the defendants. The evidence of the defendant R. B. Denison shews that he took the deed of 1869 in trust for the benefit of the family; the reason of the transaction should be considered; why did the son buy at all? The so-called covenant does not run with the land; it is merely a personal matter, and, the word "assigns" is not used in it; it is only an undertaking that so long as the defendant R. B. Denison had the property it should not be built upon: *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Keates* v. *Lyon*, L. R. 4 Ch. 218. "Bellevue Square" was never dedicated, and is too indefinite: *City of Toronto* v. *McGill*, 7 Gr. 462. The plaintiffs are estopped by the conduct of Bovell, and by their own. If Bovell did not choose to come to the Court promptly, a subsequent purchaser is in no better position; and the plaintiffs have waited till the house was erected before coming to the Court.

He also referred to *McQueen* v. *Farquhar*, 11 Ves. 478; *Roper* v. *Williams*, 1 T. & R. 18.

Black, on the same side. There is no evidence within the Statute of Frauds to identify the *locus in quo*; *Stretton* v. *Stretton*, 24 Gr. 20; *McLean* v. *McKay*, L. R. 5 P. C. 327, 335. The plaintiff takes after conveyance made to the

trustees for the children. He also referred to *Otter* v. *Lord Vaux*, 2 K. & J. 650; S. C. 6 DeG. M. & G. 638; Dart on V. & P., 5th ed., p. 37; *Haywood* v. *Brunswick Benefit Building Society*, 51 L. J. N. S. (Q. B. D.) 73.

Maclennan, Q.C., in reply. In order to constitute an express covenant, the law does not require any precise or technical language: *Platt* on Covenants, pp. 27, 28; *Haywood* v. *Brunswick Benefit Society*, *ubi supra*. One violation of a covenant does not preclude a plaintiff from asking relief; there has been here no acquiescence: *Gaskin* v. *Balls*, L. R. 13 Ch. D. 325. The deed is registered, and it should be assumed that the clause was also registered, and if so it was notice to all.

He also referred to *Mann* v. *Stephens*, 15 Sim. 377; *Patching* v. *Dubbins*, Kay 1; *Lord Manners* v. *Johnson*, L. R. 1 Ch. D. 673; *Coles* v. *Simes*, Kay 67; *Western* v. *McDermott*, L. R. 2 Ch. 72; *Van Wagner* v. *Findlay*, 14 Gr. 53.

May 10th, 1882. BOYD, C.—The undertaking or agreement, which need not be in any particular form, appears on the face of the conveyance to Dr. Bovell, and that imports that the benefit of the restriction was to be enjoyed by the owners for the time being of the land conveyed, as being attached to that land for its protection and advantage. See *Keates* v. *Lyon*, L. R. 4 Ch. 225, 226, and *Renals* v. *Cowlishaw*, L. R. 11 Ch. D., 868, (per James, L. J.)

Here, moreover, we have the evidence of the plaintiff, which shows that when he contracted to purchase from Dr. Bovell he was largely influenced by the restrictive clause, and it was used by his vendor as an inducement for him to buy. This evidence is further corroborated by the letter written by plaintiff S. J. VanKoughnet to defendant Denison in less than a year after his purchase, calling Mr. Denison's attention to the fact of the existence of this stipulation, which the plaintiff supposed he was about to infringe. As laid down by Hall, V. C., in *Renals* v. *Cowlishaw*, L. R. 9

Ch. D. 129, "a purchaser may be entitled to the benefit of a restrictive covenant entered into with his vendor by another, where his vendor has contracted with him that he shall be the assignee of it, that is, have the benefit of the covenant, and such covenant need not be expressed, but may be collected from the transaction of sale and purchase."

Here also is a restrictive covenant entered into by Dr. Bovell as to his use of the land, which binds it in the hands of the plaintiff, and in such cases the Court favours the holding of these mutual engagements as involving reciprocal rights: *Western* v. *Macdermott*, L. R. 1 Eq. 499 and 2 Ch. 72.

I hold, therefore, that the benefit of the restriction passed to the purchaser of the land, as one of the advantages and privileges appurtenant to it, though the word "assign" is not there, and although the benefit of it was not formally transferred to the plaintiff.

The next question is, does the restriction relate to a particular and defined portion of land? *Primâ facie* the description, "Bellevue Square," is sufficient to justify the reception of parol evidence to explain what was meant. As said by Lord Cottenham in *Ricketts* v. *Turquand*, 1 H. L. C. 472-490: "Here is a term which includes more or less land, according to what was meant by the term used, and all we are in search of is, the particular meaning of the expression which is used."

The general rule as to this kind of explanatory evidence is thus stated by Parke, J., in *Doe dem. Templeman* v. *Martin*, 4 B. & Ad. 785: "All facts relating to the subject matter, and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will." Or, as put by the same Judge when Lord Wensleydale in a case in the House of Lords of *Baird* v. *Fortune*, 7 Jur. N. S. 926, the condition of the property may be shewn and all circumstances necessary to place the Court in the position of the parties, so as to enable the Court to judge of the meaning of the instrument.

It is doubtful whether evidence of reputation is admissible here; but I incline to the view that it may be received on somewhat of the ground mentioned in *White* v. *Lisle*, 4 Madd. 224, the question of the locality and extent of this square being of a *quasi*-public nature, in which a class of people in the neighbourhood would be concerned. And in that view the old maps of the city, made while the defendant was owner of all the land, would be some evidence: *Daniel* v. *Wilkin*, 7 Ex. 429, (Parke, B.); *Stephen's* Digest of Evidence, p. 45, Art. 35; *Doe dem. Hughes* v. *Lakin*, 7 C. & P. 481; *Taylor* on Evidence, ss. 616, 622.

In *McMurray* v. *Spicer*, L. R. 5 Eq. 537, Malins, V. C., in ascertaining the subject of the contract received evidence which shewed that the property in question had acquired a reputation of being the property described in the contract. So in defining what passed by a will counsel in arguing in the House of Lords, said: "You must take the proof of what the testator called it, not what it was called by the tradesmen of a neighbouring village." The Lord Chancellor answered: "It must be the name by which it was generally known:" *Ricketts* v. *Turquand*, 1 H. L. C. 482.

But apart from this class of evidence we have very cogent proof that the plaintiffs' contention is right as regards the place indicated by the term "Bellevue Square." The question is, What is the place which the defendant Denison describes as "Bellevue Square?" Because it is to be noticed that he is responsible for these words. The conveyance was prepared at his instance, and the language is his, or derived from him. The description in itself is sufficiently precise, and it is not pretended that there is more than one "Bellevue Square." Now the only alternative between the plaintiffs' evidence and contention is the defendant's evidence and contention—the latter being as follows: "I intended to build a house in front of the old place for myself. That, I suppose, is what I intended by "Bellevue Square," in the deed. It is a place where I meant to build, but it would not take in anything like so

much as is described here. It would be to the south of the old house." That is to say there was no existing Bellevue Square—it was to be a creation of the future; and the restriction was inserted so as to apply to some portion of the land which might afterwards be so occupied. But this leaves unexplained the earlier use of the same term, "Bellevue Square," in the mortgage made by the defendant to the building society, in August, 1859, and the fact that the courses of the property therein described shew that "Bellevue Square," extended as far west as the line of Lippincott street produced. Then in the deed to Dr. Bovell, dated the year after, we find from the courses that "Bellevue Square" is found also opposite the land conveyed thereby, which is some six hundred feet from the produced line of Lippincott street. The same locality as in the first mortgage is assigned to "Bellevue Square," in the mortgages executed respectively in November, 1861, and December, 1862, which brings the time down to about the date (as is said) of the actual execution of the Bovell deed. The internal evidence to be found in the language of the restriction itself, indicates that a spacious tract was being dealt with. It is a "square" which is to have on it a "residence," so placed as to require a "porter's lodge" to guard the approaches. Again it is shewn that the old homestead was on the site from which originated the name "Bellevue." There the defendant has always lived, and the land around and occupied therewith was, at the date of the deed, bounded by at least three streets or private roads—one to the south, one to the east, and one to the west. The evidence is not very precise as to the north limit, but it was clearly beyond both the old family residence and the new building now complained of, and was probably up to the south limit of a street laid down in the plan of 1857, to the south of Cambridge street.

It is significant in view of the present contention of the defendant (that is, that there was no defined place intended in the Bovell deed by "Bellevue Square,") to notice the memorandum made on the letter addressed to him by the

plaintiff on 26th March, 1872. [The learned Judge here read the letter, set out ante p. 353.] On the back of this is endorsed: "There is a clause in Dr. Bovell's deed respecting the square, but no covenant." The argument implied here is, not that there was no square, but that there was no covenant.

The Court in these circumstances will not come to the conclusion sought by the defendant unless there is absolutely nothing in the evidence to shew that the term is susceptible of an obvious and appropriate explanation. It was intended thereby to give some tangible benefit to the grantee; this restriction is part of the consideration which induced his purchase. So that it is a case in which the Court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement.

For these reasons I am of opinion that "Bellevue Square," is sufficiently defined, and that what is left of it is now represented on the ground by a tract of land bounded on the south by Bellevue Terrace, by Bellevue Avenue on the west, by Grosvenor street on the east and by an alleged street south of Cambridge street on the north, as in the plan of 1857. If, however, the defendant desires to limit this area in a northerly direction it might be left to the Master to report thereon, as in *Chattock* v. *Muller*, L. R. 8 Ch. D. 177, and in this case further directions and costs of the inquiry will be reserved.

It would be unsafe to proceed judicially upon the evidence, however clear and satisfactory, of any one who having executed an instrument seeks to lessen its force or effect by his own unsupported parol testimony. For this reason I cannot consider what is said to have occurred when the deed to Dr. Bovell was actually executed. It cannot possibly affect the position of the plaintiff, a purchaser for value without notice. Nor can I for the same reason attach a trust upon the conveyance from G. S. Denison to his father the defendant. Mr. Denison's recollection is evidently at fault as to many of the details occurring at

that time. The explanation as to his purchase of the fifty feet to the north is at variance with the documentary evidence, and he himself said in evidence, "I do not understand the transaction." The conveyances and circumstances themselves afford very strong evidence against any fiduciary character being fixed upon the defendant when the son conveyed to him in September, 1869. He holds under an absolute deed for a year, and then conveys in trust with recitals and other expressions in the deed, which is executed by the son, totally irreconcileable with any trust having existed prior to that time. It is on the face of it a voluntary settlement, and the evidence of a party interested cannot be received to destroy its legal effect: *Northwood* v. *Keating*, 18 Gr. 643. Apart from this difficulty and the objection of the Statute of Frauds raised when the witness was being examined, the evidence of the defendant is too vague to prove any such trust as would deprive the settlement of its voluntary character. He merely says: "I accepted the deed from my son because he was getting married, and he was afraid that his wife's relations might have a claim on it, and I was to hold it for the family. I held it till I was getting married, and I deeded it back to my son and Mr. Winn in trust."

But he deeded back only about one-half of it in trust, and reserved besides a life-estate in the homestead. It does not appear that any declaration of trust was required as the condition of the conveyance from the son to him, or that any time was fixed for manifesting or executing the trust, or that any names of the beneficiaries were indicated, or that the defendant might not have retained the whole at his own option: *Cotton* v. *Vansittart*, 20 Gr. 244. Then, the property having come back to the defendant, that personal disability under which he was as to building on it revived, and it became as if no purchasers for value had intervened: *Lewin* on Trusts, 7th ed., 730, 731; *Van Wagner* v. *Findley*, 14 Gr. 53; *Story* Equity Jurisprudence, sec. 410.

I do not feel pressed by the objection urged of acquiesence

and delay, and that half of the original square has been taken up with buildings without complaint on the part of Dr. Bovell or the plaintiff. It is the fact that all this was done by purchasers under the mortgage prior to the conveyance to Dr. Bovell, so that he could not proceed against them, as they held by title paramount. There was therefore no breach of the restrictive condition on the part of the defendant of which complaint could be made in this Court. And again, it was not shewn that any appreciable injury arose to the plaintiff or Dr. Bovell from the occupation of the western part of the square, and without this acquiescence and waiver cannot well be urged.

Miss Winn having merely an agreement for a lease for fifteen years is not in the position of an innocent person holding for value under a completed instrument. She made no outlay on the property till after notice was served on her, nor has she paid any of the rent. If the plaintiff insists upon it I suppose the house put up by her must be removed, under the authority of *Gaskin* v. *Balls*, L. R. 13 Chy. D. 325. The other defendants are merely volunteers, and stand or fall with the defendant Mr. Denison. The declaration will be as prayed for with costs, (subject to the inquiry as to area of square, if defendant desires) and order for the removal of the building (if sought by plaintiff).

[CHANCERY DIVISION.]

RE CHARLES, FULTON V. WHATMOUGH.

Will—Vesting—Executory interests.

A testator by his will directed his trustees to accumulate certain trust moneys, arising from the sale of his real and personal estate, and to hold them after the death or second marriage of his wife, and his youngest child attaining majority, in trust for his sons and daughters in equal shares as tenants in common; and in the event of any of his said children dying leaving issue, he directed that the share of the one, so dying, should be divided among such issue, so soon as such issue should have attained majority: and in default of any such issue of his said children attaining majority, he devised the whole estate, real and personal, to his trustees to be converted into money, and applied to founding a charitable institution.

Held, on a view of the whole scope of the will, the period of absolute vesting was postponed until the grand-children attained majority, failing which the devise to the charity took effect.

Rule in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, *ib.* 408, applied.

This was a petition presented by certain devisees under the will of one James Charles, deceased, asking for a declaration as to the true construction of the said will, and for directions to the trustees under the will with regard to the application of the estate of the said James Charles.

The principal question upon the will, the provisions of which are fully set out in the judgment, was, whether the shares of the children of the said James Charles, and of the issue of such of the said children as should first die leaving issue, became absolutely vested in them upon the youngest child coming of age, or whether the period of vesting was postponed until the issue of such children so dying leaving issue should attain twenty-one years of age, in default of which the whole estate was devised in favour of a charity.

The same will was before the learned Judge on a previous petition as reported 23 Gr. 610.

The present petition was argued on March 8, 1882, when judgment was reserved.

Maclennan, Q.C., (*Langton* with him) for the petitioners. The testator contemplated the trusts of the will coming to an end at a time pointed out in the will, viz., the death or

second marriage of the wife, and the attainment of majority by the youngest child. All the contingencies mentioned were to happen prior to that time, and to that period is to be referred the dying without issue. They cited *O'Mahoney* v. *Burdett*, 7 H. L. 388; *Ingram* v. *Soutten*, L. R. 9 Ch. 45; *S.C.* 7 H. L. 408; *Gould* v. *Stokes*, 26 Gr. 122: *Little* v. *Billings*, 27 Gr. 353; *Munro* v. *Smart*, 4 App. 452, 3, 4; *Forsbrooke* v. *Forsbrooke*, L. R. 3 Ch. 93; *re Hayward, Creery* v. *Lingwood*, 45 L. T. N. S. 790; *Olivant* v. *Wright*, L. R. 20 Eq. 220; *S. C.* 1 Ch. D. 346; *Besant* v. *Cox*, L. R. 6 Ch. D. 604; *Theobald* on Wills, 1st ed., 940, sect. 5; 2nd ed., 488, sect. 5: *Monteith* v. *Nicholson*, 2 Keen 719; *re Dowling's Trusts*, L. R. 14 Eq. 463; *Clark* v. *Henry*, L. R. 11 Eq. 222.

T. S. Plumb, for infant grand-children. There is here a life estate in the children, with remainder to the grand-children; the rule is to include as many objects as possible: *Bouverie* v. *Bouverie*, 2 Phil. 349. The will was prior to the Wills Act, R. S. O. ch. 106, and the cases in England prior to the Wills Act are to be found 3 *Jarm.* on Wills, 5th Am. ed., 297; the will shews no intention that renders *O'Mahoney* v. *Burdett, supra*, inapplicable; the testator meant his estate to go over to the charity on failure of grand-children, and this implies an interest in the grand-children; the children took interests vested, but liable to be divested. He also referred to *Leaming* v. *Sherratt*, 2 Ha. 14; *Theobald* on Wills, 1st ed., 339, 341, 388; 2nd ed., 487, 489, 511; *Rogers* v. *Lowthian*, 27 Gr. 559; *Gould* v. *Stokes, supra; Ingram* v. *Soutten, supra; Gosling* v. *Townshend*, 17 Beav. 245.

Davidson, for the trustees, submitted the matter to the ruling of the Court.

Maclennan, Q. C., in reply.

May 18, 1882. PROUDFOOT, J.—This petition is for the construction of the will of James Charles, made in 1867. I had to consider the effect of this will on a former occasion, on the application of one of the devisees for an advance, (23 Gr. 610) but, at the request of some of the legatees

who were not parties to that application, I assented to the question being argued over again, and have had the benefit of a fuller discussion than on the former occasion. I have considered the will again, with every desire to discard my former opinion from my mind, and to divest myself of any bias to my former conclusion.

The will is obscure. So much as I thought requisite to dispose of the former application is found in the report; (23 Gr. 610); but some other clauses were referred to on this argument that make it expedient to give the general scope of the will, together with these other clauses.

The testator first appoints his executors and trustees. He then gives them his personal estate to sell and to stand possessed of the proceeds upon trust to pay debts, funeral expenses, and legacies, and to lay out and invest the surplus, and from the dividends, interest, &c., to pay to his wife for life or widowhood a yearly sum of £240, for her maintenance, and for the maintenance, &c., of his children who should remain at home with their mother single or unmarried, and in case of the death or marriage of his wife, the trustees were to apply that sum for the same purpose. After making a provision in reference to the education of his sons and placing them on farms, the testator gave his trustees and executors power to invest so much of the dividends, &c., as were unapplied or undisposed of under the trusts of the will, so as to accumulate the same, and at the period limited for the accumulations to be possessed of the same for the same trusts, &c., as were thereby declared of the trusts from which the accumulation proceeded.

The testator then devised to his trustees all his real estate (except such part as is in the town of Lindsay), as soon as might be after the death of his wife, and after his youngest child attained 21 years of age, to sell, and after payment of costs, charges, and expenses, &c., to hold and apply the residue upon the same trusts declared of the residue or surplus of the personal estate. The real estate and the rents accruing were to be deemed for all purposes personal estate.

As to the real estate directed to be sold, the trustees were authorized to let that unsold from year to year, or to grant leases for any term not exceeding ten years in possession.

The trustees were directed to hold the trust moneys, &c., after the death or second marriage of his wife, and his youngest child attaining 21 years of age, in trust for five daughters and two sons, in equal shares as tenants in common.

If any daughters and sons should die under the age of 21 years without leaving a child or children, then as well the share or shares thereof originally provided for the said daughters or sons so dying without leaving lawful issue, as their accrued shares should go to the others of his sons or daughters.

The trustees were to receive the interest and dividends of the shares of daughters who should at any time during their respective lives be under coverture, and pay the same into their hands for their sole and separate use, free from control of any husband they might marry.

Until the shares provided for the children of his daughters and sons should become vested in them under the trusts thereinbefore declared, the trustees were to apply the interest and dividends for the benefit of the children entitled in expectancy to such shares.

As to the Lindsay lands, he directs the trustees, after the death of his wife and the majority of his youngest child, to stand, be seized and possessed of the rents issues and profits in trust for the same daughters and sons, in the same shares, and subject to the same limitations, and with such and the same cross remainders as were limited concerning the trusts, stocks, proceeds, dividends and interest or income thereof, or as near thereto as the tenure of the premises will permit and the law allow. And he gave power to the trustees to lease the lands in Lindsay on building leases for 21 years, renewable for 21 years.

The testator then appointed the trustees guardians of minor children. He declared the bequest to his wife to be

in lieu of dower, and made provision in case of her not accepting it. Then followed a provision for the appointment of new trustees, and the usual indemnity clauses.

The testator then desired that the shares of any of his children dying without leaving issue should be divided equally among the residue of his said children.

But any of his children dying leaving issue, the share of the one so dying should be divided equally among such issue, or should be divided by the will of such of the children so dying leaving issue as to such child (of his) might seem meet so soon as such issue should have attained the full age of twenty-one years.

And in default of any such issue of his children attaining the full age of twenty-one years, then he devised the whole of his estate, real and personal, unto his trustees, to be by them converted into funds or money, the whole of which he desired his trustees to apply in the founding an institution for the dumb and blind, and if there were not sufficient for the purpose, then to apply the same to contributions from other sources to be applied for such purpose only. The institution to be founded or built in the city of Toronto.

It was contended that the accumulation was to cease upon the death of the wife and the youngest child attaining majority, and as the trustees were to hold at that time for the daughters and sons in equal shares as tenants in common, that the dying without children or without issue referred to that period, and those who survived it took absolute interests.

But the whole scope of the will, so far as can be gathered from the confused language employed, is opposed to this.

There is no express limitation of time during which the accumulations are to be made, but it may perhaps be inferred that it was only during the lifetime of the widow, and till the youngest child attained majority. However there is no direction that a division is then to be made; the trustees are to hold for the children as tenants in common, but their duties in regard to the property do not

cease: they have the power to lease unsold land for terms not exceeding ten years in possession, a power that is not limited to its exercise before the attaining of age of the children and death or marriage of the wife. And the trustees were after that time to receive the interest and dividends of the shares of daughters under coverture at any time during their lives, and pay them for their separate use.

A provision more clearly indicating the continued duty of the trustees is found in the direction that until the shares provided *for the children of the daughters and sons* became vested under the trusts *thereinbefore* declared the trustees were to apply the interest and dividends for the benefit of the children entitled in expectancy to such shares. No trusts were declared for the benefit of children of daughters and sons in the previous part of the will, but it shows, at all events, that the trusts did not cease with the coming of age of the testator's children, and recognizes a right in the grandchildren under the will which the trustees were to observe.

The whole of the provisions in regard to the property in Lindsay rest also on the notion that the property was to be in the custody of the trustees till it was ascertained which of the children, if any, should die leaving children. There is no express devise of this property to the trustees, but the duties they had to perform would imply a fee in them. Nor is there any devise of the *corpus* of it to the beneficiaries, though the right to receive the rents would also imply a right to the *corpus* in them. Then the trustees are empowered, after death of wife and majority of youngest child, to grant building leases for twenty-one years renewable for twenty-one years, and were to be possessed of the profits on the same trusts as limited concerning the previous funds. This carries on, if it were necessary to resort to it, the continuance of the former trusts along with the trusts of the Lindsay property.

After making the disposition of the Lindsay property then follows the appointment of guardians, declaration of

gift to wife being in lieu of dower, power to appoint new trustees, and trustees indemnity clauses. And then come the directions with regard to his children dying without leaving issue, which must apply to all the previous dispositions, and they are that if any child dies without leaving issue, which I will assume to be at the time of his or her death, the share is to be divided equally among the residue of the children. If any of his children died leaving issue the share of the deceased was to be divided equally among the issue, or as the deceased should direct by will, so soon as the issue should attain twenty-one.

There is nothing to restrict the period of dying without leaving issue to any time short of the life of the devisee. The natural import of the language is dying at any time without issue, and no contrary intention appears.

But a conclusive answer to the argument of the plaintiffs may also be found in the devise over to the charity. In default of any such issue of his children attaining twenty-one years of age the whole estate was devised to the trustees to be by them converted into funds or money, the whole of which he desired his trustees to apply in providing or aiding the charity.

It is plain therefore that the duties of the trustees were not to be terminated until the grandchildren attained twenty-one years of age. The estate remained in the trustees till then, and it was only then that the trust could be deemed at an end. The general scheme of the trust was in favour of his children and grandchildren, and failing the latter attaining twenty-one years then to a charity.

No clearer case can well be imagined for the application of the rule in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, L. R. 9 Ch. 45, 7 H. L. 408. There will be a declaration accordingly.

[CHANCERY DIVISION.]

DAVIS V. WICKSON ET AL.

Chattel mortgage—R. S. O. ch. 119—Fraudulent preference—13 Eliz. ch. 5.

The omission of the word "him," at the conclusion of the affidavit of *bona fides* registered with a chattel mortgage, has the effect of destroying the security as against an execution creditor who has seized while the goods remained in *statu quo*, but does not impair the instrument as between the parties.

Semble, where one creditor, having obtained property from his debtor in fraud of other creditors, has realized the property, and received the proceeds in a shape that cannot be ear-marked, another creditor who has been thereby defrauded, cannot make the preferred creditor account for the said proceeds, but has no other remedy than that prescribed by 13 Eliz. ch. 5, sec. 2.

THIS action was brought by Joseph Davis against Samuel Wickson, James B. Boustead, and Oswald F. Foster, under the following circumstances:—

By a certain indenture, dated October 24th, 1881, and registered October 25th, 1881, the defendant Foster, being owner in fee of certain lands in the village of Yorkville, mortgaged them to the defendant Wickson to secure the sum of $1,500, subject to a prior mortgage of $1,600. By chattel mortgage of the same date, Foster also mortgaged to Wickson certain goods and chattels to secure $1,500, the said chattel mortgage being declared to be a collateral security to the mortgage on the land of even date therewith. This chattel mortgage was filed in the office of the clerk of the County Court, in accordance with the Act, R. S. O. ch. 119, but it appeared that the words "him, the said O. F. Foster," were not inserted, as they should have been, at the end of the last clause of the affidavit of *bona fides* registered with the chattel mortgage, in accordance with the Act. Thus the clause, as it appeared in the affidavit, was as follows:—

"That the said bill of sale, by way of mortgage, was executed in good faith and for the express purpose of securing the payment of the money so justly due, or accruing due, as aforesaid, and not for the purpose of

protecting the goods and chattels mentioned in the said bill of sale by way of mortgage against the creditors of the said ————, the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against ————."

By an indenture of November 2nd, 1881, registered November 9th, 1881, Foster conveyed the said lands in Yorkville to the defendant J. B. Boustead for $2,800, subject to the mortgage for $1,600, and his wife, M. S. Foster, joined in the conveyance. On November 4th, 1881, the defendant Wickson commenced an action in the Common Pleas against Foster by writ dated that day, and on the same day the writ was served, appearance entered, a statement of claim for a sum of $1,429.75, and a statement of defence thereto, delivered, an order obtained in Chambers by consent striking out the said defence, and for leave to enter judgment, judgment entered up, and writs of *fi. fa.* against the goods and chattels of Foster placed at once in the hands of the sheriff of the county of York. On November 9th, 1881, the plaintiff, J. Davis, brought an action in the County Court of the said county against Foster, and on November 22nd following entered judgment by default of appearance for $278.80, and on November 29th following, placed writs of *fi. fa.* in the said sheriff's hands against the goods and lands of Foster, which writs at the time of the present action were still in full force and unsatisfied. On November 9, 1881, the goods and chattels comprised in the chattel mortgage of October 24, 1881, were sold by auction, and the defendant Boustead became the purchaser of the whole. Boustead at once paid the purchase money to the auctioneers. The sheriff, thereupon, notified the auctioneers of the writs in his hands in the suit of *Wickson* v. *Foster*, and the next day, November 10, the auctioneers paid the money over to the sheriff, and the sheriff paid it over to Wickson.

In his statement of claim, the plaintiff, Davis, stated the several instruments and proceedings above mentioned, and alleged that Foster was not indebted to Wickson for the

amount of the judgment for $1,429.75 obtained as aforesaid in the Court of Common Pleas: that Foster was before the making of the two mortgages aforesaid of October 24, 1881, and at the time of the present action, insolvent and indebted to the plaintiff for the debt for which he (Davis) recovered judgment against him, as aforesaid, in the County Court, and was then and at the time of the present action indebted to several other persons: that neither at the time of making the said chattel mortgage of October 24, 1881, and the said conveyance of lands of November 2, 1881, nor at the time of the recovery of the said judgment against him by Wickson, nor at any other subsequent time, had Foster any other property, real or personal, except the goods and chattels in the said chattel mortgage comprised, and the lands so conveyed, out of which he, the plaintiff, could realise his said judgment: that the chattel mortgage, the judgment and execution of Wickson, the conveyance of November 2, 1881, and sale by auction of November 9, 1881, and the subsequent seizure of the purchase money by the sheriff under Wickson's *fi. fa.* were all fraudulent and collusive, for the purpose of defrauding the creditors of Foster, and intended to give Wickson a fraudulent preference. And the plaintiff claimed that the said chattel mortgage, the conveyance of November 2nd, 1881, the judgment in *Wickson v. Foster*, and the *fi. fa.* issued thereon might be declared fraudulent and void, and set aside: that an account might be taken of the moneys received by Wickson under the *fi. fa.* in his said action, and otherwise received in respect of the matters in question, and that Wickson might be ordered to pay the same over to the plaintiff.

To this statement of claim the defendants Wickson and Boustead delivered a joint statement of defence. In this they denied the fraud and collusion charged by the plaintiff, and also asserted that Foster made the mortgages to Wickson not voluntarily, but as the result of pressure and threats of criminal proceedings; for that Wickson was treasurer of certain trust funds of a certain public body,

called the Methodist Church of Canada, Bloor Street, Yorkville, and at the time of giving the said mortgages Foster had collected moneys belonging to the said trust funds, but had failed to pay the same over to Wickson. They also alleged that on receiving the proceeds of the auction sale of November 9, 1881, and before the commencement of the present action, and before the recovery by Davis of any judgment against Foster, Wickson paid over the moneys thus realised from his securities, and had since had no control over them.

The defendant Foster put in no defence to the action.

The remaining circumstances of the case and evidence sufficiently appear from the judgment.

The case was heard at the Spring Sittings at Toronto, on May 12, 1882.

R. Wardrop, for the plaintiff, cited *Barron* on Bills of Sale, p. 145; *re Andrews*, 2 App. 24, 25, and 28; *Morrow* v. *Rorke*, 39 U. C. R. 500; *Nisbet* v. *Cock*, 4 App. R. 200; *Dalglish* v. *McCarthy*, 19 Gr. 578; *McEdie* v. *Watt*, 17 C. L. J. 473.

Blake, Q. C., (*Thomson* with him), for defendant Wickson. Where goods have been reduced into possession by the mortgagee, defects in the mortgage cannot be attacked by a subsequent mortgagee; *Taylor* v. *The Commercial Bank*, 4 C. P. 447: possession was taken by the mortgagee when the funds were handed over to him; *Watson* v. *Henderson*, 25 C. P. 562: the plaintiff has no right to apply after the money has been received under the judgment; the Court has no power to recall the money: R. S. O. ch. 118, sec. 1; there is no right of action against Wickson, for he received the money for the trustees, and paid it over to them before the commencement of this suit; the plaintiff should attack the goods by seizure if he alleges the first mortgage was invalid. The judgment can only be attacked under R. S. O. ch. 118, and there must be an "intent to prefer" under that Act.

They also cited *Nelles* v. *Paul*, 4 App. R. 1; *Clemmow* v.

Converse, 16 Gr. 547; *Totten* v. *Douglas*, 15 Gr. 126; *Labatt* v. *Bixel*, 28 Gr. 593. *King* v. *Duncan*, 29 Gr. 113; *Lewin* on Trusts, 7th ed., p. 501; *White* v. *Brown*, 12 U. C. R. 477; *Brodie* v. *Ruttan*, 16 U. C. R. 207; *Fitch* v. *Machel*, *per* Osler, J.. (Chy. D.,) Nov. 11, 1881.

J. M. Reeve, for the defendant Boustead. The plaintiff had no right to call Boustead before the Court. He is merely a creditor who has been paid his money.

Wardrop, in reply. The dealings of Boustead were suspicious, and he should not get his costs: *Moore* v. *Davis*, 16 Gr. 224. As to possession, there was no change of it whatever; *Barron* on Bills of Sale, p. 116. Wickson had no authority to bring the action he brought against Foster; 35 Vic. ch. 107, Ont. secs. 10, 11. He also referred to *Wilson* v. *Wilson*, 2 P. R. 374.

May 31, 1882. BOYD, C.—At the conclusion of the case I held that the transaction in both its branches as to the real and personal security was not impeachable under either 13 Eliz. ch. 5, or the R. S. O. ch. 118. But I reserved judgment on the point raised in argument, though not on the pleadings, that the chattel mortgage was invalid because of the omission of the word "him" at the conclusion of the affidavit of *bona fides*, so that in view of all the facts I might consider the rights of the parties to this litigation. The effect of this omission would be to destroy the security as against an execution creditor, who seized while the goods remained *in statu quo*; but it would not impair the instrument as between the parties. But in this case both mortgagor and mortgagee agree upon a sale of the goods at public auction before the plaintiff intervenes with his execution, and the effect of that sale is to pass the property and the possession of the goods to the purchaser Boustead. The plaintiff does not seek to follow the goods into the hands of Boustead, which would be his only remedy, probably because Boustead has again sold to *bonâ fide* purchasers, which would effectually extinguish all rights of the plaintiff to the goods. Such would be the

case even if actual fraud were made out as set forth in the bill; *a fortiori* would it be the case where fraud is disproved, and the possibility of losing the security arose from a clerical error in the affidavit required by the Chattel Mortgage Act.

It becomes unnecessary to express any opinion upon the validity of the judgment recovered by Wickson against Foster, because, like the chattel mortgage, that was good between the parties, and the money was made thereunder by the sheriff and paid over to the plaintiff, and by him to the Board of Trustees, before the plaintiff attacked his *locus standi*. For the purpose of costs I have somewhat considered the question, and after reading the cases of *Holbird* v. *Anderson*, 5 T. R. 235 (which would now be a case unquestionably of improper preference) *Feehan* v. *Lee*, 10 C. P. 385, and *Labatt* v. *Bixel*, 28 Gr. 593, I do not think that the plaintiff could at any time have successfully attacked this prior judgment. See also *Heaman* v. *Seale*, 2 C. L. T. 44, to which my brother Proudfoot referred me after I had arrived at the same result.

The relief sought by the bill is such as I find no authority for granting. It is sought to make Wickson account for the proceeds of the securities impeached as fraudulent; it being admitted that the corpus of the property has passed beyond his control, and it being proved that before litigation he had paid over the money to his principals, who are not before the Court. The redress sought is specifically wrong. The right of the plaintiff in this class of cases is to have any impediment removed or declared invalid which intercepts the action of his writs of execution. So long as the property of his execution debtor remains distinguishable, and so long as no purchaser for value without notice intervenes, so long may the Court award relief against that property in the hands of fraudulent or voluntary holders. But where, as here, the first holder sells the property obtained from the debtor and receives the proceeds in a shape that cannot be earmarked, there is no jurisdiction to go beyond the further remedy which

the Statute of Elizabeth prescribes, namely, that all parties to fraudulent conveyances aliening or assigning thereunder shall forfeit a year's value of the lands, and the whole value of the goods, whereof half shall go the Crown and half to the party aggrieved, to be recovered by action of debt as mentioned in section 2 of the Act.

Upon every aspect of the case, I think the action should be dismissed, with costs.

[CHANCERY DIVISION.]

SIEVEWRIGHT ET AL. V. LEYS.

Executors—Compensation—R. S. O. ch. 107 sec. 41—Rests—Master's report—Practice.

The fact that, an account being taken in the Master's office pursuant to a decree in an administration suit, a balance has been found against an executor, some of the items of which are the result of a surcharge, is not alone sufficient to disentitle him to compensation under R. S. O. ch. 107 sec. 41.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the Court to determine on the propriety of his decision.

Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case.

THE bill in this case was filed by certain beneficiaries under the will of one George Earnest, deceased, against John Leys, a barrister in practice in Toronto, the surviving executor of one John Earnest, who had been executor under the will of the said George Earnest, his brother, seeking for a declaration as to the proper construction of the will of the said George Earnest, and for an account of the estate of the said George Earnest, and of the rents and profits thereof come to the hands of the said John Leys, or

which might have so come, but for his wilful neglect and default; and that the trusts of the said will might be carried out under the direction of the Court, and if necessary a receiver be appointed; and for an order for costs against John Leys. Certain other persons entitled under the will of the said George Earnest were also made parties defendant.

On May 5th, 1881, a decree was made by consent, construing the said will, and referring it to the Master in the usual way to take the accounts and make the usual enquiries as to the dealings of the said John Leys with the real and personal estate of the said George Earnest, and directing the Master to appoint a new executor and trustee in the place of the said John Leys, and ordering John Leys, on such appointment being made, to transfer the personal estate and convey the real estate of the said said George Earnest to the new executor and trustee; and ordering John Leys to pay the costs of all parties to the suit up to and inclusive of the hearing, and reserving further directions and the question of costs subsequent to the decree until after the Master should have made his report.

During the taking of the accounts, the plaintiffs served notice of surcharge and falsification on the defendant John Leys, and sought to charge him with several sums of money beyond what he had admitted to have received, by his accounts filed in the Master's office.

On December 22nd, 1881, the Master made his report, whereby he found that certain sums therein set out, had come to the hands of John Leys, on account of the estate of the said George Earnest, and whereby also he charged him with a certain sum "for the value of land, which but for his wilful neglect and default, he might have received," and with a certain sum for interest "upon balances of moneys remaining from time to time in his hands;" and after allowing him a certain sum by way of commission the Master found a balance due from him of $1,179.87. And in the last two clauses of his report, the Master certified as follows:

9. "I certify specially that the defendant John Leys did not keep books or accounts containing entries of his receipts or accurate entries of his disbursements connected with the estate, nor did he take proper vouchers for many of his payments, by reason whereof the expense of taking the accounts under the decree herein was increased, *viva voce* evidence having to be given as to many of the items in the said accounts

10. "I further certify specially that the plaintiffs filed a surcharge seeking to charge the said defendant with various items, amounting in all to $3,341.84, over and above what he had admitted by his accounts. That before evidence upon the said surcharge was gone into items amounting to $1,470, were abandoned by the plaintiffs, and that after evidence in support of and against the surcharge had been adduced, items therein amounting to $1,071.84, were allowed, and the remainder disallowed.

The defendant John Leys having served notice of appeal on various grounds from this report, on February 4th, 1882, the plaintiffs served notice of cross-appeal, on the grounds, (1) that the Master allowed, when he ought not to have allowed, to the defendant John Leys commission on the various sales of real estate in the said report referred to, the evidence shewing that the said John Leys had disentitled himself to any commission by way of allowance as executor; (2) that the said Master did not take as he should have done, the said account with quarterly or half-quarterly rests against the said defendant John Leys, the evidence warranting the account being taken in that way.

This cross-appeal came up for argument on March 16th, 1882.

D. Black, for the appeal, cited as to the first ground, *Gould* v. *Burritt*, 11 Gr, 523; *Bald* v. *Thompson*, 17 Gr. 154; *Kennedy* v. *Pingle*, 27 Gr. 304; *Life Association of Scotland* v. *Walker*, 24 Gr. 293; as to the second ground. *Inglis* v. *Beatty*, 2 App. Rep. 453; *Attorney-General* v. *Alford*, 4 DeG. M. & G. 843; *Lewin* on Trusts 7th ed., p. 313-314; *Williams* on Executors, 8th ed. p. 1851, 1857.

C. Moss, Q. C., contra; cited *McMillan* v. *McMillan*, 21 Gr. 369; *Inglis* v. *Beatty*, supra; *McLennan* v. *Heward*, 9 Gr. 178, 279.

June 14, 1882. PROUDFOOT, J.—The plaintiff appeals from the Master's report on two grounds, first, because the master has allowed a commission to the executor; and second, because he has not charged the defendant with rests or compound interest on the money in his hands.

The reason for objecting to the commission is because the defendant has been found in debt to the estate;* and that some items of over-charge have been proved against him. In *Gould* v. *Burritt*, 11 Gr. 523, Mowat, V. C., says that he saw nothing in the statute (R. S. O. ch. 107, sec. 41), rendering it necessary to hold that an executor who does not do his duty properly, has right to the same compensation as an executor whose conduct has been free from blame; and he therefore refused to allow a commission to the defendant Buell under the circumstances of that case. What these circumstances were does not appear. I agree that the statute does not render it necessary, does not compel the Court in every case, no matter how flagrant the misconduct, to allow the compensation. And I assume that the circumstances of Buell's conduct were such as to warrant the disallowance of commission. But the same case also shews that neglect of duty by an executor, such as retaining money in hand that should have been applied in payment of mortgage debts, and of such magnitude as to justify charging him with interest and rests, is not enough to deprive him of commission, nor even of the costs of the suit. And in the case of *Bald* v. *Thompson*, 17 Gr. 154, although the conduct of the executor was such as to require the appointment of a receiver, and he was charged with a considerable part of the costs of the suit, he was allowed his commission. And in *Kennedy* v. *Pingle*, 27 Gr. 305, Spragge C., approved of a commission to the executors, although they had so dealt with the estate that he

*[NOTE.—The result of the defendant John Leys's appeal, mentioned above, was, that the Master was directed to retake the said defendant's accounts on the basis contended for by the appeal, and the result of such retaking of the accounts was, that there was a balance found due to him of $1,992.20.—REP.]

did not give them costs. The Court of Appeal in *Inglis* v. *Beatty*, 2 App. 453, 496, allowed commission to a trustee who had for many years retained money of the estate in his hands.

I think the course of decision has been that an executor or trustee will be allowed his commission, though he may have so managed the estate as to justify the appointment of a receiver, and to be deprived of and even made to pay costs. There may be cases of such exceptional misconduct as to induce the Court to deprive him of a commission. I do not mean to bind the hands of the Court in such a case. See also the remarks of Spragge, C., in *Simpson* v. *Horne*, 28 Gr. 1: "I must, in this case, reiterate my opinion that the principle stated in *Tebbs* v. *Carpenter*, 1 Mad. 290, is the sound one; and certainly there is less hardship in applying it in this country, where an executor doing his duty to the estate he represents is allowed a fair compensation for his pains and trouble; a compensation of which he is not deprived unless there be serious misconduct or mismanagement on his part."

And *Simpson* v. *Horne* was a case where the dealing of the executor with the estate was not only careless but perverse.

In this case, however, nothing appears on the report to require the application of so stringent a rule. The executor has merely a balance found against him, and that some of the items composing that balance were the result of a surcharge. This appeal is disallowed.

The second ground of appeal is, that the executor has not been charged with rests. He has been charged with simple interest. In the case above cited of *Inglis* v. *Beatty*, 2 App. 453, 473, *et seq.*, the late C. J. Moss, collects the cases on the subject of charging executors or trustees with compound interest, or rests, and at p. 495, he says, "The authorities, our own as well as the English, shew that the rule for the guidance of the Court rests upon the basis of compensating the *cestui que trust*, and depriving the trustee of advantages he has wrongfully obtained. It is an errone-

ous assumption that, at least since 1858, the Court has been bound to charge either six per cent simple interest, or six per cent compounded, according to circumstances. The charge of compound interest is in some cases the appropriate remedy, as, for example, where there has been an inexcusable neglect of an express direction for accumulation." And the charge of interest with rests was set aside in that case.

The defendant in this case is not a trader, but a barrister; and there is no evidence to shew that he made any profit of the money, further than the fact of its going into his bank account or being used with other money of his own. It was not argued that there was any violation of an express direction to accumulate. And in fact there could not be any liability on this ground, for George Earnest, the testator whose estate is now in question, gave all his property to his brother John upon trust to sell and to make use of the proceeds for the benefit of his (George's) wife and children as to him and them might seem best, and appointed John his executor.

John, by his will, disposed of George's estate in pursuance of this trust, and directed his (John's) executor to sell and *to retain the money in his hands*, and apply it as he directed for George's wife and children. And then he made provision that in no case should his executors be chargeable with more than six per cent on money retained by them—a provision that seems to me inconsistent with charging compound interest. And there is no direction for accumulation, but the interest is to be spent.

But there are not materials before me to enable me to determine whether compound interest should be charged or not. It does not appear what balances the defendant from time to time had in his hand. The report contains no particulars of the dates when money received, or how long money retained. I have no doubt that the master has authority to take the account with rests, under the ordinary reference, in a proper case; but when he declines to charge the defendant in that way, if it were intended to

appeal, he should have been required to report the facts to enable the Court to determine on the propriety of his decision. I doubt also the propriety of appealing on such a subject. It would more properly come up on further directions if all the materials for the consideration of the question were spread out on the report. This appeal is also dismissed.

[CHANCERY DIVISION.]

CARMICHAEL V. SHARP.

Partnership action—Costs.

Where, on the dissolution of a partnership between the plaintiff and defendant, it was agreed that the defendant should wind up the concern, and the plaintiff having demanded a statement of account, the defendant rendered an untrue and imperfect one, whereupon the plaintiff brought this action for a winding up, claiming that the defendant was indebted to him on account of partnership assets received, which the defendant denied, and the plaintiff succeeded.

Held, that defendant must pay the costs of the suit.

THIS action was brought by Angus Carmichael against John Sharp, under the following circumstances:

The plaintiff and the defendant, in April, 1874, entered into partnership in the business of general merchants. On April 15th, 1876, the partnership was dissolved, and at the time of the dissolution it was agreed that the defendant should collect the debts and pay the liabilities of the firm. Prior to the commencement of this action the plaintiff demanded from the defendant a statement of account, and the defendant rendered him a statement, by which he purported to shew that there was nothing coming to the plaintiff, but, on the contrary, that the latter had already received more than his share of the partnership estate.

On November 5th, 1881, the plaintiff commenced this action, and by his statement of claim he alleged that the

account rendered by the defendant was a partial and imperfect one; that the defendant had collected more than sufficient to pay off the debts and liabilities of the partnership, and had by his neglect or default lost to the partnership many debts due and owing to the same; and he claimed to have the partnership estate wound up, and for such purpose to have all necessary accounts taken.

By his statement of defence the defendant disputed the correctness of the plaintiff's statement of the term of the partnership and of the agreement for dissolution, and alleged that he had no money in his hands belonging to the plaintiff, and that he had always been ready and willing to account for his dealings in the partnership matters and had accounted to the plaintiff therefor, but that the plaintiff had not accounted to him for the partnership moneys received by the plaintiff, although repeatedly requested to do so.

On January 18th, 1882, the action came on by way of motion for judgment, and an order was made referring it to the Master at Whitby to take an account of the partnership dealings between the plaintiff and defendant, and to wind up the affairs of the partnership; and further directions and costs were reserved.

On May 4th, 1882, the Master reported that the defendant had received in excess of his share the sum of $421.54, and he charged the defendant with interest thereon since Aprif 12th, 1878. He also certified that the defendant claimed a commission of $133.85 as compensation for his services in collecting the debts, but he had not allowed the same to him, but submitted the question to the Court. He, also, specially certified that the defendant had rendered to the plaintiff the statements of account above referred to, purporting to shew that the plaintiff had received more than his share of the partnership estate; and that the defendant, on cross-examination before him, had claimed that the plaintiff had been over-paid to the extent of $582.

On June 21st, 1882, the matter came before the Court, on further directions and on the question of costs, and the principal point argued was as to costs.

A. Hoskin, Q. C., for the plaintiff. The defendant is chargeable with the costs; this is a different case from the ordinary partnership suit. It is in fact a suit in which the plaintiff claimed that the defendant was indebted to him on account of partnership assets received and the defendant denied such liability, and the plaintiff has succeeded. He referred to *Woolans* v. *Vansickle*, 17 Gr. 451; *Downey* v. *Roaf*, 6 Pr. R. 89.

Farewell, for the defendant. The usual rule should prevail; the plaintiff sought to charge the defendant with moneys that he (defendant) should have collected, and the plaintiff failed in this, though the report is silent upon it; there are matters not reported that would show that the defendant should not pay the costs.

June 21, 1882. FERGUSON, J., said he could not pay attention to anything behind the report, that he was unable from what appeared to distinguish the case from *Woolans* v. *Vansickle*, *supra*; the defendant must pay the plaintiff the amount found due, less one-half the $133.85 commission mentioned in the report; and the defendant must pay the costs of the action; and interest must be added to the balance above found due, to be paid by the defendant since the date of the report.

[CHANCERY DIVISION.]

CRUSO v. BOND.

Mortgage—Acceleration clause—Foreclosure—Election.

In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of the clause, and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest, and costs, whenever tendered, although he does not pray for a personal order for immediate payment. *Drummond* v. *Guickard*, cited in *Green* v. *Adams*, 2 Chy. Ch. R. 124, overruled.

This was a foreclosure suit on a mortgage for $700, payable in five years from the 1st June, 1878, with interest at ten per cent. payable on 1st June and December, and was brought by Michael Daintry Close the mortgagee, plaintiff, against William Bond, the mortgagor, defendant. The mortgage contained the usual statutory proviso, that in default of payment of interest the principal should immediately become due, and the usual statutory covenant for payment. The defendant made default in payment of the instalment of interest which fell due on the 1st June, 1881, and on the 29th June the plaintiff filed his bill of complaint, which set out the terms of the mortgage, and alleged that it contained the usual statutory proviso that in default of payment of the interest thereby secured, the principal should become payable, and that one instalment of interest was over-due and unpaid, so that the whole principal had become payable, and that the plaintiff had not been in occupation, and was entitled to the equity of redemption, and the plaintiff prayed for payment, or foreclosure, and also for a personal order for immediate payment against the defendant. On the 30th June, the plaintiff's solicitors received from the defendant a P. O. order for $28 or $29, the amount of overdue interest, but they refused to accept it, and returned it to defendant, stating that a bill had been filed and that he must pay the costs in addition to the interest. Subsequently the plaintiff's

solicitors stayed proceedings for a month at the defendant's request. Meantime several letters had passed between the plaintiff's solicitors (at Toronto,) and the defendant's solicitor (at Cobourg) as to a settlement; and in one of these dated the 4th August, 1881, the defendant's solicitor offered to pay off the full amount of principal, interest, and costs; but this offer the plaintiff's solicitors declined to accept, claiming that they were not bound to do so. It did not appear that the contents of the bill had been communicated to the defendant before service. On the 20th August, the plaintiff amended his bill by striking out the prayer for immediate payment, and the allegations setting out that the mortgage contained the usual covenant for payment of the mortgage money, and that the plaintiff was entitled to be paid forthwith, but he left untouched the allegation of the acceleration clause and of the principal being due. He served the amended bill on the 29th August. The bill had not been served previously to the amendments. On the 20th September the defendant made a formal tender to the plaintiff's solicitors of a sufficient sum to cover principal, interest, and costs to that date, and on the 21st tendered a discharge for execution. Both tenders were declined; and on the 24th, the defendant served a notice of motion returnable before the Master in Chambers for an order dismissing plaintiff's bill, and directing him to receive payment of the principal, interest, and costs, and to discharge the mortgage. The Master in Chambers made the order as prayed with costs. His decision was reversed by the Chancellor on appeal, on the authority of *Drummond* v. *Guickard*, referred to in *Green* v. *Adams*, 2 Chy. Ch. 134, by which he considered himself bound. The judgments of the Master in Chambers and the Chancellor, are reported in 9 Pr. 111.

The defendant appealed to the Divisional Court.

C. Moss, Q. C., for the appeal. The plaintiff by filing his bill and demanding payment of the full amount of principal and interest elected to take the whole amount, and that

election is irrevocable, and the plaintiff is precluded from refusing to accept payment now when it is tendered. He cited the following cases: *White & Tudor's* L. C. Eq., vol. I. p. 932; *Harmer* v. *Priestly*, 16 Beav. 569; *Dearman* v. *Wyche*, 9 Sim. 570; *Letts* v. *Hutchins*, L. R. 13 Eq. 176; *Paynter* v. *Carew*, Kay, Ap. XLIII; *Fisher* on Mortgages, 3rd ed. vol. II. 787, sec. 1273; *Parker* v. *Vine Growers' Association*, 23 Gr. 179; *Cameron* v. *McRae*, 3 Gr. 311; *Trust and Loan Co.* v. *Kirk*, 8 P. R. 203; *Tylee* v. *Hinton*, 42 Q. B. 228; *Barwick* v. *Barwick*, 21 Gr. 39; *Talbot* v. *Braddil*, 1 Ver. 393; *Green* v. *Adams*, 2 Chy. Cham. 134.

E. H. E. Eddis, contra. The plaintiff had no other remedy, and was obliged to claim the full amount. The mere demand of money is not sufficient evidence of election. He relied on *Green* v. *Adams* and *Lett* v. *Hutchins*, (cited before.) If appeal sustained, it should be without costs, as the plaintiff proceeded as he did on the authority of *Drummond* v. *Guickard*.

March 11, 1882. BOYD, C.—What took place before the bill was served on the defendant should not prejudice him in this application. He had made default in paying one instalment of interest and was anxious to gain time to pay this and escape costs. When he made the offer to pay in a month at the higher rate of interest he did not know the precise shape in which the bill against him was framed, as a copy of it had not been served. When it is served as amended by striking out the claim for immediate payment, he sees that the whole sum is nevertheless claimed as due by virtue of the acceleration clause, and is he not justified in tendering what is claimed? The plaintiff might have so amended his bill before service as to shew that only the overdue interest was sought; but as his bill was served he claims what the defendant has the right to hold him to in the subsequent proceedings. It is only a question of less or more at an earlier or later date in this suit, because if the defendant declines to pay at the outset he can compel the plaintiff to accept the whole sum by

waiting till the Master reports. No point is made that the plaintiff has altered his position as to investing the principal on account of the correspondence between the parties; nor is it claimed that he should receive some interest in advance to compensate him for the defendant's change of attitude. In the absence of any such contentions I do not see that the plaintiff can insist on holding the defendant to his offer to pay interest only, or that the plaintiff's waiting for a month during the vacation should give him the advantage he now claims from it.

The judgment of the Master cannot on the other grounds be supported unless the decision of Esten, V. C., is overruled, but sitting in Court I do not feel bound by his decision, and I am of opinion now, as I was before, that it should no longer be followed. There is the more reason for coming to this conclusion now because all proceedings have been simplified and rendered more uniform by the recent amendments of the law.

It is a good rule to apply as far as possible in all judicial proceedings, that where anything is sought by a party he should be treated as prepared to receive what he asks for. "Besides," as the author of The Treatise on Equity sagely observes, "a man can never be injured, if he receives principal, interest, and costs," *Fonblanque*, 5th ed. vol. ii., p. 264. In the case of a mortgage security, if the plaintiff seeks to recover for overdue interest alone let him do so. If to get in the whole sum upon the default, then let him claim that. For reasons more fully given in my former judgment, I think the original order in Chambers should be restored.

I incline to think no costs should be given of the appeals.

[CHANCERY DIVISION.]

ROBERTS v. HALL.

Contract—Adoption of child—Parental control—Promise to make a will—Parties.

Where a father enters into a contract whereby he parts with the custody and control of his child, with the *bonâ fide* intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy; and, although, where such a contract is executory on both sides, the Court cannot decree specific performance, by reason of the want of mutuality, yet where the contract has been faithfully performed so far as the father and child are concerned, so that their *status* has become altered, the Court will if possible, enforce in *specie* the performance of the contract by the other party to it.

Where, therefore, the parents of the plaintiff agreed with H. and his wife to give up to them their daughter, the plaintiff, then six years old, to bring up as their own, and make her sole heiress to their property at their death, and where it appeared that the agreement was *bonâ fide* intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will,

Held, (reversing the judgment of FERGUSON, J.) that the agreement could be enforced against H.'s representative, and that it must be decreed accordingly.

Held, also, (affirming FERGUSON, J.) that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name.

THE bill in this case was filed by Christina Roberts, wife of Thomas Lee Roberts, who was made a defendant, and daughter of the two McKays, who were parties to the agreement—specific performance of which was sought—and who were also defendants hereto, by her next friend, against the heirs at law, the next of kin, and the personal representatives of Dennis Hall, deceased, another party to the said agreement, including Elizabeth Hall, widow of the said Dennis Hall, the remaining party to the said agreement.

The plaintiff submitted that by virtue of the said agreement, and by reason of the facts and circumstances set out in her bill, and sufficiently referred to in the judgment, she was owner in equity of the real and personal estate of the

said Dennis Hall, subject to the right of Elizabeth Hall as doweress therein; and that she was entitled to have the said agreement performed and carried out. And she prayed that the said agreement might be specifically performed; and in the words of the prayer, "that it might be declared that upon the death of the said Dennis Hall, the plaintiff, became and now is entitled to his real and personal estate, subject to the rights of his widow therein, as such widow; and that in equity the plaintiff's rights and interests in the said estate were the same as if she had been the only child of the said Dennis Hall, or as if he had bequeathed and devised the said property to the plaintiff by will." She also prayed for an injunction against the defendants to restrain them from interfering with the said real and personal estate; and that an account might be taken of the personal estate already distributed amongst those of the defendants who were the next of kin of the said Dennis Hall, and an order for repayment, and for costs.

The agreement in question, and the circumstances under which it was made, and the evidence adduced as well as the objections raised on behalf of the defendants, are clearly set out in the judgment of Ferguson, J.

The cause was heard at Simcoe, on September 17th and 18th, 1881.

S. H. Blake, Q. C., for plaintiff. No question is raised by the answer as to whether or not the plaintiff, not being a party thereto, can sustain a suit upon the agreement. But, if necessary, the proper plaintiff can be substituted under Rule 90 and Rule 103. Under the old practice a party plaintiff could be treated as a defendant, and *vice versâ*: *Shaw* v. *Shaw*, 17 Gr. 282; *Mulholland* v. *Merriam*, 19 Gr. 288, affirmed 20 Gr. 152. As to the merits, the agreement was fully performed by the plaintiff and her parents: *McDonald* v. *McKinnon*, 26 Gr. 12; *Loffus* v. *Maw*, 3 Giff. 592; *Halloran* v. *Moon*, 28 Gr. 319; *Fitzgerald* v. *Fitzgerald*, 20 Gr. 410; *Hammersley* v. *de Biel*, 12 Cl. &

F. 45. As to "sole heir" to the property, see *Darmer* v. *Phillips*, 3 Drew 78; *Jarman* on Wills, 4th ed., vol. 2 p. 75; *Parker* v. *Nickson*, 1 DeG. J. &. S. 177; *Powell* on Devises, vol. 1 pp. 309, 313, "Heir."

McCarthy, Q. C., for the defendants. The plaintiff cannot maintain the suit even in equity. In *Shaw* v. *Shaw* there was a trust, and therefore that case is different. *Mulholland* v. *Merriam* has gone further than any English case; *Pollock* on Contracts, 3rd ed., 219; *Gregory* v. *Williams*, 3 Mer. 582; *Eley* v. *Positive Life Assur. Co.*, L. R. 1 Ex. D. 88, which was decided under the Judicature Act. The defendants have claimed by their answer all the rights which they would have had if they had demurred to the bill.

As to the merits, the Evidence Act requires corroboration of the plaintiff's evidence, and there is not sufficient corroborative evidence here: *Orr* v. *Orr*, 21 Gr. 397. Neither is there evidence of the signing of the document by Hall. Again, the agreement is contrary to public policy; the parent owes a duty to the child; *Swift* v. *Swift*, 34 Beav. 266, S. C. 34 L. J. Ch. 394; *Kennedy* v. *May*, 11 W. R. 358; *Hope* v. *Hope*, 8 DeG. M. & G. 731; *Reg.* v. *Smith*, 22 L. J. Q. B. 116; *Re Andrews*, L. R. 8 Q. B. 153; *Pollock* on Contracts, 3rd ed., p. 320. The parent cannot, by contract, deprive himself of the right of control of the child. *Swift* v. *Swift* shows the exception and proves the rule. It makes no difference that the contract has been executed. The contract being illegal the Court will not lend its aid. *Alderson* v. *Maddison*, L. R. 5 Ex. D. 293, *S. C.* on App. L. R. 7 Q. B. D. 174; 50 L. J. N. S. 466, contains many of the cases on the subject. Supposing the contract to be good, it was revoked by the father when he took away the child; while the new contract made the next morning was not in writing, and was not to be performed within a year. The cases referred to by counsel for the plaintiff were cases in which the contract was made by the party himself and legal. I refer also to R. S. O. ch. 133, and ch. 135. Again the words of the

contract are that the McKays did then and there give the child, provided that if the Halls should have no child, she should be sole heir of "their property," and this means joint property, and there is no such property. "Heir" also has a technical meaning, and applies only to real estate.

S. H. Blake, Q. C., in reply. There is sufficient corroboration in this case. Indeed, the production of the paper was sufficient corroboration. The handing over of the child to the aunt was not a handing over to a stranger. The laws of slavery and apprenticeship have nothing to do with such a case as this. The agreement really was this: We will let you have the child if you will do for her. The continuance of the plaintiff after 21 was a good consideration, and the Court will not weigh nicely the consideration.

[*McCarthy*, Q. C. At 21 the plaintiff was in ignorance of the contract.]

The words of the contract cover the property of both or either of the Halls at the time of the death. The following authorities were also referred to on the argument: *Bridge* v. *Bridge*, 16 Beav. 315; *Wheatley* v. *Purr*, 1 Keen 551; *Meredith* v. *Heneage*, 1 Sim. 553; *Robinson* v. *Raynor*, 28 N. Y. 494; *Vansittart* v. *Vansittart*, 2 DeG. & J. 249.

April 8, 1882. FERGUSON, J.—In the year 1846, Angus McKay, of the township of Walsingham, and Elizabeth his wife, had a family of ten children, and Dennis Hall, of the Township of Woodhouse, and Margaret his wife, had no family. McKay and Hall were brothers-in-law, and an agreement was made between McKay and his wife of the one part, and Hall and his wife of the other part, whereby McKay and wife were to give their daughter Christina McKay, the present plaintiff, then six years old, to Hall and wife, who were to adopt her as their own child, and to make her their sole heir to their property in case they should have no child, but in case of their

having a child, Christina was to share equally with such child. This agreement is in these words and figures :—

"WALSINGHAM, April 15th, 1846.

"This is an agreement between Angus McKay and Elizabeth McKay, his wife, of the Township of Walsingham, and Dennis Hall and Margaret Hall, his wife, of the Township of Woodhouse, in the County of Norfolk. That the first parties did then and there give to the second parties their daughter Christina McKay, now at the age of six years, in adoption to clothe and school as their own born child, and providing that they, Dennis Hall and Margaret Hall, his wife, should not have any child of their own, that the child Christina McKay, hereafter known as Christina Hall, shall be sole heir to their property after their death, and if they should have a child of their own, then she was to have equal share, and that Dennis Hall and Margaret Hall, his wife, did then agree to do the same by the child, now known as Christina Hall, the same as if she was their own born child. This is the agreement between Angus McKay and Elizabeth McKay, his wife, and Dennis Hall and Margaret Hall, his wife.

"ANGUS McKAY,
her
"ELIZABETH x McKAY,
mark.
"DENNIS HALL,
her
"MARGARET x HALL."
mark.

In pursuance of this agreement the plaintiff, then six years old, was given by her parents to Hall and his wife, and she remained with them until the time of her marriage about fourteen years ago, at the age of twenty-six. The evidence shows that during that period she was good and faithful, as well as very industrious, and that she was of very material service to Hall and his wife, and was always treated by them as their daughter. It was also shewn that her marriage was with their approbation, and that Hall then gave her a present of $40, but other than this sum and an occasional dollar or so she did not receive any remuneration from the Halls. She also adopted the name of Christina Hall instead of Christina McKay, and by that name she was called and known till the time of her marriage to Roberts.

At the time of the agreement neither McKay nor Hall had much property. Margaret Hall died about seven years ago, and Dennis Hall died about two years ago intes-

tate, having at the time of his death real estate to the value of $5,000 and upwards, as well as some personal property said to be of the value of $1,000 or thereabouts.

After the death of Dennis Hall, who left a widow, admitted to be entitled to dower, &c., his next of kin commenced proceedings for the partition and administration of the estate, whereupon this suit was commenced by the plaintiff, and, as was stated at the bar, the property was, by consent of all parties, sold, and the money, the proceeds of the sale, paid into Court, where it remains pending these proceedings.

Dennis Hall and his wife had not any children, and there is much and I think sufficient evidence to show that during his lifetime, and up to a period within a very short time of his death, (and nothing to the contrary appears up to his death,) he intended that the plaintiff should have his property, and thought that the agreement he had made was binding in this respect, so much so that he considered it unnecessary to make a will.

McKay and wife, the parents of the plaintiff, went to reside and still reside in Michigan. The agreement, according to the evidence, was taken possession of and kept by the plaintiff's mother. Hall had frequently told the plaintiff that there was an agreement, (not saying that it was in writing,) and that she was to have his property, but it appears that the plaintiff was not aware of the written agreement till after the death of Hall, when it was produced by her mother. The plaintiff by her bill of complaint asks, among other things, that this agreement may be performed and carried into execution, and that it may be declared that upon the death of Dennis Hall she became and is entitled to his real and personal estate, subject to the right of his widow therein, and that her rights and interests therein may be declared to be the same as if she had been the only child of Dennis Hall, or as if he had devised and bequeathed his property to her.

For the defendants, it was objected that the execution

of the agreement was not sufficiently proved, but I cannot see the force of the objection, or that it should prevail. Both Angus McKay and his wife, (who were examined under a commission), swore to the fact that the document was signed by the parties whose names appear to it, and that the body of it was written by McKay, and the wife swore that she had possession of the agreement always after its execution until a short time ago. It was a natural thing for a mother to keep and preserve a paper that she thought would be of advantage to her child, and I cannot entertain any doubt that the document was really executed as alleged by the plaintiff. But the defence further object that there is not the necessary corroboration. As to this, I think the evidence of the McKays and the production of the document sufficient, and besides I think the case of the plaintiff on this point is aided (if any aid can be thought necessary) by the statute, Revised Statutes Ontario, Cap. 109.

It was also objected that the plaintiff cannot sustain this suit in her own name. I am, however, of the opinion that the cases *Shaw* v. *Shaw*, 17 Gr. 282, and *Mulholland* v. *Merriam*, 19 Gr. 288, referred to by counsel for the plaintiff sufficiently show that she can maintain the suit. I refer particularly to the language of the learned V. C. Strong, near the foot of page 293, of the latter case, where he says: "But even if Merriam is not a trustee, I think there could be no doubt that a personal representative of the testator recovering this money in an action at law would be considered a trustee for the plaintiff, and if so it would, I think, follow that the plaintiff can maintain this suit." The language of Mellish, L. J., in *Ex parte Piercy*, L. R. 9 Ch. at p. 43, where in deciding against Piercy, and after speaking of the necessity of a consideration moving from Piercy to entitle him to the benefit of the contract, he says: "Or else it must be proved that there were such facts in the case as would, in a Court of Equity, make the company trustees for him with reference to that covenant, so as to entitle him to use

the name of the company in suing the other three companies, if they refused the benefit of the covenant," is also, I think applicable, although the question then was not a question of parties. There cannot, I think, be any reasonable doubt that if the parents of the plaintiff had brought a suit upon the agreement in this case, and recovered, they would be trustees of the proceeds for the plaintiff, and that according to the view stated by the learned V. C. Strong, would entitle her to maintain the suit. I have examined the very early cases mentioned in *Addison* on Contracts, 4th ed., p. 942, with the view of showing that the plaintiff could upon other grounds, that of the relationship of parent and child, or a sort of agency, maintain the suit. These occurred to me at the hearing, but I find them somewhat reflected upon in the last edition of *Leake* on Contracts, at p. 443. Besides, an amendment, if necessary might be made, for counsel for the parents of the plaintiff expressed his willingness that they should be made plaintiffs in the suit. I do not think such an amendment necessary: if I did I should be disposed to allow it.

The plaintiff's difficulty, however, (which I think an insuperable one,) is this. The contract which she seeks to have specifically performed is contrary to public policy and illegal. The law gives the father the custody and control of his children, and casts upon him the duty of caring for them and seeing to their education, and this duty he can neither renounce nor delegate. There are many authorities, both early and late, showing this. See the remarks of Lord Hatherley, L. in *Hamilton* v. *Hector*, L. R. 6 Chy. 701, *Fry* on Specific Performance, 2nd ed., sec. 1537, and cases there cited in the foot note. In this contract the illegality by reason of contravention of public policy reaches the whole consideration for the promise to which the plaintiff seeks to have effect given by way of specific performance. It is laid down in *Fry*, sec. 456, "that the illegality of a contract, or any part of a contract, is of course a bar to specific performance as well as to every other proceeding, by which either of the parties may seek to enforce it."

The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and right of the parties, but upon grounds of public policy: *Fry*, sec. 459. It was argued in this case that inasmuch as the consideration had been executed there should be a performance of the other part of the contract. The position of the parties in such a case is illustrated in the same section, the conclusion of the illustration being this: "As, for instance, if under a contract between A. and B., to ship goods contrary to law, A. ships the goods, B. has no ground in natural equity for refusing to pay the stipulated price. A. and B. were equal in the culpability of the contract, and B. does a fresh wrong by refusing payment, but it is a wrong for which no remedy is afforded by law." The author quotes Lord Mansfield, in *Holman* v. *Johnson*, Cowp. 343. "It is not for the defendant's sake that the objection is ever allowed, but it is founded on the general principles of policy, which the defendant has the advantage of, contrary to the reall justice between him and the plaintiff." It is also laid down that where in a suit for specific performance, a fact not put in issue by either party, has come out on the evidence affecting the legality of the contract, it has been noticed by the Court, which has not proceeded without directing an inquiry: *Fry*, sec. 460, and cases cited.

It was stated in argument that the contract in this case, though it might not be capable of being enforced against the father, was and is different in kind from the contracts to which I am referring, and not having been resisted in any way by him, and the consideration having been fully executed, it should be specifically performed against the other party to it. I was not referred to any authority showing this. I have not found any, and I think reason and analogy against the proposition.

After a perusal of all the cases to which I have been referred, and a somewhat diligent search, I have not found any authority on which I can feel justified in saying that specific performance of the agreement should be

ordered; I am, on the contrary, of the opinion that it cannot.

Then it was argued that there had been at least five year's service of the plaintiff after she became of full age: that this was a good consideration moving from her, and that it was upon the understanding that she should be her uncle's heir, &c., that he had told her that there was an agreement to that effect; and that this would be sufficient to support that agreement with her parent, or would constitute an agreement between her and her uncle, and that effect should be given to either one or the other of these. The plaintiff's evidence on this part of the case was not very definite. She did not say that she had been told of the written agreement by her uncle at all, and she did not know of its existence until it was shown her by her mother after the death of her uncle. The evidence is quite insufficient to establish an agreement between her and her uncle, even if a parol agreement would suffice, and I cannot see how the service, after she attained full age, and what she says passed between her and her uncle, can have the effect in respect of the written agreement that was contended for. I feel quite certain that it cannot.

On another branch of the case attention may be called to the dictum of the Court of Appeal, in the case of *Alderson* v. *Maddison*, L. R. 7 Q. B. D. at p. 181, where Baggallay, L. J., delivering the judgment of the Court, says: "It appears to us that to give the same effect to a man's promise and agreement to make a will as to a will made by him in pursuance of such promise or agreement would be in direct contravention of the provisions of the statute."

I am, for the reasons that I have given, of the opinion that the plaintiff cannot succeed, and that the bill must, I regret to say, be dismissed with costs; and there will be judgment accordingly.

On June 9th, 1882, the plaintiff moved before the Divisional Court to have the above judgment set aside and

judgment entered for her. The motion was heard before Boyd, C., and Proudfoot, and Ferguson, JJ.

W. Cassels, for the motion. It is stated in the judgment no authority was cited to the Judge below, but there is authority that where an agreement has been fully performed, and the consideration fully executed, it should be specifically performed: *Hill* v. *Gomme*, 1 Beav. 540. Though there the Court held that the agreement had been varied by subsequent agreement that does not affect the law laid down. Although the contract might not be enforceable against the father, yet it is only *primâ facie* void.

[BOYD, C.—If it is shewn the other person is rich and the father unable to provide, then the *primâ facie* aspect is removed.]

That this is considered to be the law is clear: *Fry* on Specific Performance, sec. 182, 2nd ed. In the case put by Fry there was no property settled; there were only expectations.

[PROUDFOOT, J.—This is not quite the case of selling the child to a stranger; here she was passing to her aunt.]

Lyons v. *Blenkin*, Jac. 245, which is approved in *Andrews* v. *Salt*, L. R. 8 Ch. 639, shews that there is no barrier in the way of enforcing this agreement. See also *Colson* v. *Morris*, in the note to *Lyon* v. *Blenkin*, *supra*. It may be if the father had gone next day and taken the child, it could not be enforced against him. But since it has been acted upon, and the circumstances of the parties have been altered, it is binding on the defendants. *Simpson* on Infants, pp. 145, 156, and *Bazeley* v. *Forder*, L. R. 3 Q. B. 559, show that it is only under the English Poor Laws that a father is bound to support his child. There is no legal liability on a father to support his children, apart from the English Poor Laws. But although the state, in England, will not allow a father to shield himself behind an agreement whereby he parts with the custody and care of his children, yet as between the parties such an agreement is good, at all events when circumstances have so changed

that it would be unjust to the child not to enforce the agreement. There is nothing immoral about such an agreement. The father can if he chooses retreat from such an agreement, until it has been acted upon, so that he does not prejudice the child; but the opinion of Fry, Simpson, and Lord Langdale, is clear, that where the agreement has been acted upon it will be enforced so that the child may not be wronged. The father only does what the Court would do under similar circumstances. I refer to *Powel* v. *Cleaver*, 2 Br. C. C. 499. It is clear from other cases that the father may abdicate his rights: *Re Agar Ellis*, L. R. 10 Ch. D. 49. It would be unreasonable to say a line should be drawn while a child is an infant; an infant cannot have higher rights in a Court of Equity than an adult has.

As to an agreement to make a will being void, I refer to *Alderson* v. *Maddison*, L. R. 5 Ex. D. 293; *Davis* v. *McCaffray*, 21 Gr. 554; *Fitzgerald* v. *Fitzgerald*, 20 Gr. 410. There is nothing more contrary to the spirit of the Wills Act in an agreement to make a will, than there is contrary to Acts relating to conveyances in an agreement to make a deed. Therefore the dictum of the Court of Appeal in *Alderson* v. *Maddison*, L. R. 7 Q. B. D., at p. 181, is well founded.

In the course of the argument, *Hill* v. *Gomme*, as reported 5 Myl. & Cr. 250; and *Hamilton* v. *Hector*, L. R. 6 Ch. 701, were also referred to.

James Robb, who was to have appeared for the heirs-at-law and next of kin of Dennis Hall, was unavoidably absent at the argument; but leave was reserved to him to put in a written argument. He informed the Court, however, subsequently, that he would not avail himself of this permission, since all the points and cases on which he relied had been considered by the learned Judge in the Court below, and were therefore already before the Court.

September 7, 1882. BOYD, C.—This is not a suit in which the plaintiff's right to relief depends upon the doctrines specially pertaining to suits for "specific per-

formance," using that term in its technical sense as restricted to executory contracts. As pointed out by Lord Selborne in *Wolverhampton R. W. Co.* v. *London and North Western R. W. Co.*, L. R. 16 Eq. 439, some confusion has arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions which have arisen as to the propriety of the Court requiring something or other to be done in *specie*. In this case the terms of the agreement are clearly defined in the written instrument set forth in the pleadings. There was the giving up of the plaintiff, then six years of age, by her parents to the deceased Dennis Hall and his wife, who undertook to bring her up as their own child, and who agreed that she should be sole heir of their property at their death. The adoption took place, and the plaintiff thenceforward and always discharged all the duties devolving upon her in the new family to the entire satisfaction of the deceased. All that a child could do for a parent was fulfilled by the plaintiff down to the death of both Hall and his wife. Hall frequently recognized her rights under the agreement, and abstained from making a will in her favour because of his belief that this agreement rendered it unnecessary. This is not then the case of an executory contract so far as the plaintiff and her own proper parents are concerned. All that was engaged to be done on their part has been done; but not until the death of Hall and his wife were they entitled to call for the performance of his part of the bargain, as to the property he might die possessed of. So that it is manifest the parties did not contemplate a contemporaneous performance of the agreement in this aspect of it.

The question is not, now, whether the contract originally would have been enforceable by the Court in *specie*. Doubtless as in all personal contracts of a continuing character, and as in all voluntary contracts involving a renunciation of parental rights, *that* could not been granted by the Court: *Kennedy* v. *May*, 11 W. R. (Ch.) 358. But the agreement having been faithfully performed by

the father and the child on their part, should any objection that there is in the agreement itself a want of mutuality be allowed to prevail at this stage? It may be conceded that the Court could not have enforced this contract at the outset, but by its terms the parties did not contemplate then obtaining the property now in question. The transaction was intended to be a conditional one. Provided father and child carried out the agreement on their part, then at the death of the other party, all his property should be left to the child. The principle referred to by Bacon, V. C., in *Coverdale* v. *Eastwood*, L. R. 15 Eq. 131, applies to this kind of case: "That where a man makes a representation to another, in consequence of which that other contracts engagements or alters his position, or is induced to do any other act which either is permitted or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively." The promise in that case, as in this, was to leave property at death.

In the case of executory contracts, by the doctrine of mutuality, a party seeking specific performance cannot get that mode of relief unless the Court is able to deal with the whole contract, and has jurisdiction specifically to enforce what the plaintiff has to do or to give as the consideration. But if the plaintiff has fully performed his part, then if the Court can enforce in *specie* the part which remains to be done by the defendant, why should it not so decree?

As put by Lord Cottenham in *Dietrichson* v. *Carburn*, 2 Phil. 57: "I cannot see any difference between a consideration actually paid and a performance alleged by the plaintiff of all that he had undertaken to do." I may also appropriately cite the language of Wigram, V. C., in *Waring* v. *Manchester, etc., R. W. Co.*, 7 Ha. 492: "The Court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will on his part do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to be some-

thing which the Court cannot give him, it certainly has been the generally understood rule, that that is a case in which the Court will not interfere. * * * If that which the plaintiff is to give on a bill for specific performance be something to be done at a future time, and which the Court cannot enforce, the Court in that case will not give relief." But, as said in *Price* v. *Penzance*, 4 Ha. 506, when one party has had the benefit of the contract in *specie*, as far as he is concerned, the Court will go to any length which it can to compel him to perform in *specie* also.

According to my best judgment, the correct position as to part performance is expounded by Sir John Romilly in *Hope* v. *Hope*, 22 Beav. 364, at p. 365: "But agreeing to all those propositions, and particularly to the decision of *Hills* v. *Crolls*, 2 Phill. 60, and those other cases of which I think the case of *Price's* Reports, *Clarke* v. *Price*, 2 Wilson, C. C. 157, was the original instance, that this Court will not enforce one part of a contract where it finds itself unable to enforce the other part of it, the case is very different where that part of the contract which this Court cannot enforce has been already performed by the party on whom that duty lay. In Mr. Price's case he had entered into a contract with a bookseller to compose and write the Reports of Cases in the Court of Exchequer, in consideration of a certain price to be paid by the bookseller. The Court would not enforce the contract against Mr. Price, saying: 'How can we do it, and by what means can we make him write a report of any case?' *Hills* v. *Crolls* was a similar case. There Mr. Crolls, being a chemist of some skill, had entered into an agreement with the plaintiff as to the supply of certain chemical articles, and the Court said we cannot enforce the agreement, the Court has no such power. But, assume that Mr. Price had written and delivered his report, and done all that the contract required on his part, would the Court have allowed the bookseller to say that he would not perform his part of the contract, because Mr. Price could not have been compelled to perform his? Certainly not; the case stands

upon very different grounds, and still more so when the things to be performed are of such character, that if completed it is impossible to restore the parties to the same situation they were in before."

The text-books, however, treat this position as over ruled by the Lords Justices in appeal: 8 DeG. M. & G. 731, 746, where Turner, L. J., says: "To hold that an agreement so objectionable as that this Court would not perform it, can be rendered capable of performance by the objectionable parts of it having been carried into execution, is a doctrine to which I cannot assent." See *Fry* on Specific Performance, 2nd ed., secs. 443, 847. But the correct interpretation of this language is to limit it to cases where the agreement is illegal and contrary to public policy. It is not to be extended to agreements generally which are not susceptible of specific performance because involving the doing of things which the Court cannot supervise. For example, in cases where an agreement is made for building houses on land by a person to whom a lease of the premises is to be given afterwards by the proprietor, the Court will not enforce the contract to build, but when the person has built, he can then ask the Court to enforce the contract for the lease. This was clearly held by Mellish, L. J., in *Wilkinson* v. *Clements*, L. R. 8 Ch. 112, who said that if the agreement then under discussion was to be treated as an entire agreement, no specific performance as to the leases could be granted until the whole of the houses had been built. The whole scope of the judgment in *Oxford* v. *Provand*, L. R. 2 P. C. 135, is to the same effect. There is, besides the language of Lord Cottenham upon this point in a case somewhat analogous to the present, not referred to in Sir Edward Fry's book, *Persse* v. *Persse*, 7 Cl. & Fin. 316, where, after disposing of an objection that the agreement in question was illegal as against public policy, he deals with another objection, that there was no *mutuality* in the contract: "But the question here is, whether after the risk incurred and the benefit secured, and the consideration thereby paid, the father can on his part resist performance

of the contract which led to those results? If this objection could prevail in this case, how could decrees for specific performance where the defendant only signed the agreement or upon part performance, be maintained? In those cases there is no mutuality in the sense in which the word is used in the present argument, because the contract being within the Statute of Frauds, could not have been originally enforced against the plaintiff, but he having performed his part, is entitled to compel the defendant to perform his."

This brings me to consider that which was held to be the turning point of the case in the Court below—namely, whether or not the agreement now in hand is illegal, as being contrary to public policy—in which event I agree that part performance or entire performance by the plaintiff would not avail to sustain her suit.

The general rule is indisputable, that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which, as a parent, the law casts upon him, is illegal and contrary to public policy. The reason of this rule of law is given by Turner, L. J., in *Vansittart* v. *Vansittart*, 2 DeG. & Jo. 259: "It is not competent to the father to fetter and abandon his parental power to the extent which by this agreement he has contracted to do. * * Whatever may be the father's judgment under any altered circumstances of the child as to the mode in which he ought to be educated, according to the provisions of this agreement he is to be bound not to act upon that judgment for the benefit of his child, unless somebody else consents. That is a provision repugnant entirely to his parental duty." In other words, the Court will not allow or assist a father to make any arrangement which will preclude him from acting according to his judgment and discretion in the most advantageous manner for the welfare of his child. It is as a general rule desirable and right that the father should exercise superintendence over his children, and that he should not be permitted by contract to deprive himself of this inherent obligation imposed on him by nature.

But while this law is broadly recognized in *Hope* v. *Hope*, 8 DeG. M. & G. 744, by Turner, L. J., it is there hinted at that there may be circumstances which would justify such a contract. These circumstances occur in certain exceptional cases, in which the control of the father may be injurious to the child, or where it is for the advantage of the child that the parental superintendence should not exist. Such cases are of equitable concern, in which, according to the expression of Sir John Romilly, the "principle is inverted," because in the particular case the policy of the law is derived from a consideration of what is most for the benefit of the child: *Swift* v. *Swift*, 34 Beav. 271. Where, for instance, the father has been guilty of any act of moral turpitude towards the child, then he disqualifies himself from longer exercising parental authority. In such a case the Court of Equity would interfere as against the father and for the protection of the child. So that, as put by Sir John Romilly, in *Swift* v. *Swift*, the benefit of the child is the foundation of both the rule and the exception. Or, again, as put by the same Judge, when Lord Romilly, in *Hamilton* v. *Hector*, L. R. 13 Eq. 520, the foundation of the jurisdiction lies in determining what is for the good of society in general. Accordingly the Court is bound to regard all the circumstances, and if it be found that the particular contract had really for its object not a violation of public policy by taking away the parental duties, but the enforcement of public policy by preventing the demoralization of the children by their own father, then such a contract will be upheld as valid: See *Swift* v. *Swift*, 4 DeG. J. & Sm. 710, and *Hamilton* v. *Hector*, 13 Eq. 511.

The rule is also flexible in another direction, as where the father agrees to forisfamiliate the child out of regard for his welfare in view of benefits, pecuniary or otherwise, bestowed or expected. In this instance if a change has actually taken place in the condition and prospects of the child, the father will be prohibited from interfering so as to disappoint the expectations of the child, and is deemed to have waived his parental rights. That is Lord Hard-

wick's expression in *Blake* v. *Leigh*, Amb. 306. As put by Lord Thurlow in *Creuze* v. *Hunter*, 2 Cox 243, the Court has arms long enough to prevent a parent from prejudicing the health or future prospects of the child. In cases where the father has consented to the child being maintained by another, and a fund has been set apart for that purpose, and there has been a continuance of the new relations resulting in advantages to the child in the way of education and training, the Court will not allow the father to interfere with the expectations of the child, founded upon his consent, and the altered condition of circumstances thereafter. In such a case he cannot capriciously interfere in what is clearly for the child's benefit: *Lyon* v. *Blenkin*, Jac. 262.

In these cases the Court, before coming between the parent and the child, requires to be satisfied that there are solid considerations for the infant to be taken into account, and not merely expectations. This, however, is not a necessary element, where the father is not seeking to regain the custody of the child, in determining whether such an arrangement is contrary to public policy. Here the child transferred was one of a large family, and the uncle and aunt had no children, and they promise to leave her all they have at their death. The circumstances of the uncle were then somewhat better than those of the father, though both were poor. The chances of the child were very much better in the father's judgment by making the change than by having her at home. The father could have interfered at any moment and put an end to the arrangement if he found that it was being carried out disadvantageously to the child. The fact that he did not do so, and that the infant when coming to the years of discretion did not do so, is cogent evidence that the benefits of this compact commended themselves both to parent and child. I am not compelled by any of the authorities to hold such a transaction contrary to public policy; and to my mind it would be a contravention of the policy of the law to allow the plaintiff to go unrewarded for her many years

of service in the family of the deceased. Besides, the child, being emancipated by the parent, would have the right to receive for her own use wages and earnings for personal service. Of all this the deceased Hall received the benefit on the faith of the promise to leave her all his property: *Jack* v. *Greig*, 27 Gr. 13; R. S. O. ch. 47, sec. 58, p. 494. She helped to earn the property as Hall admitted.

In considering the legality of the instrument, it is unimportant to weigh very nicely the *quantum* of benefit to be gained by the child, and whether immediate or prospective. The real point is, was the arrangement one *bonâ fide* intended for the benefit of the child, or was it a colourable attempt to contravene the policy of the law? I cannot hesitate to believe that the former is the correct view; and that therefore the contract is not obnoxious to the objection, which was held fatal to the plaintiff's recovery.

Hill v. *Gomme*, 1 Beav. 540, is a case strongly resembling the present. Dean covenanted with the plaintiff's father to maintain and apprentice the plaintiff, then an infant, and that he should take a certain interest in all the estate which Dean should possess at his death. The child was taken for a short period by Dean, but was then sent home again; and it was held that there was no appreciable part performance affecting the boy, and no expectation on his part defeated. The Master of the Rolls expressed the opinion that had there been a part performance altering the condition in life of the boy, the Court would not have permitted the father to take him back to his prejudice, and would have compelled a complete performance of the covenants in his favour: (p. 554.)

Upon appeal, in 5 M. & C. 250, Lord Cottenham indicates some difficulties that arise in giving specific performance of such a contract regarded as entirely executory, such as whether the Court would decree performance of a contract by which a party deprived himself of the possibility of realizing proporty which he could dispose of by will, and so destroy an active motive for bettering his condition in life. (p. 253.) But assuming the contract to be an

executed one by the plaintiff, the Lord Chancellor's view accords with that of Lord Langdale. At p. 255, he says: "If, indeed, the agreement had been so far acted upon as to have altered the *status* of the child, and that by the act of Dean, Dean might have been precluded from disputing with the child his liability to perform his part of the agreement, but that would have been a new equity, though arising out of the agreement, and which the facts of this case exclude." That, however, is an equity which in my judgment the facts of the present case include, and as to which the plaintiff's right to relief is most persuasive.

It is worthy of notice that the conclusions indicated in the views of these eminent Judges, were judicially held in 1858, in a case in the New Jersey Courts, in which *Hill* v. *Gomme* was not at first cited.

In *Van Dyne* v. *Vreeland*, 11 N. J. Eq. 370, the Chancellor decided the case upon demurrer irrespective of authority. Upon the hearing it again came before him, when *Hill* v. *Gomme* was for the first time cited, in 12 N. J. Eq. 142. This decision is not binding upon our Courts, but I willingly adopt the views and reasoning of the Judge embodied in a remarkably able judgment. In the case as first reported it was held that when a father makes an agreement in reference to his infant child from which benefits are to accrue to the child upon the performance of the agreement, then after performance the child in his own name may enforce it; and this *a fortiori*, if any valuable part of the consideration has been rendered by the child. That was a case in which the father agreed by parol with the child's uncle that the latter should adopt and treat the child as his own son, and that the property he should have at his death should be given to the child. The child assumed the uncle's surname, and lived and worked with the uncle under this arrangement for twenty-five years, and then filed this bill to restrain the defendant from disposing of his property to defraud the plaintiff. The Chancellor said, *inter alia*: "There is no consideration

of public policy which should forbid the Court's countenancing such an agreement. Considering the situation of the parties and their circumstances in life, it was beneficial to all parties, and cannot be considered as injudicious or unreasonable. The father made a beneficial arrangement for his offspring, and Vreeland's affections were satisfied by the adoption of a son. The agreement is alleged to have been unreasonable, because it deprived him of the free disposal of his property. But this is not so. It provided him with a son, and only obligated (*sic.*) him in the disposal of his property to make such provision for the child of his adoption as might reasonably be expected from parental obligation and affection. There was nothing unnatural, situated as he was, in his assuming such an obligation, and of his making the complainant the object of his affections. It did not deprive the defendant of the power of disposing of his property as he might see fit for his own comfort and benefit": p. 381, citing *Gregor* v. *Kemp.* 3 Swan, 404.

To the objection as to want of mutuality, the Judge said: "It is too late for a plaintiff who has accepted the performance of an agreement from the other party, and has induced him to perform his part of it, to raise the objection, that he is not bound by the agreement, because he could not enforce that performance if it had been refused." The case came on again for hearing before the same Chancellor, Williamson, and is reported in 12 N. J. Eq. 142, when he adhered to his former judgment, and decreed in the plaintiff's favour. He further observed in the later decision. "The agreement put no restraint whatever upon the parties to the free and unrestricted enjoyment of their property. They might give it away, while they lived, but they could not make a disposition of it to take effect at their death. What was left at their death they agreed the complainant should have:" p. 147.

The same conclusion was also arrived at in the like circumstances in 1876, in another State Court: *Sutton* v. *Hayden*, 62 Mo. 101, in which neither *Hill* v. *Gomme*, nor

VanDyne v. *Vreeland*, appear to be cited. It is, however, a case deserving attention.

The relief to which the plaintiff is entitled is a declaration that the property real and personal of which the intestate died possessed, is impressed with a trust in her favour, and as the money the proceeds of that property is now in Court, she is entitled to have it paid out to her, deducting, of course, the share of the second wife of Hall.

The current of authorities enabling the Court to give effect, in a proper case, to an agreement to dispose of by will, or to leave a man's property at his death, is too well established to justify giving effect to the dictum to the contrary in *Alderson* v. *Maddison*, L. R. 7 Q. B. D. 181. See early cases collected in *Harg.* Jur. Arg. vol. 2 p. 310, &c., also later ones in *Fry's* Spec. Perf., secs. 223, 554, and *Ridley* v. *Ridley*, 34 Beav. 479, not cited there.

If thought necessary the parents of the plaintiff, who consent, may be added as plaintiffs; but for the reasons given in the judgment below I think the plaintiff has the right of suit in her own name. See upon this point *Fry* on Spec. Perf. sec. 182, and *Spence's* Equity, vol. ii. p. 281.

The plaintiff should have the costs of this application to the Divisional Court.

PROUDFOOT, J., concurred.

[QUEEN'S BENCH DIVISION.]

RE THE CORPORATION OF THE TOWNSHIP OF SARNIA AND THE CORPORATION OF THE TOWN OF SARNIA.

Extending limits of town—Arbitration—Drainage assessment—Award against township invalid—R. S. O. ch. 174, sec. 53, ch. 33.

A portion of the township of Sarnia was added to the town of Sarnia by proclamation of the Lieutenant-Governor. The former municipality was indebted to the Province for certain drainage works under the provisions of R. S. O. ch. 33, in respect of roads benefited by the drains. The arbitrators, in settling the matters in dispute between the two corporations, refused to consider this indebtedness, and made their award without adjudicating thereon.

Held, that the award was invalid, for the liability in respect of the roads was an ordinary debt payable out of the general funds of the township, to which the town should contribute.

The award directed the township to pay a certain sum to the town.

Held, bad; for the Municipal Act, R. S. O. ch. 174, sec. 53, only provides for a payment by the town to the township.

In re the Village of Point Edward and the Township of Sarnia, 44 U. C. R. 461, distinguished.

THIS was an application on behalf of the corporation of the township of Sarnia, on notice of motion, to set aside an award made by Robert Fleck and Archibald Bell, two of the arbitrators appointed under the provisions of the Municipal Institutions Act, R. S. O. ch. 174, to settle the matters in dispute between the above named corporations by reason of the addition of a portion of the township of Sarnia to the latter municipality by proclamation of the Lieutenant-Governor, in accordance with the provisions in that behalf contained in section 20 of the said Act.

By their award, dated the 20th May, 1882, the said two arbitrators awarded that the township of Sarnia should pay to the town of Sarnia the sum of $275.86, with interest from the first day of January, 1882, that being the date from which the addition of the territory to the town was to take effect; and with respect to a claim made by the township that the town should pay a proper proportion of the amount due, or to accrue due, from the said township for the construction of certain government drainage works

in the township, the arbitrators, by their award, declared their opinion that the government drainage assessment was not a proper subject of arbitration between the said municipalities, and they did not therefore, adjudicate thereon.

It appeared from the evidence given before the arbitrators that the corporation of the township of Sarnia was indebted for certain drainage works to the Ontario government, under the provisions of R. S. O. ch. 33, in the sum of $17,893, in respect of roads benefited by the drains constructed or made. There was a further liability of the township in respect of the lands in the township drained by the drainage works, and in respect of the lands and roads in other municipalities improved or benefited by such works.

The arbitrators refused to take any part of this indebtedness into consideration in making their award, being apparently under the impression that the decision of Osler, J., in the matter of the arbitration between the corporation of the village of Point Edward and the corporation of the township of Sarnia, reported in 44 U. C. R. 462, precluded them from considering any liability in respect of the drainage work.

The corporation of the township of Sarnia, apart from such liability for drainage works, had assets, and the arbitrators awarded that the township corporation should pay to the town a portion of such assets, amounting to the sum of $275.86, above mentioned.

September 15th, 1882, *Aylesworth* supported the motion. The award directs a payment to be made by the township to the town, a result the framers of the Municipal Act evidently intended no possible circumstances should warrant. See section 53 of that Act. If the assets of the township exceeded its liabilities, the town taking a portion of the township territory would only be entitled to do so without having to make any payment to the township. Here there was a heavy indebtedness upon the township for the benefit to public property from the construction of drainage

works. This was a liability resting alike upon every part of the township, to which the portion of the township attached to the town was before its annexation ratably liable, and to which the town ought now to contribute. There could be no possible distinction between this particular liability of the township and any other debt of the corporation. The whole difficulty was created by the arbitrators thinking they must be governed by the decision in the Point Edward case, 44 U. C. R. 461, which, however, was a very different case from this. There, at the time of the separation, there had been no assessment under the Drainage Act, and therefore no liability for improvements to the public property had been fixed upon the township. There the assessors had only to assess a share of the liability against Point Edward if lands in its municipality were benefited by the works. Here the assessment roll was finally revised before the territory in question was taken from the township and added to the town. He referred to the Municipal Act, R. S. O., ch. 174, secs. 11, 13, 20, 52, 53, 385, and the Ontario Drainage Act, R, S. O. ch. 33, secs. 7, 8, 9, 10, 11, 14 and 19.

Robinson, Q.C., contra.

September 22, 1882, CAMERON, J.—I am of opinion the arbitrators ought to have taken into consideration in making their award the liability of the township in respect of the roads benefited by the drainage works, which is a liability the township has to discharge out of the general funds, and towards which the lands detached from the township and added to the town would have had to contribute if they had not been detached. Sections 21 and 33 of R. S. O. ch. 33, the Ontario Drainage Act, in express terms make this an obligation to be defrayed or paid out of the general funds of the municipality, while the liability incurred in respect of the drainage of private lands, or lands situate in other municipalities improved by the works, are to be charged to such lands and municipalities, and collected under the Drainage Act. If the lands in the

detached territory were directly benefited and assessed in respect to such benefit it would be a different thing, and their being made part of another municipality might not prevent their liability being directly enforced under the Drainage Act, and they would be brought within the decision of the Court in the Point Edward case, above referred to. But where the charge or liability is to be met out of the general funds, it assumes the character of an ordinary debt of the municipality, to the payment of which the municipality attaching any portion of the territory of the indebted municipality must contribute a just proportion, under section 53 of R. S. O. ch. 174, the Municipal Institutions Act.

The power in a town corporation to attach to it any portion of the adjacent lands in any adjoining township is contained in section 20 of the said Act, and no provision is made therein as to the terms upon which the acquisition of such adjacent lands may be had. This is provided for in section 53, which seems only to make the town or city increasing its limits liable to the township whose lands are attached, and does not provide for the township, under any circumstances, paying anything to the town or city; which would seem to make the award in this case clearly bad.

It must, therefore, be remitted back to the arbitrators, who are to make their award in writing within one month; the costs of this application to be costs of the arbitration, and to be in the discretion of the arbitrators in the same manner as the general costs of the arbitration, under section 381 of the Municipal Act.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

IN RE BRONSON ET AL. AND THE CORPORATION OF THE CITY OF OTTAWA.

Railway—Point of commencement—"From," meaning of—Eminent domain—Expropriation of lands already devoted to public uses.

The charter of the Canada Atlantic Railway Company, reciting in the preamble that the line of railway which it was proposed to construct, would afford the shortest and most convenient connection between the cities of Ottawa and Montreal, authorized the company to construct their track *from* the city of Ottawa to, &c. The head office was to be in Ottawa.

Held, that they had the right to enter the city and construct from a point within its limits.

The city passed resolutions providing for a lease of right of way to the company over lands expropriated by the city for water-works purposes, under 35 Vict. ch. 80, O.

Held, that though *primâ facie* the only right intended to be conferred on a company, is that of expropriating the private property of individuals or corporations, and not property already devoted to public uses, or already expropriated under other Acts, yet under some circumstances the right to make such expropriation might exist, and if so, then the city would have the corresponding power to convey; and as the applicant had not shown to the Court that circumstances did not exist under which the railway company could take the land, the Court would not assume that the city had committed a breach of trust in passing the resolutions.

Held, also, that there was nothing in the resolutions authorizing the railway to cross the streets at a grade different from that prescribed by the Railway Act of 1879.

April 15, 1882. *Robinson*, Q.C., obtained a rule *nisi* calling upon the Corporation of the city of Ottawa to shew cause why the resolutions of the corporation, passed on the 15th March, 1882, purporting to grant to the Canada Atlantic Railway Company certain lands, or the use of certain lands as well as the right to cross certain streets and property in the said city, and the resolutions of the said corporation, passed on the 20th of March, declining to re-consider the said first-mentioned resolutions, should not be quashed in the whole or in part, with costs, on the following grounds: (1) That the said railway company have no right or power to enter the said city. (2) That the said lands consist of water-works property acquired compulsorily under the Act of the Legislature of Ontario, 35 Vic., ch. 80, and subsequent statutes for the construction of water-works for the

city of Ottawa, and the said corporation have no power to grant the said lands, or the right to use the same, or to lease them to the railway company. (3) That the terms and conditions embodied in the said first mentioned resolutions are unauthorized and beyond the power of the corporation to impose, and authorize the crossing of the street at a different grade from that prescribed by the Consolidated Railway Act of 1879.

The affidavits filed in support of the application verified a copy of the application, dated the 16th of January, 1882, of the railway company for the use of a portion of the lands held by the city in connection with the water-works property, together with the necessary street-croossings, for the purpose of laying or constructing the Chaudiere terminus of the railway, with switches and side tracks, &c.

A plan was annexed shewing the line of the railway within the city limits.

The affidavits further stated that the water-works property marked green upon the plan referred to in the letter of Edward McGillivray, and the resolutions moved against, was property acquired by the corporation of the city under the several statutes enabling them to acquire property for the construction and maintenance of water-works in the city, and that the money authorized by the said statutes to be borrowed had been borrowed, and was still unpaid.

May 23, 1882. *McCarthy*, Q.C., with him *Gormully*, (of Ottawa), shewed cause.

Robinson, Q. C., with him *Christie*, (of Ottawa), supported the rule.

The arguments sufficiently appear in the judgment.

September 5, 1882. OSLER, J.—This is an application to quash certain resolutions passed by the council of the corporation of the city of Ottawa, granting permission to the Canada Atlantic Railway Company to cross certain streets and property belonging to the city, the latter being property which they had acquired in connection with and for the purposes of the city water-works.

It is contended by the applicants that these resolutions are illegal on one or all of the following grounds: 1. Because the railway company have no power to enter within the limits of the city, their charter enabling them only to construct their line *from* the city, and therefore not from a point within the limits. 2. Because the property over which permission is granted to carry the railway is held in trust by the city, and already expropriated for other purposes. 3. Because the resolutions authorize the company to cross the highways or streets at a grade or in a manner differing from that prescribed by the Con. Railway Act of 1879.

The first of these objections turns upon the meaning to be attributed to the word "from" in the second section of the railway company's charter.

By 42 Vic. ch. 57, D., the Montreal and City of Ottawa Junction Railway Company and the Coteau and Province Railway Company are amalgamated under the corporate name of the Canada Atlantic Railway Company. The Act incorporating the first named company is 34 Vic., ch. 47, D. The second section of the Act authorizes the company to lay out, construct, and finish a double or single iron railway *from* the city of Ottawa to some point *at or near* the village of Alexandria, and thence to some point *at or near* Coteau Landing, on the line of the Grand Trunk Railway.

There is no inflexible rule that words "from" and "to" when used in relation to points in space, or points of time, are always to be taken exclusively. In *Rex* v. *Hall*, 1 B. & C., at p. 136, it is said: "The meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used and the object that is intended to be attained." In *Pugh* v. *The Duke of Leeds*, Cowp. 714, it was held, that to effectuate the intention or to promote and uphold the spirit and meaning of an Act of Parliament, the words "from the date,"

or "from the day," should be construed either inclusive or exclusive; and see also *Lester* v. *Garland*, 15 Vesey 248. In *Rex* v. *Norwich*, 1 Str. 177, the question was, whether a certain bridge was within the city bounds. The words of the charter were, *usque ad pontem de Harford ad exteriorem partem rivi.* Counsel for the Crown, in argument, say, "There is a great difference where *usque ad* is used to terminate a way and where it is only used as a mark or designation of any conspicuous place. Calvin, in his *Lexicon Juridicum*, says, *usque ad* is sometimes *inclusionis nota.*" Many cases are to be found of indictments for not repairing highways where the way has been described as leading *from* one parish or place *to* another, and in all of them it appears to have been held that both of such places were excluded by the terms of such description, so that the road alleged to be out of repair could not be in either of them. But these are decisions upon questions of pleading, and are not necessarily of much assistance in determining the proper construction of a statute, even when the words of the statute and the indictment are the same. In the *King* v. *The Inhabitants of Gamlingay*, 3 T. R. 513, Ashhurst, J., says: "The case of *Pugh* v. *The Duke of Leeds*, was properly decided, but that turned on the construction of a contract between two persons where their intention was to be considered. But greater certainty is required in indictments than in contracts of that kind. Now the whole of the road described by the former part of the indictment is excluded by the terms 'from' and 'unto,' and the latter part is a contradiction in terms to the former allegation." See also *Rex* v. *Inhabitants of Upton-on-Severn*, 6 C. & P. 133. *Hammond* v. *Brewer*, 1 Burr. 376, shews that the question is one of construction and intention. There an Act of Parliament had been made for repairing and widening a road from Flimwell-vent to the town of Hastings, which passed through other towns in its course. The question arose upon that part of the Act which gave directions for repairing the road to and from the town of Battel, which was stated to be lately paved before the Act of Parliament

by the inhabitants, and that it was and is kept in repair by them. In other parts of the Act the roads were described as leading from, to, and through such and such towns; but in mentioning the town of Battel it only said "to" and "from" it. The only question was, whether the Act intended to include or exclude that town. "The Court was clear that the Act intended to exclude the town of Battel, and that it was right and reasonable it should be excluded."

In the case of *Dougall* v. *The Sandwich and Windsor Road Co.*, 12 U. C. R. 59, cited by Mr. Robinson, the road which the defendants were authorized to make by their instrument of incorporation, filed under the Act relating to joint stock road companies, was described as a road from the town of Sandwich *to* the town of Windsor. It was held that they had no authority to construct it through the town of Windsor, or beyond the entrance of that town from Sandwich, and therefore had no authority to erect a toll-gate within the limits of the town. No reasons are assigned for the conclusion beyond the statement that the word "to" is "clearly not inclusive but exclusive." The Court were speaking, however, only of the case before them, and construing the language used by the defendants themselves in their declaration of incorporation, which contained nothing else to shew that they intended to enter either town. It was moreover the case of a road company seeking to establish a toll-gate in the town, and the language of the Court in *Hammond* v. *Brewer*, *supra*, might well be thought applicable, viz., that it was neither usual nor convenient to erect toll-gates in the middle of great towns, which might obstruct the necessary intercourse amongst the inhabitants. There was nothing therefore in the character of the road itself, or in the terms of the instrument incorporating the company, which required any other than the ordinary meaning, which is no doubt exclusive, to be attributed to the word.

The question under consideration could not arise under the English railway Acts, which refer to a line already laid

down, and maps and plans and books of reference already in existence. See for example the special Act referred to in *Lord Beauchamp* v. *Great Western R. W. Co.*, L. R. 3 Chy. 745; and per Jessel, M. R., in *Wilkinson* v. *Hull R. W.*, L. R. 20 Ch. D. p. 332. The charters granted to railways in the United States are more like those granted by our Legislatures, merely indicating the terminus and general direction of the railways and leaving the line to be afterwards surveyed, and the books of reference subsequently made: *Springfield* v. *Conn. R. W. Co.*, 4 Cush. 69. As might be expected, there are numerous cases on the point in the American Courts, most of which are collected in Mr. *Pierce's* Treatise on the Law of Railroads. Some of these decisions, though of course not binding on us, are by Courts of high authority, and with, I think, but one exception, support the construction contended for by the company.

It is held that the words must receive a reasonable interpretation with reference to the subject matter and the public object of the grant.

In *Smith* v. *Hebner*, 7 Barb. 416, the title of the Act which authorized the construction of the road was, "to provide for the construction of a highway between the villages of Herkimer and Middleville," and by the first section of the Act commissioners were appointed to alter, reconstruct and improve the public road leading from the village of Herkimer to * * and thence along, &c., &c., to the village of M. The Court said, "The word 'from' in the Act must receive a reasonable construction in reference to the subject matter, and unless it is held to include some part of the village of Herkimer, the object of the Act, which was to construct a good road from the village of Herkimer for practical purposes, and therefore necessarily from the compact part of the village, cannot be accomplished." In *The Commonwealth* v. *The Erie and North Eastern R. W. Co.*, 27 Pa. 330, the defendants' act of incorporation authorized them to build a railroad "*from the borough of Erie* to some point on the east boundary of the

township of North East." The Court held that the Act was obeyed when the road was made from any part of the borough. "When a city or borough is made the terminus of a road the whole territory within the municipal limits must be regarded as a single point, and the terminus may therefore be established at any spot within the limits thus prescribed according to the discretion of the company."

In *Morris and Essex Railway* v. *Central Railroad Co.*, 31 N. J. 205, the defendants were authorized by Act of the Legislature "to locate new lines when additional tracks shall be required at any point or points between Phillipsburgh and Elizabeth Point." It was urged that the expression between two places was by its natural import exclusive of both. The Court, however, held that this was not the fair construction of the Act. "Far too much stress has been laid upon the word 'between.' In common use it does not always exclude the places to which it relates. A grant of power to construct a railway between Princeton and Trenton would very clearly include the right of carrying such road into each place. In the clause in question, the intention being to include the entire road, the villages in which the termini are situated are used as descriptive of the termini themselves."

In *Union Pacific R. W. Co.* v. *Hall et al.*, 91 U. S. R. 343, Mr. Justice Strong, in delivering the opinion of the Court, uses this language: "Instances are not rare in which statutes have been construed not literally but in accordance with the common use of the language employed by the lawmakers. Authority to construct a railroad or turnpike from A. to B., or begining at A. and running to B., is held to confer authority to commence the road at some point within A. and to end it at some point within B. The words 'from,' 'to,' and 'at,' are taken inclusively according to the subject matter." He refers, among other cases, to the case of *The Mohawk Bridge Co.* v. *The Utica and Schenectady R. W. Co.*, 6 Paige 554, and continues: "The city of Schenectady was on the south bank of the Mohawk river, the

north bounds of the city being the middle of the channel of the river; yet it was held that a railroad company authorized to build a railroad, commencing at or near the city of Schenectady, and running thence on the north side of the Mohawk river, was by those words empowered to build a bridge over the Mohawk and commence their railroad at or within the city." See, also, *Moses* v. *The Pittsburgh R. W. Co.*, 21 Ill. 522; *Farmers' Turnpike Co.* v. *Coventry*, 10 Johns. N. Y., 391; *The Mayor of Macon* v. *Macon R. W. Co.* 7 Georgia, 221; *The Central R. W. Co.* v. *Pen. R. W. Co.*, 31 N. J. Eq. 475. A case which is contrary to the spirit of those I have quoted, is the *North East R. W. Co.* v. *Payne*, 8 Rich. (South Carolina) 177. The plaintiffs' charter authorized them to construct a road *from* Charleston to L.———. The Court say that by this language, "The boundary of the city is indicated as the terminus *a quo*. For the public convenience streets and ways are provided by the corporation, and within their jurisdiction the extension of the road is superseded. When it is proposed to extend a railroad within the corporate limits of a city or town, the intention to do so is not left to conjecture." There was a circumstance in that case to which the Court may have attached some weight, viz., that by law no corporation or person could build a road into the city of Charleston without the consent of the city council being first had; and it may have been thought necessary that express language should have been used to supersede this law.

In the principal case we find, in the preamble of the Act incorporating the Montreal and City of Ottawa Junction Railway Company, a recital that a line of railway to be constructed from the City of Ottawa to a point on the Grand Trunk Railway at or near Coteau landing, would afford the shortest and most convenient connection between these cities. That is the object to be attained. Not only are they to be connected, but they are to be connected in the shortest and most convenient way, and the convenience to be served is of course that of the public. Literally the

railroad would not afford a connection between the cities mentioned in the Act if the *terminus a quo* is to be situated outside or at the boundary of one of them; or if a road just touching the city limits may be deemed a connection, it needs no argument to shew that it is not likely to be a very convenient one. I think, too, it is not unreasonable to assume that the Legislature did not intend the connection at one terminus to be less convenient than or of a different character from that at the other, treating the City of Montreal as in effect the other terminus to be served by the road. The Act authorizes the company to make arrangements (secs. 14, 15) for the purpose of connecting with any other railway, or to lease their railway or hire the railway of another company. Other companies, as we know, have constructed their lines within the limits of the City of Ottawa, and if this company cannot do the same, the large powers given them by these sections may under some circumstances be found difficult to exercise. The fact, too, that the amalgamated company may have their head office in Ottawa, seems to me to be of some weight in favour of their right to enter the city. No doubt Acts are to be found on the Statute Books of this Province, and of the Dominion, in which the promoters have taken care to define more accurately the termini of the line, as *e. g.*, by using the expression "from" or "to" any point within the limits, &c., but this is not so invariably or frequently the case as to justify the adoption of the argument in the case quoted from South Carolina, that the Legislature meant to use the words in their most restricted sense. Indeed the contrary inference might be drawn from some of the most important railway legislation on the Statute Books. For instance by ch. 46, 34 Vic. D., the Vaudreuil Railway Company is authorized to construct their road "from" V. "to" Vankleek Hill, and thence to any railway which may be constructed to Bytown. 34 Vic. ch. 45, D., authorizes the Ontario and Quebec Railway Company to construct a road from the City of Toronto to the City of Ottawa, and chs. 73 and 75 of 37 Vic. D., authorize the con-

struction of railways "to" the City of Winnipeg. And if we may look at the Acts of the old Province of Canada we shall find that in those relating to the Great Western Railway system, under which the undertakings authorized have been actually built, the language used to indicate the termini almost invariably is *from* and *to* or *at* or *between* such a town or city. See 4 Wm. IV., ch. 29, as to London and Gore R. W. Co. 8 Vic. ch. 86, from London to Point Edward. 13 & 14 Vic. ch. 130 "to Galt." 16 Vic. ch. 42, from terminus of Great Western Railway at Galt "to Guelph." 16 Vic. ch. 44, from terminus of Great Western Railway at Hamilton "to Toronto." 16 Vic. ch. 101, from "at or near Sarnia" "to intersect Great Western Railway" at or near London. 18 Vic. ch. 176, "to the town of Brantford;" and I dare say many other instances might be found.

Considering the objects to be attained by the construction of a railway, some of which, at least, are the promotion of rapid and convenient communication between different localities and the establishment of all the modern facilities for carrying on trade and commerce, including convenience of access to freight and passenger stations, I should be disposed to hold, as in the case in 27 Pa. R., that where a city, town, or village is made the terminus of a railway, there being nothing in the Act to indicate a contrary intention, the whole of such city, &c., must be regarded as a single point—a mere mark or designation of a conspicuous place to or from any part of which in the authorized direction the road might be constructed. Enough, however, in my opinion, appears in what I have pointed out in reference to the Acts relating to this company to shew that they are authorized to construct their line from a point within the limits of the city of Ottawa. So to hold will not infringe upon any rule as to the construction of a special Act, while to hold otherwise would be to frustrate what appears to me to be the manifest object and intention of the statute.

The first objection to the resolutions, therefore, in my opinion fails.

The next objection is, assuming the railway company to have a right to enter the city, that the corporation of the latter have no power to grant a right of way over the property mentioned in the resolutions, inasmuch as it has already been expressly expropriated, under 35 Vic. ch. 80 (O), An Act for the construction of Water Works for the City of Ottawa, and vested in the corporation under section 4 of that Act; and by sec. 31 and by subsequent Acts is specially charged, pledged, mortgaged, and hypothecated in favour of debenture holders for the repayment of moneys borrowed by the corporation for the purposes of the Acts.

So far as appears from the affidavits and the plan filed on the motion, this objection is one *strictissimi juris*.

It is not alleged, nor is there the least reason to suppose that the security of debenture holders, or the water works property itself, will be prejudicially affected in the slightest degree by what is proposed to be done; and I may infer, from what was said in the course of the argument, that the motion is not prompted by any consideration of that sort.

By the resolutions complained of permission is granted to the railway company "to cross certain streets and property belonging to this corporation, so far as the corporation have power legally to do so, and in accordance with the restrictions set forth."

The property referred to is part of that acquired by the city under the Water Works Act, and the restrictions provide for a lease of the right of way over the same to the company.

There is nothing, I apprehend, in the mere fact that this property belongs to a municipal corporation, which makes it necessary that any special power to alien or convey it should be conferred upon them. The power exists as incident to the corporation, if not expressly or impliedly taken away by the Act under which it was constituted. See *Riche* v. *The Ashbury Railway Carriage Co.*, L. R. 9 Ex. pp. 224, 262, where Lord Blackburn lays it down that in construing the statutes creating a corporation as regards

their power to enter into any particular contract, "the real question is, do they by express provision or necessary implication shew an intention on the part of the legislature to prohibit and so to avoid the making of a contract of this particular kind?" *Dillon* on Municipal Corporations, sec. 445, 2nd. ed.

Now this property was expropriated for public purposes, and was vested in the corporation in trust for those purposes under the express provisions of the Act I have referred to, and is specially charged in favour of persons who have become creditors of the corporation under that and subsequent Acts. In *The Attorney-General* v. *Goderich*, 5 Gr. 404, land had been conveyed to the Town Council of Goderich to hold as a market place for the use of the inhabitants of the town. The council, considering that it was more than would ever be required for that purpose, resolved to convey a portion of it to the corporation of the county for the site of a Court House. It was held that a corporate body acting as a trustee was amenable to the jurisdiction of a Court of equity as an individual: that any alienation of the land was a breach of trust, and that the land should be re-conveyed. See also *Guelph* v. *The Canada Co.*, 4 Gr. 632; *Attorney-General* v. *City of Toronto*, 10 Gr. 436; *Peck* v. *The Town of Galt*, 46 U. C. R. 211.

It appears to me, therefore, that the corporation are impliedly prohibited from creating any rights over this property inconsistent with the purposes to which it has been devoted, and for which they hold it. Any such dealing would be a breach of trust on their part, and might be restrained as in the Goderich case, unless under any circumstances they might convey, or the company expropriate the land under the Consolidated Railway Act, 1879.

It is necessary, therefore, to consider what powers are expressly or by necessary implication conferred upon the railway company by their special Act, and those clauses of the Consolidated Act which are incorporated with it.

First, there is the power to construct the railway between the *termini* mentioned in the former Act. Then, by section

7 of the latter Act, the company have power and authority (sub-section 5) "to make, carry, or place the railway accross or upon the lands of any corporation or person on the line of the railway, or within the distance from such line stated in the Special Act." Sub-section 13: to enter into or upon any lands of Her Majesty, without previous license therefor, or into and upon the lands of any corporation or person whatsoever lying in the intended route or line of the railway, and to make surveys * * on such lands necessary for fixing the site of the railway, and to set out and ascertain such parts of the lands as are necessary and proper for the railway."

Sub-section 6: "To construct * * the railway across, along, or upon any stream of water, water course, canal, highway, or railway which it intersects or touches," restoring it to its former state, or to such state as not to impair its usefulness.

Sub-section 15: To cross and unite with any other railways.

Section 15 makes regulations as to the railway crossing, or being carried along existing highways.

Section 7, sub-sections 3 and 4, expressly prohibit the company from taking possession of public land or the public beach without the license of the Governor-in-Council.

These enactments limit the scope of the company's charter.

It is contended that they enable them to expropriate only the lands of private individuals, and lands of corporations which they hold as natural persons might do, but not lands which have been already expropriated for public purposes under powers conferred by a former Act, or otherwise held in trust for the public.

The expropriation of property, whether directly by the state, or by public or private companies under the authority of the state, is an exercise of the right of eminent domain, a right which, though usually understood in a more restricted sense, no doubt includes the power of interfering with or resuming charters already granted, or taking

for one public or *quasi* public use property already devoted to another. In Mr. Cooley's work on Constitutional Limitations it is spoken of as "that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken, or its use controlled, for the public benefit without regard to the wishes of its owners. More accurately, it is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare, may demand." 3rd ed., p. 524.

I take it to be an implied condition in every Act incorporating a public company, apart from any statutory or other rule for the construction or interpretation of special Acts, or Acts in the nature of a private Act, that rights acquired by another company or public body under a former Act shall not be interfered with unless or further than the power to do so is expressly, or by necessary implication, conferred by the terms of the latter Act. An Act by which a company is authorized to build a railway, or other highway, from A. to B. will not enable them to take for that purpose lands already expropriated by another railway road or canal company, and the fact that express provision is made by the general Act for interference to a limited extent in these cases affirms the general truth of the proposition. The same may be said of land granted by the Crown, or dedicated by an individual to public uses, as for a park, market-place, &c.

Primâ facie, therefore, the only right intended to be conferred by the Legislature is that of expropriating the private property of individuals or corporations, and not property which is already devoted to public uses, or property already expropriated under other Acts, and therefore presumed not to have been acquired unnecessarily.

The question has frequently been raised in the Courts of the United States, where, as under our railway system,

a company is permitted to locate its line after the passage of the special Act. In *Re The Boston and Albany R. W. Co.*, 5 Am. Ry. Rep. 92, 53 N. Y. 574, it was held that power given to a railway company by statute to acquire title to any real estate required for the purposes of the corporation, does not authorize such company to take property already held and used for another public use, unless the right to do so is conferred in express terms or by necessary implication, "and the implication does not arise if the powers expressly conferred can by reasonable intendment be exercised without the expropriation of such property." In that case a village corporation was opposing an attempt on the part of the railway company to take certain land which had been granted to the former for a public park. It was held that they could not do so.

In *Re The Rochester Water Commissioners*, 66 N. Y., 413, the Court said: "The property rights of a corporation in lands not held in trust for a public use, are no more sacred than those of individual proprietors. The law only protects from condemnation for public purposes lands actually held by the sovereign power for or necessary to some public purpose or use. Lands held upon a special trust for a public use, cannot be appropriated to another public use without special authority from the Legislature." See also *Springfield* v. *Connecticut R. W. Co.*, 4 Cush. at p. 71; *The West River Bridge Co.*, v. *Dix*, 6 How. S. C. 507; *Commonwealth* v. *Pennsylvania Canal Co.*, 66 Pa. 41; *Savannah, &c. R. W. Co.* v. *City of Savannah*, 3 Am. R. R. 36; *Central Bridge Corporation* v. *City of Lowell*, 4 Gray 472, 481; *The People* v. *Kerr*, 37 Barb. 357; *Re Kerr*, 42 Barb. 119; *Indiana Central R. W. Co.* v. *State*, 3 Ind. 421; *Pierce* on Railroads, 154; *Redfield* on Railways, 4th ed., pp. 228, 232, 255.

In England the question does not seem to have arisen so prominently, no doubt because of the different system of railway legislation which prevails there, under which the battle between the land owners and the company is fought out on the application for the special Act.

I have only seen the case of *The Queen* v. *The South Wales R. W. Co.*, 19 L. J. N. S. Q. B. 272, in which the Court refused to compel a railway company to purchase any part of the land on which the actual line of another railway was laid down, because the parliamentary obligation of the latter company prevented them from selling, and the land had been already appropriated to the public, and there was no express power for one party to sell or the other to buy it. From this case it would also appear that the one company could acquire parts of the land of another company which were necessary for the construction of the line of the former, and apparently not necessary for the enjoyment of the franchise of the latter.

But it is also, I think, to be deduced from the cases I have referred to, as well as from the reason of the thing, that if powers granted for one public or quasi-public purpose, such as the construction of a railway, cannot be exercised without acquiring lands already expropriated for another public purpose, and yet may be so exercised consistently with the existence of the latter and without substantial interference therewith, the right to exercise such power exists by necessary implication. Now, if the corporation were here seeking to restrain the railway company from acquiring *in invitum* the property in question, the onus would rest upon the latter to make out very clearly that their powers could not, to use the language of the Court in the *Boston and Albany Case*, 5 Am. R. Rep. 91, by reasonable intendment be exercised without the appropriation of this property. The case, however, is not presented in that way. The applicants complain that what has been done is *ultra vires*, or perhaps it would be more accurate to say a breach of trust on the part of the corporation. Under certain circumstances, however, it might not be so. It is for the applicants to shew that those circumstances do not exist. I cannot assume that the corporation have exceeded their powers or have committed a breach of trust, and I am not satisfied from what appears before me that they have in fact done so. If a right or power might exist under any

circumstances on the part of the company to expropriate this or other land acquired under the Water Works Act, and the applicants have not shewn that it does not exist, then there is a corresponding right or power on the part of the corporation to convey without committing a breach of trust. If they could convey, they could, instead of doing so, grant such a right or easement as they have agreed to grant, although I think the railway could not acquire such easement *in invitum*. See *Pinchin* v. *London and Blackwall R. W. Co.*, 5 DeG. M. & G. 851; *Metropolitan District R. W. Co. and Cosh*, L. R. 13 Ch. D., at p. 616.

The case in 66 N. Y. does not apply on this point, as the Company's Act there expressly empowered them to acquire an easement.

For these reasons, therefore, I am not prepared to give effect to the second objection; and not being satisfied that the resolutions are *primâ facie* illegal, I would also as a matter of discretion decline to quash them, leaving the applicants to take such other remedy as may be open to them, *e. g.*, by satisfying the Attorney-General, if they can, that there is a proper case for his intervention to restrain either corporation from exceeding their statutory powers; or, should it become necessary to do so, by requiring the property to be sold for the satisfaction of the debenture holders, or in relief of the ratepayers of the city, free from or without regard to any interests supposed to be acquired therein by the railway company: *McKinnon* v. *Corporation of Village of Caledonia*, 33 U. C. R. 502; *Attorney-General* v. *Shrewsbury Bridge Co.*, 46 L. T. N. S. 687, and *Attorney-General* v. *Great Eastern R. W. Co.*, 11 Ch. D. 449.

I have not overlooked sub-sections 3, 4, 5, and 8, of section 9, which, with certain limitations in sub-sections 4 and 8, empower corporations and others to convey to the railway company.

On the whole, however, and notwithstanding some difficulty in the construction of sub-section 4, which, in its origin, (22 Vic. ch. 17), was and perhaps still is declaratory

of the meaning of the previous sub-section, I think these sub-sections are intended only to enable corporations and persons under disability, or representatives of persons under disability, to convey, and, except so far as such disabillity is removed, they do not extend the compulsory powers of the company, or enable them to acquire lands already expropriated or devoted to public uses: *Regina* v. *South Wales R. W. Co.*, 19 L. J. Q. B. N. S. 272.

The third and last objection relates to the grade of the railway authorized by the resolutions, which, it is said, differs from that prescribed by the Consol. Railway Act, 1879. Sec. 15, subsec. 2, provides that the railway shall not rise more than one inch above the level of the highway when crossing it. I have read these resolutions carefully, and they appear to me not to be open to this objection either. It is true that they contemplate and require a change of grade in the highways, so as to conform to the grade of the proposed crossings, but there is not a word in them which is inconsistent with the section I have quoted.

It is hardly contended that the railway must necessarily be carried across at the present grade level of the streets, and the resolutions carefully provide that the latter shall be graded up to the level of the railway. It is clearly within the power of the municipality to change or alter the grade of the streets if they think proper.

Mr. Robinson asked leave, if I should be against him on the second objection, to examine witnesses in support of it, but I am not so much impressed with the merits of the case as to feel that justice requires me to assist the applicants in this respect.

I therefore discharge the rule, and dismiss the motion, with costs.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

IN RE WEST HURON ELECTION—MITCHELL V. CAMERON.

Dominion controverted election — Preliminary objections — Allegation of agency—Sufficiency of—Allegation of undue influence by Provincial Government—Striking off votes when seat not claimed.

Held, following the North York election case, 32 C. P. 458, that the High Court of Justice has no jurisdiction in Dominion controverted election cases.

Allegation, that the Goverment of the Province of Ontario, in the interest and on behalf of the respondent, used undue influence to secure his return. Objection, that no agency was alleged, and because no such agency, if alleged, could in law exist.

Held, that this objection should be left to be disposed of by the Judge at the trial; and *Semble*, that evidence of agency could be given under the allegation.

Allegation, that forty persons whose names were not on the voters' list, who were not entitled by law to vote, did vote, and voted for the respondent. Objection, that the matters alleged were not available, because the seat was not claimed for the defeated candidate, and because it could be shewn that the forty votes were cast for the respondent.

Held, though this objection came within the *East Elgin Case*, 4 App. 412, there appeared to be too much doubt about the question to strike out the allegation; for, *Semble*, that a person who has voted without a right to do so is not entitled to the protection of the statute as to secret voting, and that an elector should not be prevented from showing that the elected member obtained his majority through bad votes.

On the 12th August, 1882, John Mitchell presented a petition in the High Court of Justice, Queen's Bench Division, against the election of the respondent, on the ground of bribery and corrupt practices, and other grounds.

The election took place on the 30th June, 1882.

The petition was served on the 1st day of September, the time for service having been extended by an order of Mr. Justice Osler, made on the 15th day of August, until the 15th day of September.

On the 6th day of September, 1882, the respondent presented the preliminary objections following:

1. "This Honourable Court has had no jurisdiction, in the matter of Crontroverted Elections of members of the House of Commons of Canada, conferred upon it either by the Dominion Controverted Elections Act, in pretended pursuance whereof the petition herein has been filed, or by any other Act of the Parliament of Canada.

2. "The said petition was presented on the 12th day of August, A.D.

1882, but the respondent was not, within the time limited by the statutes and rules of Court in that behalf, served with notice of the presentation of the said petition, or of the security given therewith, nor with a copy of the said petition, which the respondent is ready to verify.

3. "The pretended order extending the time for serving such petition and notices, obtained by the petitioner and purporting to be made by the Honourable Mr. Justice Osler, is *ultra vires* and void, inasmuch as the said The Honourable Mr. Justice Osler had no jurisdiction to make the same, and the pretended service effected in pursuance of the said order is therefore ineffectual and invalid.

4. "The respondent further says that the eighteenth paragraph of the said petition ought to be struck out and set aside with costs, because it alleges undue influence to have been exercised by the Government of the Province of Ontario at the said election in the interest and on behalf of the respondent, in order to aid him in his candidature, and because no agency on the part of the Government of the said Province of Ontario, or for the respondent, is alleged, and because no such agency, even if sufficiently alleged, could in law exist.

5. "The respondent further says that the twentieth paragraph of the said petition ought to be struck out and set aside with costs, because the matters therein set forth are not available to the petitioner, inasmuch as he does not in and by his said petition claim the seat for Robert Porter in the said petition named, and because the said paragraph does not and cannot allege it as a matter to be proved at the trial that the persons in the said paragraph referred to voted for the respondent, and because the said paragraph is virtually a demand for a scrutiny of votes, which, under the statues in force with regard to elections of members of the House of Commons in Canada, cannot be had."

The following were the paragraphs of the petition to which exception was taken by the 4th and 5th preliminary objections:

18. "The Government of the Province of Ontario, in the interest and on behalf of the said Malcolm Colin Cameron, and in order to aid him in his candidature, by itself, its servants, officials and agents, was guilty of the offence of undue influence at the said election within the meaning of the statutes in that behalf, and otherwise, and especially of "The Dominion Elections Act, 1874," and practised and exercised such undue influence to induce divers voters at the said election to vote for the said Malcolm Colin Cameron, and other voters at the said election to refrain from voting for the said Robert Porter."

20. "Your petitioner also says that the said Malcolm Colin Cameron was unduly elected, and unduly returned as elected, for the following reason: Certain persons to the number of forty, whose names were not on the voters' lists proper to be used on the said election, and who were not entitled by law to vote, were allowed to vote, and did vote, and as your petitioner believes they all voted for the said Malcolm Colin Cameron."

October 16, 1882. *Shepley* for the respondent. The first objection is, as to the jurisdiction of the Court, and the argument would be the same as in the other cases where the question was raised. As to the objection to Mr. Justice Osler's jurisdiction. Section 9 of 37 Vic. ch. 10, clearly confines the jurisdiction to extend the time for service to the Judges of the Court in which the petition is filed. The interpretation clause of the same Act clearly defines the expression "the Court," and confines it to "*any*," *i. e.*, "*any one*" of the Courts named. If the order is *intra vires* it would logically follow that a Judge of the Queen's Bench Division could make a similar order in the case of a petition presented to the Court of Chancery or the Court of Appeal, which could not have been intended. Section 6 of the Act expressly provides that the distribution of cases among the several Courts shall be arranged by the Judges, unless already provided for by the practice. It is not contended that any such arrangement has been made, and if the practice of the Courts is to prevail, there was clearly no practice under which the order in question could properly be made.

The 18th paragraph of the petition is clearly bad for not alleging agency on the part of the Ontario Government: 37 Vic. ch. 9, sec. 101; and no such agency could exist in law, and the paragraph could not stand even with such an allegation.

The question raised by the objection to the 20th paragraph is already completely concluded by authority.

Re East Elgin Election, 4 Ap. R. 412, expressly decides that votes cannot be struck off at the instance of a petitioner who does not claim the seat. The paragraph in question is bad, moreover, because it is not alleged that the votes in question were polled for the petitioner; and even if all the votes were struck off the respondent might still, consistently with the paragraph, be in a majority. There is no means of ascertaining how the persons mentioned actually voted: 37 Vic. ch. 9, sec. 77; *Re Lincoln*, 4 Ap. R. 206.

McCarthy, Q. C., and *Creelman*, contra. The jurisdiction of Mr. Justice Osler is sustainable under section 6 of the Act, the last clause of which provides that petitions may be heard and all questions disposed of by any of the Judges of the Superior Courts of the province. A similar order was made by Mr. Justice Ferguson, of the Chancery Division, in a case in this Division. Agency is sufficiently alleged in the 18th paragraph, and the matters set up in the objections both to it and the 20th paragraph are properly for the consideration of the Judge at the trial. As to the 20th paragraph, it complains of an undue election and return, and is not in any way a demand for a scrutiny. The votes complained of are alleged with sufficient precision to have been given for the respondent, and if they are struck off it sufficiently appears that the respondent's majority will be converted into a minority. The protection given by section 77 of the Election Act, in respect of voters, only applies to *bona fide* electors, and not to persons voting without the right to vote.

Shepley, in reply. The clause of section 6 of the Controverted Election's Act referred to and relied on is expressly applicable only to such cases as were pending when the Act was passed. Section 77 of the Elections Act provides that "*no person*" who has voted shall be required to state for whom he has voted, and makes no distinction between *bona fide* electors and other persons.

October 20, 1882. CAMERON, J.—The first objection is to the jurisdiction of the High Court of Justice, and is in effect the same as that taken in the North York election case, *Paterson* v. *Mulock*, in which I have just given judgment, holding that this Court has no jurisdiction, and staying the proceedings on the petition. (*a*) The like result must follow upon the facts in this case.

The second objection is, that the petition or notice thereof was not served in time, and that Mr. Justice Osler,

(*a*) 32 C. P. 458.

not being a Judge of the Court of Queen's Bench, had no power to make an order extending the time of service.

This objection was supported on the ground that when a petition is presented in a particular Court, it is only the Judges of that Court that have jurisdiction to make such order, "the Court" being by the interpretation clause of the Act declared to mean any of the four Courts mentioned, and it is contended that it did not constitute the four Courts as one Court; so when the particular Court had been selected in which to present the petition, that Court and no other, and the Judges thereof, answered to the Court and Judges intended by the Act to have jurisdiction.

Mr. Justice Ferguson made a similar order in a case not in the Chancery Division of the High Court, and were it necessary to decide the point, I would adopt the action of those learned Judges in making the orders, as indicating they thought they had the power, and would in deference to them overrule the objection, whatever my own opinion may be on the point, and leave the question to be decided on appeal.

The objection to the 18th paragraph of the petition is one that should be left to the Judge at the trial to dispose of. It may be that it is defective in not expressly alleging agency on the part of the Ontario Government. But when it is charged that the Government did the alleged improper Acts "on behalf of" the respondent, I am not prepared to say evidence of agency could not be given thereunder. A petition is not required to state the grounds that invalidate an election so as to be free from objection on special demurrer, but to shew facts the existence of which would invalidate the election. Extensive bribery, or the exercise of undue influence in many instances, in the interest of the elected member, should render an election void. I decline, therefore, at this stage of the proceedings to remove the paragraph from the petition.

The charge of the exercise of undue influence by a Government in an election is one of the gravest character, and ought not lightly to be made, and when made the

investigation of the truth of the charge should be facilitated, rather than hindered. If there is no truth in the charge, its being allowed to remain in the petition can do no harm. If there is truth in it, it is in the public interest that it should be made to appear; for it is all important that the electors in every constituency of the province should be allowed to exercise their franchise without any corrupt or improper influence being brought to bear upon them, to prevent their voluntary action in casting their votes.

The 20th paragraph would seem to be objectionable under the decision of Vice-Chancellor Proudfoot, in the *East Elgin Election*, 4 Ap. R. 414, the seat not being claimed for the defeated candidate. I am not satisfied that a person who has no vote and voted at an election may not be asked how he voted. The protection afforded by secret voting to a person having the right to vote, and to vote as he pleased, without being questioned, in reason ought not to be extended to one who voted without the right to do so. If the respondent was elected by the votes of persons not having the right to vote, I do not see on what principle an elector who does not desire to have the defeated candidate seated may not shew that the elected member has obtained his majority through bad votes, sufficient to convert his majority into a minority, if struck off. The petitioner may be satisfied that the defeated candidate has by some act committed by him during the election disqualified himself from taking the seat, but the petitioner should not thereby be precluded from shewing the illegality of the election of the sitting member. Without, therefore, in express terms deciding the point, I think there is too much doubt about the question to strike out the paragraph.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

IN RE RUSSELL ELECTION, PETITION—JOHN HENDERSON PETITIONER, v. MOSS KENT DICKENSON, RESPONDENT.

Dominion election case—Jurisdiction of High Court of Justice—Entitling of petition—Delivery to officer of Court of Queen's Bench—Security—Mode of depositing.

The Court of Queen's Bench is an existing Court for the presentation and trial of Dominion controverted election cases, notwithstanding the Ontario Judicature Act, 1881.

The petition in this case was intituled, "In the Queen's Bench, High Court of Justice, Queen's Bench Division," and was delivered, without any special instructions to him, to an officer of and in the office of the Queen's Bench Division, with whom and in which the business of the Court of Queen's Bench had formerly been transacted, and the officer entered it in the procedure book of the Queen's Bench Division.

Held, that the words "High Court of Justice, Queen's Bench Division," added in entituling the petition, might be rejected as surplusage, and that the petition had been properly presented in the Queen's Bench.

Held, also, that the act of the officer in entering it in a wrong book should not prejudicially affect the petition.

The deposit of $1,000 was given to the clerk at the same time, but it was afterwards paid into a bank under the direction of the accountant of the Supreme Court. *Held*, that having been properly paid to the clerk, the subsequent disposition of it could not affect the petitioner.

An election petition need not shew the time at which the return of the respondent was published in the *Gazette*.

On the 7th August, 1882, John Henderson presented a petition against the election of the respondent, as a member of the House of Commons of Canada, for the electoral district of Russell, at an election held on the 20th June, 1882, charging that the respondent by himself and agents was guilty of corrupt practices, as defined by the Dominion Controverted Elections' Act of 1874, and the Dominion Election Act, 1874, and the Acts amending the said Acts.

On the 11th August the respondent presented in writing, in substance, the following preliminary objections against the petition and the further proceeding therein:

That the petition was not presented in any Court having jurisdiction to entertain or try the matter of such petition: that the same was presented in the Queen's Bench Division

of the High Court of Justice, which was not an election Court, and had no power to entertain the same, and since the Ontario Judicature Act, 1881, there was no Court of Queen's Bench: that the petitioner did not give the proper security required by the statute in that behalf; and that the petition was not presented within the time allowed by law for the presentation of election petitions.

On the 16th October the said preliminary objections were brought on to be heard before Cameron, J., sitting as a Judge in vacation, under the Ontario Judicature Act, when it appeared in evidence that the petition was presented without any special direction as to the Court in which the same was to be presented, on the 7th August, to Mr. Alexander Macdonell, a clerk in the Queen's Bench Division of the High Court of Justice: that Mr. Macdonell was a clerk in the office of the Clerk of the Crown and Pleas of the Court of Queen's Bench before and at the time the Ontario Judicature Act, 1881, came into force, and discharged the same duties in the Queen's Bench Division of the High Court of Justice that he had formerly discharged in the Queen's Bench: that before and at the time the said Ontario Judicature Act came into force, R. G. Dalton, Esq., Q. C., was Clerk of the Crown and Pleas in the Court of Queen's Bench, and at the time the said Judicature came into force he was appointed by order in Council Master in Chambers, and by the same order R. P. Stephens, Esq., was appointed to succeed him as Clerk of the Crown and Pleas, and called Registrar of the Queen's Bench Division. The order was passed by the Lieutenant-Governor of Ontario in Council, on the 30th June, 1882, and the portions relating to Mr. Dalton, Mr. Stephens and Mr. Macdonell, were as follow: "Mr. Dalton shall be Master in Chambers; Mr. Stephens shall succeed Mr. Dalton as Clerk of the Crown and Pleas of the Court of Queen's Bench * * and shall be called Registrar of the Queen's Bench Division, and it shall be part of his duty from time to time, on the request of the Master in Chambers, or of a Judge of the High Court of Justice, to sit with or for such

Master: that Mr. Alexander Macdonell Clerk of the Queen's Bench be paid $1,400 per annum: that this order shall take effect on and from the 22nd August next."

The petition was intitutled as follows:—

"In the Queen's Bench,
High Court of Justice,
Queen's Bench Division."

At the time of its presentation Mr. Dalton and Mr. Stephens were absent from the city of Toronto. It was the practice of Mr. Macdonell to sign the name of Mr. Dalton, by the latter's direction and consent, to all papers requiring Mr. Dalton's signature, as matter of routine, as well in relation to election petitions as ordinary suits between party and party, while Mr. Dalton occupied the position of clerk of the Crown and Pleas, and after the appointment of Mr. Stephens, with his directions and consent, he signed Mr. Stephens's name in the same way. The office of the Queen's Bench Division of the High Court of Justice and of the Clerk of the Crown and Pleas of the Queen's Bench, and Registrar of the Queen's Bench Division, were held in the same room; that is, the business of the Queen's Bench Division of the High Court of Justice, and of the Registrar of that division of the High Court, was carried on in the same rooms in which the business of the former Court of Queen's Bench and Clerk of the Crown and Pleas of the Queen's Bench had been carried on, and there was no office of the Queen's Bench or of the Clerk of the Crown and Pleas of that Court other than the said rooms. There was a deposit of $1,000 in Dominion notes at the time of presenting the petition, as required by the Controverted Elections Act, which sum was afterwards by Mr. Stephens, in accordance with section 121 of ch. 50 R. S. O., as amended by Rules 475 and 476 of the Ontario Judicature Act, under the direction of Mr. Murray, accountant of the Supreme Court, paid into the Bank of Commerce, and a certificate to the effect hereinafter stated given to Mr. Stephens.

"THE CANADIAN BANK OF COMMERCE,
"Toronto, 6th Sept., 1882.

"Re Dominion Controverted Election Petitions Account
Henderson *v.* Dickinson.

"$1,000. This is to certify that J. Henderson, Re Russell Election Petition, has this day paid into this bank to the credit of this account, in the High Court of Justice, Q. B. Division, the sum of one thousand dollars."

Mr. Macdonell entered the receipt of the petition in the ordinary procedure book, which was endorsed "High Court of Justice Procedure Book, Queen's Bench Division," and in a separate book made an entry of the receipt of the deposit. The *Canada Gazette* was put in, from which it appeared that the return of the respondent was published on the 18th day of July, 1882, and the petition was proved to have been served on the 8th day of August following.

Bethune, Q. C., appeared for the petitioner, and *McCarthy*, Q. C., and *Creelman*, contra.

October 20, 1882. CAMERON, J.—On an application made to me to take an election petition off the files of the High Court of Justice in the matter of the North York Election petition, *Paterson* v. *Mulock*, for the reasons assigned in giving judgment in that case, I held that for the presentation and trial of election petitions the Court of Queen's Bench was an existing Court, and was not the same as the Queen's Bench Division of the High Court of Justice, which was a branch of the High Court of Justice, and not a distinct Court (*a*). If I was right in so holding, it follows that the petition in the present case is properly entitled in the Queen's Bench, and unless the addition of the words "The High Court of Justice, Queen's Bench Division," makes it a different Court, there is no valid objection to the petition on the ground of its having been intituled in the wrong Court. I am of opinion these words were merely surplusage. They do not in fact change the

(*a*) 32 C. P. 458.

style of the Court, and may he taken, as far as the words "High Court of Justice" alone are concerned, as unnecessary description or character of the Queen's Bench. Had the word "in" been inserted before the words High Court, more difficulty might exist, as then the words "Queen's Bench" would not so clearly indicate an independent and distinct Court, but constitute an informal way of describing the Queen's Bench Division of the High Court. If then the Court of Queen's Bench exists for the trial of election petitions, the petition in the present case having been duly presented in the proper Court to a proper officer to receive it, and without any direction that it should not be taken as presented to the Court in which it was intituled, the petitioner cannot be prejudicially affected by the act of the officer in entering it in the wrong book, or committing any error in respect to it. The Dominion Controverted Elections Act does not require an election petition to be presented to the Clerk of the Crown or other officer indicated by the Act, but declares presentation of a petition shall be made by delivering it at the office of the Clerk of the Court during office hours, which was done in this case.

In *re Kingston Election*, 39 U. C. R. 144, Wilson, J., the present Chief Justice of the Common Pleas, in delivering the judgment of the Court, the case presenting a similar, though not exactly the same, question, said: "If the petition had been delivered to the proper officer of the Court to which it belonged, or for which it was intended, the want of an intituling in the Court, or a wrong intituling, would be an irregularity only, and, therefore, it would be a curable and not a void proceeding." This language applied to the circumstances of the present case shews that the addition of the words "High Court of Justice, Queen's Bench Division," constitutes a mere irregularity, which the Court of Queen's Bench, having jurisdiction over the case, may or may not, in its discretion, amend, if amendment should be deemed necessary. Mr. Macdonell was and is a Clerk in the Court of Queen's Bench. The order in Council made no change in his position, it merely made provision

with respect to his salary; but by section 58 of the Ontario Judicature Act he became attached to the Queen's Bench Division of the High Court, and by section 59, subject to any order in Council and rules of Court, all officers of the former Courts shall continue to perform the same duties, as nearly as may be, and in the same manner as if the Judicature Act had not been passed. If, therefore, any duty appertained to him before the Judicature Act in relation to election petitions, he was bound to perform, by the express provision of the Act, such duty, when the petition in this case was filed, and he then represented Mr. Stephens, who by the express language of the order in Council succeeded Mr. Dalton as Clerk of the Crown and Pleas in the Queen's Bench, and so filled the office of Clerk of the Crown, or Clerk of the Court designated by the Controverted Elections Act.

On the facts in evidence there does not appear to be any valid objection to the petition on the ground that the security required by the Controverted Elections Act was not sufficient, or not regularly given, as $1000 in Dominion Notes were paid to the clerk at the time of presenting the petition, and the subsequent disposition of the money by the clerk could not, as I have already stated, in my opinion, affect the petitioner.

I think it is not necessary that an election petition should, as was contended on the part of the respondent, shew the time at which the return of the respondent was published in the *Gazette*. All that is required on this head to be stated by Rule 2, is stated in this petition, which follows the form prescribed by Rule 5 of the rules for the trial of controverted elections. *Primâ facie*, the election having taken place on the 20th of June, the petition filed on the 7th August was too late; but by the production of the *Canada Gazette*, shewing the return of the respondent was published on the 18th July, of which fact the *Gazette* is evidence, the objection is removed.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. BENNETT.

Canada Temperance Act, 1878—Information—Several offences—Amendment after close of case—Order in Council, proof of—Evidence—Constitutional law—Power to appoint Justices of Peace.

Held, that an information which includes the three distinct offences of keeping for sale, selling, and bartering, intoxicating liquors, which are prohibited by section 99 of the Canada Temperance Act, 1878, contravenes 32-33 Vic. ch. 31, sec. 25, which provides that every information shall be for one offence only; but

Held, that such information may be amended by striking out all the offences charged except one; and that such an amendment may be made after the case has been closed and reserved for decision.

Held, also, that a magistrate cannot take judicial notice of Orders in Council, or their publication, without proof thereof by production of the *Official Gazette*, and, therefore, that a conviction was bad which was made without such evidence, that the Canada Temperance Act, 1878, was in force in the county, pursuant to the terms of section 96 thereof. The defendant swore that he did not sell any intoxicating liquor on the day charged. The recipient of some liquor sold on that day named it in his evidence for the defence, but there was no evidence that it was an intoxicating drink, the evidence for the Crown only shewing that it resembled intoxicating liquor.

Held, that there was no reasonable evidence on which to found a conviction for selling intoxicating liquor.

Held, also, that the Legislature of the Province of Ontario had power under number 14 of section 92, B. N. A. Act, to pass R. S. O. ch. 71, providing for the qualification and appointment of Justices of Peace.

The defendant Robert Bennett was convicted before William Hixon Young, Police Magistrate, at Milton, on the 20th July, 1882, for having at the village of Georgetown, between the 1st May and 16th June, to wit, on 16th June last past, unlawfully sold intoxicating liquor, contrary to the provisions of the Canada Temperance Act, 1878; and he was adjudged to pay the sum of $50 and $6.65 costs, to be levied by distress and sale of goods and chattels, and in default of sufficient distress to be imprisoned in the common gaol of the county for the space of two months at hard labour.

The information on which the conviction was based, as far as material, was as follows: "That he (the informant) hath just cause to suspect and believe, and doth suspect and believe that Robert Bennett * * within the space

of thirty days last past, to wit, on * or about the 15th and 16th days of June last past, at the village of Georgetown, in the county of Halton, did keep, sell, trade, and otherwise unlawfully dispose of intoxicating liquors, contrary to the form of the statute in such case made and provided." After the evidence had all been given and exception had been taken to the information on the ground that it contained more than one charge or offence, and that the time of committing the same was not stated with sufficient clearness, the magistrate reserved his decision until the 20th July, 1882, when he amended the information, without the informant having been re-sworn, so as to read as follows, after the asterisk (*) in the information, as above stated: "The 16th day of June, in the year of our Lord one thousand eight hundred and eighty-two, at the village of Georgetown, in the county of Halton, aforesaid, did unlawfully sell intoxicating liquor, contrary to the form of the Canada Temperance Act, 1878, in such case made and provided."

On 15th July evidence in support of the charge was taken as follows:—

Robert Bennett.—"I reside in Georgetown. The Bennett House is the name of the house I live in. I did not sell intoxicating liquors on June the 16th." Counsel for the prosecution asked witness: "Did you sell any liquor of any kind from the 1st May, to the date of laying the information, or on the 16th June?" This was objected to as not being relevant to the offence charged, as opening an enquiry that was not proper in this case Witness.—"I guess there was liquor sold between the 1st May and the 16th June, but I cannot say at what particular time. I did not sell on the 16th June. I thought when I was served with a summons I would pay a fine, but afterwards found I was mistaken in the date—cannot say on what days I may have sold liquors."

E. Nelson.—"I have had liquor at Bennett's often, but since the 1st May I do not remember of drinking any liquor in his house—on the 16th June I drank pop."

John Stedaford.—"I was at Robert Bennett's house on the 16th June last. I saw Nelson there. Bennett took from under the counter and gave Nelson some liquid; it resembled liquor. Mr. Bennett also drank, and Nelson paid for it. My home is in Hamilton. I lived three years in Hamilton. My age is, say, forty years. I have been in gaol for about ten days for contempt of Court. Have been engaged in my present business about two years. I get $4.00 per day. I am not employed every day. My work is to bring prosecutions. I am not limited to any time or work. I will not get any extra pay if there is a conviction in this case." (Note by Magistrate.—"A memorandum book in the possession of witness, which he had in hand and read a date from, was asked to be produced. Witness refused to so produce it, and was sustained by the Court.") "I was at Georgetown between twelve and one o'clock on June the 16th—had been in Georgetown a day or two; got dinner at Bennett's; Nelson drove up before dinner. I never carried the mail at Palermo; what I saw Nelson drink had the appearance of liquor."

E. Nelson, re-called. "I do not think I was in Georgetown at the time spoken, viz., 12 o'clock, June 16th, 1882."

R. Bennett, re-called. "I have not had a poney glass in my house in two years. I have had them in the house, but not used."

This closed the evidence, and the magistrate noted that he reserved his decision till July 20th, at 11 a. m. On the 20th July, before rendering the judgment, counsel for the Crown asked that the information be amended by striking out the words "did keep." It was objected that the Crown having closed, and the matter reserved for judment till this day, it was too late for any amendment.

The conviction, depositions, and information were returned into this Court under a writ of *certiorari*, and on notice of motion the Court was, on the 19th day of September, moved on behalf of the defendant Bennett to quash the conviction, on the following grounds:

1. The information charged more than one offence.

2. No amendment of the information was made until after the hearing of the complaint.

3. The information, as well before as after the amendment, did not allege or charge the offence with sufficient or any particularity or certainty, in not identifying in any way the person to whom the intoxicating liquor was sold.

4. The conviction was bad on the like grounds.

5. There was no evidence before the convicting Police Magistrate to warrant the conviction.

6. The evidence failed to shew that any liquor sold was spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and a part of which was spirituous or intoxicating, and there was no evidence that the Temperance Act was in force at the time of sale.

7. If there was a *primâ facie* case that the liquor sold was spirituous, under the provisions of the Canada Temperance Act, such *primâ facie* case was clearly rebutted.

8. The convicting magistrate was not a duly authorized magistrate, because the government of Ontario, by whom he was appointed, had no power to appoint police magistrates; and in any event there was no power or authority to appoint a police magistrate for the county of Halton, for which the said convicting magistrate was appointed.

9. And on the ground that it was not shown in evidence that the said Canada Temperance Act was in force in the said county of Halton.

D. McCarthy, Q. C. (*Fullerton* with him), for the motion. The information is bad as it contains three specific charges, and is therefore contrary to the provisions of sec. 25, ch. 31, 32-33 Vic. The record shows objection was taken and noted, and the information being bad the trial could not properly proceed, and it could not be cured by amendment after the close of the trial. This is not a variance such as is contemplated by the Summary Convictions Act or Canada Temperance Act. There is no evidence to sustain the conviction on its merits. The only evidence is of a sale of something resembling liquor, and the person who drank it

swears it was "pop." There is no evidence that the Canada Temperance Act was in force in the Municipality. The Magistrate cannot take judicial notice of this fact. The Magistrate was not duly appointed. The appointment of Magistrates is a prerogative of the Crown—*Jones* v. *Williams*, 3 B. & C. 762—and has not been delegated to the Provincial Legislatures. Sec. 65 of the British N. A. Acts has reference to executive, not judicial officers. The Magistrate is not a Provincial Officer within the meaning of sub-sec. 4, sec. 92 of that Act, nor a part of the "constitution, maintenance, or organization of the Court" of sub-sec. 14. And the power not having been delegated to the Lieutenant-Governor in Council, remains in the Governor General. The *Queen* v. *Reno*, 4 P. R. 281, is clearly distinguishable. In this case the Police Magistrate was appointed by the Governor-General under 28 Vic. ch. 20, and the Ontario Act 31 Vic. ch 17 merely continues this Act in force, as was competent, as it related to the administration of Justice. The Magistrate remained in power by force of his previous appointment. The question is the same as that considered in *Lenoir* v. *Ritchie*, 3 S. C. 575, as to the right to appoint Queen's Counsel.

Irving, Q. C., contra. The information does not charge more than one offence, but charges that which the statute has enacted cumulatively; but if otherwise, the information and conviction can be amended by sections 115 to 118, of the Canada Temperance Act, 1878, 41 Vic. ch. 16. It cannot be said that there is no evidence whatever; and if any evidence, its weight is not examinable in this Court—*Paley* on Convictions, 469; *Cornwell* v. *Sanders*, 3 B. & S. 206—and upon the evidence the magistrate has decided. The magistrate was bound to take notice of the Canada Temperance Act being in force, and in the absence of objection taken at the hearing, it is to be presumed that the Gazette and Order in Council were in evidence: see section 98 of the Canada Temperance Act of 1878. In order to question the appointment of the Police Magistrate, the defendant has produced the Order in Council, shewing

his appointment by the Lieutenant-Governor, which appointment was made in pursuance of R. S. O. ch. 72, and the 41 Vic. ch. 4, O. These statutes are *intra vires* the Legislature of Ontario. The magistracy were appointed by provincial authority under statutes passed by the Province of Upper Canada, afterwards in the former Province of Canada. Police Magistrates were appointed under powers contained in the statute, introducing municipal institutions. See 12 Vic. ch. 71, sec. 7. These powers having been exercised by provincial authority, in pursuance of statutes in that behalf, at the time of Confederation, would fall within the distribution of powers made by the B. N. A. Act—see *Slavin* v. *Orillia*, 36 U. C. R. 159 and 175, *per* Richards, C. J.—and having been exercised in that part of Canada, now Ontario, become part of the powers of the Legislature of Ontario, falling under sections 65 and 92, sub-sections 4, 8, and 14. See also *Queen* v. *Reno et al.*, 4 P. R. 281. The power of the Lieutenant-Governor of Ontario to appoint the magistracy rests upon different ground from that which the Supreme Court question in the case of Queen's Counsel appointed in Nova Scotia, in *Lenoire* v. *Ritchie*, 3 S. C. 575. There it was said that as the Crown had never by Act of the Provincial Parliament detached from the prerogative, of the Crown the appointment by the Lieutenant-Governor of Nova Scotia of Queen's Counsel, such appointment still remained as part of the prerogative of the Crown, exercisable by the Governor-General of Canada only. But in the case now under consideration the Parliament of the Province of Upper Canada, and afterwards of the Province of Canada, having legislated on the subject of the magistracy, so as to detach the appointment of Justices of the Peace from the Crown, as matter of prerogative, in favour of the Lieutenant-Governor, or Governor of the said province, respectively, the power of their appointment falls under the powers of the Province of Ontario, by virtue of the sections of the B. N. A. Act before mentioned.

October 20, 1882. CAMERON, J.—The above nine objections may be conveniently arranged under the following heads, or questions:

1. Is the information defective and invalid so as not to support a conviction?

2. If so, had the magistrate power to cure the defect by allowing the amendment that was made; and if he had the power at all, had he power to make it after the evidence had been all taken, without re-swearing the informant and hearing the charge in the amended form?

3. Is the conviction bad for want of certainty, preciseness, or particularity in the statement of the offence?

4. Was there evidence of the charge sufficient to make out a *primâ facie* case to be considered by the magistrate; and if so, was it rebutted so as to leave no conflict of evidence, on which he could exercise his judgment?

5. Was the magistrate qualified to act, or, in other words, was he a magistrate at all?

Before the passing of the Act 14 & 15 Vic. ch. 95, which corresponded with the Imperial Act 11 & 12 Vic. ch. 43, sec. 10 whereof is the same as section 25 of ch. 31 of 32-33 Vic. D., which is the Act now in force relating to the duties of Justices of the Peace in summary convictions, an information might have included several offences; but now it is certainly improper to include more than one offence in the same information, as section 25 of 32-33 Vic. ch. 31 expressly declares "every information shall be for one offence only, and not for two or more offences." The information in the present case offends against this provision, as before it was amended it embraced three distinct offences under the Canada Temperance Act of 1878, though defectively stated. By section 99 of the Act the keeping of spirituous or intoxicating liquors for sale is an offence: the mere keeping of the liquor is not. Selling is an offence, and so is bartering, which is synonymous perhaps with trading; but the word barter, and not trade, should be used in an information or conviction under this Act. The information charged that the defendant did keep, sell, trade,

and otherwise unlawfully dispose of. That was in effect charging the defendant with the offence of keeping for sale, the offence of selling, and the offence of bartering. It does not follow, however, that because section 25 of ch. 31 of 32-33 Vic. prohibited the including of these three offences in the one information, that a conviction for one of the offences after appearance by defendant and evidence taken is bad.

By section 24 of the last mentioned Act it is declared all informations for any offence or act punishable on summary conviction may be laid without any oath or affirmation as to the truth thereof, unless a warrant is to be issued for the arrest of the accused. By section 36, if both parties appear either personally or by their counsel or attorneys before the Justice or Justices who are to hear and determine the complaint or information, then the Justice or Justices shall proceed to hear and determine the same. And by section 5, "No objection shall be allowed to any information * * for any alleged defect therein, in substance or in form, or for any variance between such information * * and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint; but if any such variance appears to the Justice or Justices present and acting at such hearing to be such that the person summoned and appearing has been thereby deceived or misled, such Justice or Justices may, upon such terms as he or they think fit, adjourn the hearing of the case to a future day."

By section 107 of the Temperance Act of 1878 the provisions of the Act 32-33 Vic. ch. 31, so far as the Temperance Act makes no special provision, are made applicable to prosecutions under the latter Act. Those provisions would seem to warrant the Justice or Justices in proceeding to hear a charge quite defectively stated, if the evidence shewed an offence had been committed over which they had jurisdiction, without any amendment in terms being made in the information The defendant or accused being present, the evidence would

amount to a charge which he was bound then and there to answer, unless the hearing was adjourned by the justice or justices, and a conviction, valid in form, supported by evidence, would not be liable to be quashed because it varied from the original information.

But by section 116 of the Temperance Act of 1878 it is expressly provided that "In the event of any variance between the information and evidence adduced in support thereof, the justices or magistrate or other officer may amend or alter such information, and may substitute for the offence charged therein any other offence against the provisions of the said 'Temperance Act of 1864,' or of this Act; but if it appears that the defendant has been materially misled by such variance, the said justices or magistrate or other officer shall thereupon adjourn the hearing of the case to some future day, unless the defendant waives such adjournment." It is curious that this clause provides for an adjournment in case of a variance between the information and evidence, but makes no provision for adjournment where the magistrate substitutes for the offence charged another offence under the Act. This is in one sense a variance, and may be covered by the provisions as to variance. None of the provisions in express terms cover the case where the information charges several distinct offences, as in this case; but it is quite within the spirit of the Act to allow an amendment by striking out all the offences except one. I am therefore of opinion the objections to the conviction on account of the defect in the information are not entitled to prevail.

As to the time of amendment. Under ordinary circumstances an amendment should be made as soon as the error or variance is made to appear, in order that the accused may have an opportunity of answering, in accordance with the well understood principles governing the administration of justice, the charge on which his conviction is sought; but in the present case the charge or offence for which the defendant was convicted was not changed. The amend-

ment relieved him from answering other charges and did not in any way prejudice his defence in respect of the charge on which he was convicted. I am therefore of opinion the amendment made after the case had been heard and closed, except for the purpose of the magistrate's final decision, cannot render invalid the conviction.

I think, apart from the fact that several offences were included in the information, there is no want of certainty in the information or in the conviction. An offence is clearly stated, and its commission is alleged with sufficient particularity as to time and place, so as to shew that the magistrate was acting within his jurisdiction, and to give notice to the defendant of the particular offence charged against him.

The next objection is based upon the insufficiency of the evidence, and this presents itself under two heads; one, that assuming that selling intoxicating liquor within the county of Halton is an offence punishable on summary conviction, by reason of the second part of the Temperance Act of 1878 being in force in that county when the sale took place, the evidence was not sufficient to warrant a Court in submitting it to a jury if the charge had been in respect of a criminal offence triable by jury; and if there was *primâ facie* evidence under the Act it was clearly rebutted by the evidence of the defendant and of the person to whom the intoxicating liquor is alleged to have been sold. The second head is, that there was no proof or evidence that the Temperance Act was in force at the time of sale.

Under the first head it is clear if there was any evidence that could with any reason be held to lead to the conclusion that the offence had been committed, this Court has no power to review the magistrate's decision. He, by the law, is made the judge of the weight to be attached to evidence, and not the Court. This principle is clearly established by authority. But it is the duty of the Court to determine whether the evidence, assuming it to be true and undisputed, when the question is properly brought

before it as in the present case, is such as could reasonably constitute proof of the defendant's committal of the offence.

As the information and conviction now stand, I think it must be taken that the specific charge against the defendant was, that he unlawfully sold intoxicating liquor at the village of Georgetown on the 16th day of June, 1882. The evidence was all produced on behalf of the prosecution. The defendant, being the first witness called, swore: "I did not sell intoxicating liquors on June the 16th." In answer to the question put by the counsel for the prosecution. "Did you sell any liquor of any kind from the 1st day of May to the date of laying the information," he answered, "I guess there was liquor sold between the 1st day of May and the 16th day of June, but I cannot say at what particular time. I did not sell on the 16th of June. I thought when I was served with a summons I would pay a fine, but afterwards found I was mistaken on the date." E. Nelson swore: "I have had liquor at Bennett's often, but since the 1st day of May I do not remember of drinking any liquor in his house. On the 16th day of June I drank pop." John Stedaford swore: "I was at Robert Bennett's (defendant's) house on the 16th day of June last. I saw E. Nelson there. Bennett took from under the counter and gave Nelson some liquid; it resembled liquor. Mr. Bennett drank, and Nelson paid for it." On cross-examination he said * * "What I saw Nelson drink had the appearance of liquor."

Apart from the provision made by section 121 of the Temperance Act, 1878, I do not think the above furnished any reasonable evidence of a sale by the defendant on the 16th day of June of intoxicating liquor. The only sale actually proved to have taken place on the 16th June was a sale to E. Nelson, who swore what he drank on that day was "pop." What pop is, there was no evidence to shew, certainly none that it was intoxicating liquor. The defendant swore that he did not sell any liquor of any kind on that day, no doubt meaning intoxicating liquor as distinguished from non-intoxicat-

ing beverages, as Stedaford would appear to use the word liquor in the same sense. Then Stedaford swore only that the liquid the defendant gave to Nelson, and for which Nelson paid, resembled, had the appearance of liquor—not that it was intoxicating liquor. Now the most that section 121 would do in affecting the rules of evidence would be, if Stedaford alone had been called on behalf of the prosecution, to justify the magistrate in putting the defendant on his defence; but I think the moment the defendant swore that he had not sold intoxicating liquor, and the man to whom the liquid was sold declared it to be pop, without evidence that pop is intoxicating liquor, it must be taken that the suspicion raised by Stedaford's evidence was rebutted, and there was no evidence before the magistrate to justify a conviction, and *a fortiori* is this so when the rebutting evidence is produced on behalf of the prosecution. I do not think that section 121 dispenses with all evidence that the liquid sold is intoxicating: it merely dispenses with evidence of the precise description of the liquor, that is, it need not be shewn that it was gin or whiskey, rum or brandy, or other known kind of liquor, but its intoxicating character must be made to appear.

I think the case of the *Queen* v. *Howarth*, 33 U. C. R. 537, sustains the conclusion that I have arrived at, that there was no reasonable evidence before the magistrate of the sale by the defendant on the 16th June of intoxicating liquor. This case is an instructive case, reviewing many of the authorities, fully establishing the principle I have above stated, that where there is reasonable evidence in support of a conviction, it is not the province of the Court in any way to interfere with the judgment or decision of the magistrate; but where there is not such reasonable evidence the accused is entitled to be relieved from the penalty imposed by the conviction, by the power in the Court of correcting the unlawful decisions of subordinate tribunals.

The next question upon the evidence presented is, was

it shewn that the Temperance Act on the 16th June, 1882, was in force in the County of Halton? There was no evidence of any kind produced to shew that it was in force, and assuming that it was in fact in force, could the magistrate take judicial notice of the fact, or had it to be proved?

By section 4 of the Temperance Act it is enacted: "Any petition to the Governor General in Council for the bringing of the second part of this Act into force in any county or city may be in the form in Schedule A. to this Act, or in words to the same effect;" and by section 5 such petition may be embodied as in Schedule A. to this Act, in a notice in writing addressed to the Secretary of State for Canada."

By section 7: "In case it appears by evidence to the satisfaction of the Governor General in Council that any such notice has appended to it the genuine signatures of one-fourth or more of all the electors in the county or city named in it * * His Excellency in Council may issue a proclamation under the first part of this Act."

By section 8: "Such proclamation shall be inserted in the *Canada Gazette*, and three times in the Official *Gazette* of the Province in which the county or city is situated."

Section 9 shews what the proclamation shall or may set forth, among other things, "the day on which the poll for taking the votes of the electors for and against the petition will be held."

By section 57: "In case more than half of all the votes polled are for the petition, the same shall be held to have been adopted; and the returning officer shall make his return to the Governor General in Council accordingly."

By section 96: "When any petition * * has been adopted by the electors * * the Governor General in Council may, at any time after the expiration of sixty days from the day on which the same was adopted, by Order in Council published in the *Canada Gazette*, declare that the second part of this Act shall be in force and take effect in such county or city upon, from and after the day on which

the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire; provided such day be not less than ninety days from the day of the date of such Order in Council; and if it be less, then on the like day in the then following year; and upon, from and after that day the second part of this Act shall become and be in force and take effect in such county or city accordingly."

It is manifest that until an order in council has been passed, the second or prohibitory part of the Temperance Act is not in force in any county by the mere adoption at the polls of the petition; and unless the magistrate was bound to know and judicially notice an order in council passed under and in accordance with clause 96, there was no proof of the Act being in force. I can find no authority for holding that Courts can without proof take judicial notice of orders in council, or of their publication in the Official *Gazette* without production of the *Gazette*. Production of a copy of the Official *Gazette*, printed by the Official Printer, would be evidence of the passing of any order in council published in such *Gazette*. In the present case it was essential to establish two things before the defendant could be found guilty of an offence under the Temperance Act; first, the passing of an order in council under section 96; and secondly, its publication in the *Canada Gazette*. These things have not been established, and the conviction must therefore be quashed.

The only remaining question is, the status of the Police Magistrate. This involves the important constitutional question, in which Government and Legislature rests the power of appointing or making laws for the appointment of Police Magistrates and other Justices of the Peace. The first Act of the Legislature respecting the appointment of Justices of the Peace since the creation of the new constitution of the Dominion and Provinces under the British North America Act, 1867, was passed at the first session of the Local Legislature on the 4th March, 1868. I was then a member of the Executive Council of this Province, which

was responsible for the introduction of the bill that afterwards passed into an Act of the Legislature. The British North America Act made no express provision on the subject of the appointment of Justices of the Peace, or any officer connected with the administration of justice inferior or subordinate to the Judges of the Superior and County Courts. From the increase in the population in the old, and the settlement of new portions of the country, it was necessary that provision should be made for the appointment of Justices of the Peace, as it was conceived that without legislation there was no power of appointment resting in the Lieutenant-Governor or in the Governor General. From the absence of express provision in the British North America Act, and the vesting in the Local Legislature of the Province the exclusive power to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, it was conceived the power to pass such a law must rest exclusively with the Local Legislature. The view that the Executive Council as a whole, or any individual member of it entertained, leading to the introduction of the enactment, is of no consequence if the Act is in fact *ultra vires*, and I merely refer to that view as indicating the question now raised was present to the mind of the framers of the Act, and it is only reasonable to assume it was present to the Governor General of the Dominion when the Act was communicated to him, and not disallowed under the power of disallowance vested in him under section 90 of the British North America Act. I assume there is no doubt that the appointment of Justices of the Peace was by prerogative in the Crown, but the Legislature of Upper Canada and the Parliament of the Province of Canada have assumed, without the power so to do having heretofore been questioned, to legislate in reference to their jurisdiction and qualification.

By the 1st Vict. ch. 11, sec. 7, the Legislature of Upper Canada gave jurisdiction to Justices appointed in and for

one county in other counties for the special purposes of the Act, and thereby virtually appointed Justices of the Peace in counties to which their commissions did not extend. By 6 Vic. ch. 3, sec. 1, it was provided that all Justices of the Peace should be of the most sufficient persons dwelling in the district or counties, and no one should be a Justice not possessed of a certain property qualification, whereby the prerogative of the Crown was limited in the choice of Justices of the Peace; and by section 1 of ch. 101, Con. Stat. Can., power was given to the Governor General in Council to appoint Justices of the Peace for remote parts of the province not included within the limits of any district or county.

It is thus manifest that the legislation that is now complained of, as not being within the proper competency of the Legislature of Ontario, was not originated since confederation with the latter Legislature.

In *Lenoir* v. *Ritchie*, 3 Sup. Ct. R. 575, it was held by a majority of the Judges of the Supreme Court, that it was not competent to the Legislature of the province of Nova Scotia to pass an Act to authorize the Lieutenant-Governor to appoint Queen's Counsel, giving to such counsel precedence over Queen's Counsel previously appointed by the Governor-General, or precedence at all over such counsel; and this case was relied upon in support of the contention presented on behalf of the defendant in the present case, that the Legislature of this province had not power to pass the 9th section of the Act, 41 Vic. ch. 4, authorizing the Lieutenant-Governor in Council to appoint a Police Magistrate for a county, and that the appointment of Mr. Young as Police Magistrate in and for the county of Halton was invalid, and consequently the conviction made by him of the defendant was totally void. But the cases are distinguishable.

The status of Queen's Counsel is one of mere honour and dignity, and not necessarily connected with the administration of justice. Their creation therefore is not in terms by the British North America Act assigned to the local Government or Legislature, but pertains to the prerogative of Her Majesty since as it did before Confederation.

In *Chitty* on Prerogative it is stated at page 118: "To the Crown belongs the prerogative of raising practitioners in the Courts of justice to a superior eminence by constituting them sergeants, &c., or by granting letters patent of precedence to such barristers as His Majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and preaudience as are assigned in their respective patents."

The office of police magistrate is the simple creation of an Act of the Legislature, and in creating the office it had, when not in conflict with the express or implied powers of such Legislature, or in excess thereof, the right to determine how the appointment should be made. The power of appointment under the Act in question is given to the Lieutenant-Governor in Council, as the power was given under chap. 101 of Consol. Stat. C. to the Governor General in Council, to appoint magistrates or justices of the peace under that Act. In the judgment of Mr. Justice Taschereau, the distinction between the Governor General acting solely as the representative of Her Majesty and the Governor General in Council is pointed out.

In reference to the disallowance of Acts passed by the Local Legislatures, he says, at page 624: "The power of veto is given to the Governor General in Council, not to the Governor General himself. And it cannot be contended that the Governor General in Council is the Queen or the representative of the Queen, or that the Governor General in Council exercises the prerogatives of the Queen, or can give, directly or indirectly, to any person or public body the right to exercise such prerogatives. (Of course, I speak here only of the power to grant dignities and honours.) The Governor General, alone, exercises the prerogatives of the Queen in Her name in all the cases in which such prerogatives can be exercised in the Dominion by any one else than Her Majesty herself."

Of course, the learned Judge is treating the Governor General in Council as acting upon the advice of the Council, the members of which are responsible under

our Constitution to Parliament for their advice, as shewn by the action following, or the result of such advice; while in the exercise of pure matters of prerogative, as distinguished from acts indicating or carrying into effect the policy of the Government, he acts of his own mere motion, independently of or even against the advice of the Privy Council, if he has chosen to consult them upon the subject. The learned Judge, too, in using the language I have quoted, was doing it for the purpose of shewing that the fact of an Act of the Local Legislature not having been disallowed by the Governor-in-Council could not be taken as an indication that Her Majesty had thereby impliedly consented to any curtailment or transfer of the right of exercise of the royal prerogative that such Act might work, and in that view does not support the contention that an interference with the prerogative in respect of the appointment of justices of the peace by former legislation which had not actually received Her Majesty's sanction, could be accepted as an indication of Her Majesty's concurrence in such legislation, so as to render valid an appointment made thereunder by an authority not having the power or right in the special case to use the royal prerogative. But, in my opinion, justices of the peace are part of the system of the administration of justice in the province, and therefore under sub-section 14 of section 92 of the British North America Act the right to legislate as to their appointment is expressly conferred upon the Legislature of the Province; and therefore Mr. Young was duly appointed police magistrate for the county of Halton. This view is supported by the provision contained in section 96, giving the appointment of Judges of the Superior District and County Courts to the Governor-General, and no provision being made for the appointment of any subordinate officer or authority in connection with the administration, indicating the intention of the Imperial Parliament, under the assignment of the power to make laws relating to the administration of justice to the Local Leg-

islature, was to give such Legislature full power to legislate as to the appointment of all officers connected with the administration except the Judges, in respect to whose appointment the appointing power was expressly indicated.

The same question was raised in the Supreme Court of Nova Scotia, in the case of *Gardner* v. *Parr*, 2 R. & G. 225, but was not decided, or, at least, in the reasons for the decision given the Court did not refer to the question of the legislative power, and dismissed the appeal on the merits. The case does not, therefore, afford any assistance in the present case.

The conviction is not open to the objections alleged against it, except those relating to the insufficiency of the evidence to establish that the offence charged was an offence at all within the county of Halton; or, if an offence, that there had been any reasonable evidence before the magistrate to sustain it. On these latter grounds it must be quashed.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

REGINA v. O'ROURKE.

Criminal law—Selection of jurors—32-33 Vic. ch. 29, sec. 44 (D.)—Writ of error—Challenge to the array.

By 32-33 Vic. ch. 29, sec. 44 (D.,) every person qualified and summoned to serve as a juror in criminal cases according to the law in any province, is declared to be qualified to serve in such province, whether such laws were passed before the B. N. A. Act or after it, subject to and in so far as such laws are not inconsistent with any Act of the Parliament of Canada. By 42 Vic. ch. 14 (O.,) and 44 Vic. ch. 6 (O.,) the mode of selecting jurors in all cases, formerly regulated by 26 Vic. ch. 44, was changed. The jury was elected according to the Ontario Statutes, and the prisoner challenged the array, to which the Crown demurred, and judgment was given for the Crown. The prisoner was found guilty and sentenced, and he then brought error.

Held, per HAGARTY, C. J., that the Dominion Statute was not *ultra vires* by reason of its adopting and applying the laws of Ontario as to jurors to criminal procedure.

Semble, that under sec. 139, Consol. Stat. U. C. ch. 31, where no unindifference or fraudulent dealing of the sheriff is shewn, any irregularities are not assignable for error.

Per ARMOUR and CAMERON, J J.—The objection raised by the prisoner was not a good ground of challenge to the array.

Quære, whether, when such a question has been reserved by a Judge at the trial, it can afterwards be made the subject of a writ of error.

The prisoner was indicted for murder, and pleaded not guilty, and at the trial before Cameron, J., at Milton, and upon the empannelling of a jury for his trial, he challenged the array of the said panel, because, he said, the array of the said panel was arrayed and returned by George Crawford McKindsey, then and at the time of the making of the said array sheriff of the county of Halton; and because said panel was, though duly selected from certain persons in the county designated by and selected in accordance with the provisions of the Revised Statutes of the Province of Ontario, and the said statutes were *ultra vires* and void, to wit, ch. 48 Revised Statutes of Ontario, and other statutes of Ontario amending the same, to wit, 42 Vic. ch. 14, 44 Vic. ch. 6; and that said panel was not selected in accordance with any section of any statute of the Dominion of Canada, which the Parliament of the Dominion of Canada had power to pass; and because the

selection and choosing of jurors in criminal cases was a part and parcel of the procedure in criminal cases, and the Parliament of the Dominion of Canada alone had jurisdiction in matters of procedure in criminal cases under the provisions of the British North America Act; and the said Parliament of Canada had no authority to delegate the powers which it had to legislate in regard to procedure in criminal cases to the Provincial Legislature of any province, or to any other body whatsoever: wherefore the prisoner said that the above-mentioned statutes of the Province of Ontario, and that section 44 of ch. 29 of 32–33 Victoria, Dominion Statutes, were *ultra vires* and void, and that said panel was improperly selected and chosen, and that the said prisoner had not a jury empannelled from the body of the county on which he could put himself upon his trial, as by law he was entitled to have; and the prisoner further said that the said panel was not selected by the selectors chosen by law, in this, that John Dewar, Esq., Clerk of the Peace of the said County of Halton, was not one of the selectors on the second selection when the jury list, from which the said panel was taken, was made up, as by law he should have been; and in this, that in the first selection of jurors from the different townships in said county only certain persons whose names commenced with certain letters were chosen, or could have been chosen, under the said statute; whereas other persons, whose names commenced with other letters, lived in said townships, and were liable to be selected, and could have been chosen as jurors; all the said proceedings having been taken and had under the laws and statutes of the Province of Ontario.

To this challenge the Crown demurred, and the prisoner joined in the demurrer, and thereupon the Court adjudged and determined that the said challenge of the prisoner to the array of the said panel was not sufficient in law to quash the array of the said panel, and it was adjudged and ordered that the said array of the said panel should be affirmed.

The said panel was thereupon duly sworn, and having duly tried the said prisoner, duly found him guilty of the felony of which he was indicted, and the prisoner was thereupon sentenced to death; and the said learned Judge thereupon reserved the question of the validity of the said challenge for the consideration of the Justices of the Common Pleas Division of the High Court of Justice, under Consol. Stat. U. C. sec. 112, who, after consideration thereof, held that the validity of the said challenge was not a matter that could be reserved under that Act. The prisoner thereupon applied for and obtained a writ of error upon the fiat of the Attorney-General, which said writ was issued from the office of the Registrar of the Queen's Bench Division of the High Court of Justice, and was addressed "To our Justices of Oyer and Terminer for our county of Halton assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, trespasses and other evil doings within the said county."

Under the said writ the prisoner assigned the following matters for error: that the indictment and the record and the matter therein contained were not sufficient in law to warrant the judgment against him or to convict him of the said felony and murder: that the jurors composing the panel summoned at the sittings of the High Court for the trial of civil and criminal cases held at Milton, in the said county of Halton, at which the said prisoner was tried and convicted, were selected and chosen under the Revised Statutes of Ontario, ch. 48, ch. 14 of 42 Vic., and ch. 6 of 44 Vic., and were selected from persons in the several municipalities forming the county of Halton, whose names began with a particular letter of the alphabet, determined upon for the respective municipalities by the county selectors, as provided for by sub-section 3 of section 11 of the said Act, 42 Vic. ch. 14; and that John Dewar, Esq., Clerk of the Peace, was not present at or acting as a selector of the persons to compose the jurors for the said county, as he should have been under

section 5 of the Statutes of the Province of Canada, ch. 44, 26 Vic., and ch. 31 of the Consolidated Statutes of Upper Canada, section 51, nor could he be allowed to be present and act as a selector under the said Statutes of Ontario: that the selection so made, not being from the body of the county, nor in accordance with the law before the British North America Act came into force, nor with any Act of the Parliament of the Dominion of Canada passed since, which the said Dominion Parliament had power to pass, was invalid, and the Acts of the Parliament of the Province of Ontario, in so far as they related to the selection of jurors for the trial of criminal cases were *ultra vires* and void, and the Act of the Parliament of Canada, 32–33 Vic. ch. 29, in so far as it related to and made qualified as jurors persons qualified and summoned as grand and petit jurors in criminal cases, according to the laws which might be then in force in any Province of Canada, whether such were laws passed before or should be passed after the coming into force of the British North America Act 1867, that is to say, section 44 of the said Act, was *ultra vires*, as delegating to the Local Legislatures a matter of criminal procedure, which by the said British North America Act belonged to, and must have been determined by, the Parliament of the Dominion.

Upon these matters of error so assigned issue was joined.

November 25, 1882. *N. Murphy*, for the prisoner. The Dominion Legislature and the Local Legislatures possess only the powers conferred on them by the British North America Act. By section 91 of that Act the Dominion Legislature has exclusive authority over all matters coming within the classes of subjects enumerated in the sub-sections of that section. By sub-section 27 the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters, is assigned exclusively to the Dominion Parliament. Section 92, sub-section 14, confirms this. Is the selection of jurors a mat-

ter of procedure or of the constitution of the Courts? The old writ of *venire facias*, by which juries are summoned, is called a process for summoning a jury. In *Chitty's* Criminal Law process is defined to be the name of proceedings to summon juries, witnesses, and the like. See also 3 Blackstone's Com. 279; 4 Blackstone's Com. 350. The Criminal Procedure Act, 32-33 Vic. ch. 29, deals with the right of challenge a prisoner may exercise, and in a capital case like this allows him twenty peremptory challenges. Is not this a matter of the selection of a jury? If so, is not the selection *ab initio ad finem* a matter of procedure? If not, where is the line to be drawn—where constitution ceases and procedure commences? The Local Legislature could not say that the prisoner could only challenge six persons peremptorily, or that six jurors only should be empanelled in criminal cases. Under the British North America Act the appointment of Judges rests with the Dominion Government. Jurors are judges of the facts. The Dominion Legislature could not delegate its powers so as to empower the Local Government to appoint Judges. The selection and number of grand juries seems to be conceded as a matter of criminal procedure; for although the Local Legislature by ch. 13 of 42 Vict. limited the number of grand jurors to fifteen, the proclamation of the Lieutenant-Governor necessary to call the Act into force was never issued.

Should the selection of jorors be a matter of procedure, as by the judgment of Wilson, C. J., in the *Queen* v. *O'Rourke*, 32 C. P. 388, it appears to be, the first question is, had the Dominion Legislature power to pass sec. 44 of ch. 29, 32-33 Vic? And the second question is, are the acts of the Local Legislature inconsistent with the laws of the Dominion?

The British North America Act being the source from which all powers that can be exercised either by the Dominion or Local Legislatures are derived, and that Act not having given to any of the Legislatures any authority to delegate their powers, all powers conferred upon them by that

Act should be exclusively exercised by those upon whom they are conferred. The Dominion Legislature cannot confer any powers upon the Local Legislature, nor can they, by a delegation, shirk the responsibilities which are cast upon them by the British North America Act. It was more than suggested in the judgment in *The Queen* v. *O'Rourke*. 32 C. P. 388, that sec. 44, ch. 29, did not delegate powers, but adopted laws passed, or to be passed, by the local legislatures. An adoption must be of a thing *in esse*: there can be no adoption of anything *in futuro*. On this section the remarks made by Taschereau, vol. 2, page 229, seem to apply very forcibly. Should the Court be of opinion that this section is *ultra vires*, they should not hesitate to declare it so: *Dwarris* on Statutes (1873), 429, 430, 431, 432, 433, 434, 437, 438, 441, 442. As to the rule of interpretation of statutes, see *Dwarris*, 122, rules 4 and 9; also *Dwarris*, 128, and *Vattel*, rules 16, 23, 30. Should the Dominion Parliament have power to delegate their authority to the Local Legislature, or should they have the power to adopt the laws of the Local Legislature, as to the selection of jurors, those laws of the Local Legislature would be inconsistent with the laws of the Dominion, and under section 44, above cited, would be invalid and of no force. Before the Local Legislature changed the jury law the selection of jurors was governed by Con. Stat. U. C., ch. 31, and under sec. 51 of that Act the Clerk of the Peace was *ex officio* one of the selectors. This Act was amended, but not materially, by 26 Vic. ch. 44. Chapter 48, R. S. Ont., sec. 46, leaves out the Clerk of the Peace as one of the selectors, and is consequently inconsistent with ch. 31, Con. Stat. U. C. By 42 Vic. ch. 14, O., a letter or letters are given to each municipality, by which they shall choose the jurors to be selected from that municipality; and by sec. 13 of that Act, sub-sec. 20, and subsecs. 2 and 3, ballotting is introduced, all which provisions are inconsistent with and contrary to ch. 31, Con. Stat. U. C., sec. 53, sub-secs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, and sec. 55. In the *Queen* v. *O'Rourke*, 32 C. P., it was said

that it was the duty of the Court to support sec. 44 of 32–33 Vic. ch. 29, if the Court could possibly do so. It had long been acted upon, and without dispute or question, and it had occasioned, and could occasion, no injustice in point of fact. The rule as to the construction of criminal statutes is, that they should be construed *in favorem vitæ*, and no grounds of public policy are weighty enough to override that rule of construction.

Irving, Q. C., contra. The deviations from the system of balloting alleged to be errors, are the matters which by the statute are directory only, and not imperative. Such matters as are alleged to be deviations from the law in force at the time of confederation, and which have been under the Ontario Act, and admittedly in accordance therewith, are such as are within the powers of the Court to order otherwise. See Consol. Stat. U. C. ch 31, sec. 63, and the judgment of Blackburn, C. J., in *Hayes & Fogarty* v. *Regina*, at page 61, of 10 Ir. Law R., commenting upon the like section in 3 & 4 Wm. IV. ch. 91, sec. 15, of the Irish Jury Act; also *Regina* v. *Conrahy*, 1 Craw. & Dix 56. The absence of the Clerk of the Peace as one of the county selectors required by 42 Vic. ch. 14, sec. 3, O., is not error, because the county selectors are such as conform to the 26 Vic. ch. 44, sec. 5, prior to Confederation. But none of the errors assigned can be maintained in the face of the Consol. Stat. U. C. ch. 31, sec. 139, carried into the Revised Statutes of Ontario, page 571: unless in the case of fraud that section must prevail.

The Parliament of Canada by sec. 44 of the Procedure Act 32–33 Vic. ch. 29, have rightfully adopted the jury laws of the provinces. If the matters in question by way of error are such as are within the powers of the Dominion Parliament, and not of the Provincial Legislature, then the Dominion Parliament has power to confer legislative powers upon the Provincial Legislatures: *Regina* v. *Hodge*, 7 A. R. 246; *Regina* v. *O'Rourke*, 32 C. P. 388; *Regina* v. *Burah*, L. R. 3 App. Cas., 889. The argument of the plaintiff in error, that the section 44 being subject to "any

provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act," means subject to laws of the old Province of Canada, cannot prevail, because the legislation in the 44th section applied to other provinces than those forming part of the former Province of Canada, and was for the whole Dominion; and if to be considered at all, then the section 139 of the Consol. Stat. U. C. ch. 31, sec. 39, an enactment of the former Province or Canada, and before cited, would be fatal to the view taken by the plaintiff in error in the construction of the section 44.

The selection and summoning of jurors to meet the Courts of Oyer and Terminer, is part of the constitution, organization, and maintenance of the Court, and is not part of criminal procedure. Although commissions are not now ordinarily issued, the constitution of the Court for the trial of offences is to be found by examination of the form of such commission. See *Whelan v. Regina*, 28 U. C. R. 2, and Per Richards, C. J., 81; and the Court cannot proceed to the trial of offenders without a jury being in attendance; and it is the commission which causes the sheriff to act under precept of the commissioners. It is no part of criminal procedure the bringing together of the jurors in the organization of the Court.

It has been decided that the state of things existing in the Confederated Provinces at the time of Confederation, and more particularly that which was recognized by law in all or most of the provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the British North America Act of 1867: *Corporation of Three Rivers v. Sulte*, 5 Legal News, p. 331, and p. 333, per Ramsay, J. *In re Slavin and the Corporation of Orillia*, 36 U. C. R., 165, per Richards, C. J. Thus, in the former province of Canada, the constitution of the Courts of criminal law, and the jury system in connection with said Courts, are enacted separately as affecting Upper and Lower Canada, while criminal procedure was made by a general Act applicable

to the whole of the former Province of Canada. The other Provinces in the same way. See *Forsyth's* Cons. Opinions, 169; *Regina* v. *Foley*, *Stevens'* New Brunswick Digest, second edition, 381, deciding that the Acts relating to the attendance of grand and petit jurors at the County Court (a Court of criminal jurisdiction over all crimes not capital) are within the powers of the Local Legislature under the British North America Act, 1867, sec. 92, as pertaining to the administration of justice and the constitution and organization of provincial Courts, and do not belong to the Parliament of Canada under section 91 as procedure in criminal matters. See also *Dalton's* Justice, ch. 193, p. 529; *Brown's* Law Dictionary, 152; *Niagara Election Case*, 29 C. P. 280, per Gwynne, J.; *Burton's Case*, 4 *Leigh's* Rep. (Virginia), 645, and 646, per Scott, J.; *Thompson* and *Merriam* on Juries, sec. 149; *Regina* v. *O'Connell*, 11 Cl. & F. 155, and 347, per Lord Brougham, as to the question of the selection of the jury going to the jurisdiction of the Court.

To raise the question of the constitution of the jury the objection must be taken by plea, and not by challenge to the array. Challenge to the array is proper when the unindifferency of the sheriff is charged. Challenges to the qualification of the jurors must be by challenge to the polls. But if in respect of neither of said matters, then the objection must be taken by way of plea, because it is by way of plea that the constitution of the Court only can be discussed: 1 *Chitty's* Criminal Law, 309; *Commonwealth* v. *Cherry*, 2 Virginia cases, 20; 2 Hale, P. C. 155; Bac. Ab. Juries, A.; *State* v. *Foster*, 9 Texas 67; *Sheridan's* Case, 31 How. St. Trials, 543; 1 *Chitty's* Criminal Law, 438. From the nature of this plea it must evidently be pleaded before the general issue, because by pleading not guilty the defendants admits the power of the Court to try him, and refers his cause to their decision; *Joy* on Confessions and Challenges, 120; *Rex* v. *Johnston*, 6 East 583. 4 *Black's* Com. 33: "Plea to the jurisdiction is, where an indictment is taken before a Court that has no cognizance of the offence."

It is by such plea that the constitution of the Court can only be examined, and it is therefore submitted that such part of the jury system which stands in lieu of the Common Law mode of selection by the sheriff, and free from the charge against him of unindifferency, is examinable only as a question affecting the constitution of the tribunal, and so becomes part ofthe constitution of the Court.

December 2, 1882. HAGARTY, C. J.—The questions argued before us on the assignment of errors may be shortly stated.

The prisoner was convicted at the Halton Assizes.

The jurors on the panels of the grand and petit juries were selected and summoned under the Statute of Ontario, 42 Vict. ch. 14, which came into force on the 1st May, 1879.

It is fully conceded by Mr. Murphy that if this Act be in force, his objections must fall to the ground.

It is, therefore, to its validity we have solely to direct our attention.

It professes to amend and to repeal in part chapter 48 of the Revised Statutes of Ontario, and alters in some particulars the manner of selection.

The Revised Statute is, with some slight variations, a reprint of the Consolidated Statutes of Upper Canada, ch. 31, which was the Act in force (in substance) at the date of the Confederation of the Provinces.

Section 129, B. N. A. Act, provides that all laws in force in Canada, Nova Scotia, and New Brunswick, at the Union, and all Courts of Civil and Criminal jurisdiction, and all legal commissioners, &c., and all officers, judicial and administrative, &c., shall continue in Ontario and Quebec, and, as if the Union had not been made, &c., subject to be repealed, altered, &c., by the Parliament of Canada or the Provincial Legislature, &c.

The Criminal Procedure Act, 32-33 Vict. ch. 29, declares that divers Acts had been passed assimilating, amending, and consolidating certain provisions of the

statute law of the several Provinces, and extending them to all Canada, and that it was expedient to assimilate, &c., the provisions of the statute law respecting procedure and other matters not included in said Acts.

Provisions are made as to challenges of jurors, both for the prisoner and for the crown, and for juries *de mediatate linguæ*, and, when by challenge or otherwise the panel has been exhausted, for the summoning of fresh jurors by the sheriff, whether on the jurors' roll or otherwise, qualified or not, and for such jurors, whether otherwise qualified or not, being added to the panel, &c., and saving all authorities of the Court or Judge, or any practice or form in regard to trials by jury, jury process, juries or jurors, unless where altered by this Act.

Section 44 says, "And for avoiding doubt it is declared and enacted that every person qualified and summoned as a grand juror or as a petit juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before or be passed after the coming into force of the British North America Act of 1867—subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act."

Section 79 declares, "that judgment, after verdict upon an indictment for any felony or misdemeanor, shall not be stayed or reversed * * by reason that the jury process has been awarded to a wrong officer, * * nor for any misnomer or mis-description of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who was not returned as a juror by the sheriff or other officer."

In the interpretation clause, sec. 1, sub. 6, it is declared that the expression, "any Act" or "any other Act," in this Act, shall include any Act passed or to be passed by the Parliament of Canada, or by the Legislature of the late Provinces of Canada, or passed or to be passed by the

Legislature of any Province of Canada * * unless there be something in the subject or context inconsistent with such construction."

The Dominion Parliament, in this Act, seems to me clearly to assert its right to deal with the qualifications and selections of jurors as matters within its cognizance, and as pertaining to criminal procedure applicable to all the provinces.

The prisoner's counsel is necessarily forced to argue that such matters pertain exclusively to the Dominion Parliament, as procedure, because, to uphold the jurisdiction of the Local Legislature in the premises as of their own authority, is confessedly fatal to his client, the proceedings being in accordance with the local enactment.

It seems to me to be very clear that the Dominion Parliament, by this Act of 1869, adopted and as it were confirmed the existing Provincial jury laws, and also declared that future Provincial laws on that subject should be equally adopted and confirmed, subject, however, to their own right of control by any existing or future Act.

This need not be read as technically a delegation of their own authority, but rather, in the language of Wilson, C. J., an acceptance of the Provincial law, and a legislation by relation and reference to that law.

But if it were directly a delegation of power, I am not prepared to hold it erroneous.

The Dominion Parliament is supreme in criminal law and procedure, and may, I assume, exercise its powers in such fashion as it may deem expedient.

The only question with me is, whether it has clearly sanctioned and adopted the statute law of Ontario, under which the jurors were brought into Court in this case,

I think this has been done, and that the Ontario Act must govern so long as the Dominion Parliament has not interposed or enacted any provision inconsistent therewith.

This, it is conceded, has not been done.

This 44th section means that whatever law of the Province may be *then* in force, that is, whenever the question may be raised, shall govern.

It must not be considered that we are doing more than expressing our judgment on the validity of the objections taken to this conviction.

Mr. Irving, for the Crown, expressly waives all objections to the method of obtaining such judgment.

The Court of Common Pleas, in its judgment in this case, while declining to accept it as properly before them as a case reserved, has given its opinion on the merits adverse to the prisoner.

We, of course, do not overlook the existence of section 139 in the Consol. Stat. U. C. ch. 31.

"No omission to observe the directions in this Act contained, or any of them, as respects the qualification, selection, balloting, and distribution of jurors, the preparation of the jurors' book, the selecting jury lists from the jurors' rolls, the drafting panels from the jury lists, or the striking of special juries, shall be a ground of impeaching the verdict in any cause, or be allowed for error upon any writ of error or appeal to be brought upon any judgment rendered in any case, criminal or civil, by any Court in Upper Canada."

This clause is adopted in the Act in the R. S. O., ch. 48, sec. 133, confining it to civil cases in Ontario.

Where no "unindifference" of the sheriff or fraudulent dealing is suggested it would seem as if most, if not all of any possible irregularities are thus declared as not to be assignable for error.

On the merits of the objections, apart from the form in which they are presented, we have the advantage of the opinion of the Court of Common Pleas.

I am satisfied that judgment must be given for the Crown.

ARMOUR, J.—The objection raised by way of challenge to the array, otherwise stated, is, that the amendments of the Upper Canada Jurors Acts, Consol. Stat. U. C. ch. 31 and 26 Vic. ch. 44, made by the Legislature of the Province of Ontario, so far as such amendments may affect the jurors

to be summoned in criminal cases, are *ultra vires* of such Legislature: that jurors selected in pursuance of such amendments are not the proper jurors to be summoned in such cases, but that the proper jurors to be summoned in such cases are jurors to be selected in pursuance of the Upper Canada Jurors Acts as they stood without such amendments: that the jurors summoned for the trial of the prisoner were jurors selected in pursuance of the said amendments, and not in pursuance of the said Acts as they stood without such amendments, and were therefore not proper jurors to be summoned for such trial; and that section 44 of the Act of the Parliament of Canada, 32-33 Vic. ch. 29, is *ultra vires* of such Parliament.

These amendments are contained in the Acts of the Legislature of the Province of Ontario, 32 Vic. ch. 6, sec. 20, 42 Vic. ch. 14, and 44 Vic. ch. 6, and none of them affect the duties to be performed by the sheriff under any precept to him directed.

The initial question therefore for our determination is, whether the objection raised by way of challenge to the array was a good ground of challenge to the array, and could be properly so raised.

In *The King* v. *Edmonds*, 4 B. & Ald. 471, Abbott, C. J., says, p. 479: "Such a challenge is always grounded upon some matter personal to the officer by whom the jury has been summoned, and their names arrayed or placed in order, upon the parchment or panel whereon they are returned in writing to the Court. * * But as the effect of such a challenge, if allowed, would often be to delay the trial, it became usual for a plaintiff who anticipated that such a challenge might be effectually made, to apply to the Court and suggest the objection to the sheriff, and if this was not denied the Court directed its process to the coroners of the county instead of the sheriff. And in case the coroners also were liable to objection, and this was suggested to the Court, then the Court appointed certain persons of its own nomination called elizors, to whom the process should be directed. And this course of practice is not altogether obso-

lete at the present time. The coroners, like the sheriff, are general officers, and not the particular officers of the Court, amenable indeed to the Court for misconduct, but acting officially under the general authority of the law, and not, like elizors, under the special authority of the Court. The array therefore may be challenged for causes of personal objection to the coroners. But where the process has been directed to elizors, there can be no challenge of the array, Co. Litt. 158*a*, because, saith the author, they were appointed by the Court; but he may have his challenge to the polls."

* * * * * * *

"Another reason against allowing such a challenge is, the great inconvenience that would ensue, and the almost utter impossibility of enquiring into the matter satisfactorily at Nisi Prius. If such a challenge can be allowed in one case, it must be allowed in all, criminal and civil, for the prosecutor and for the defendant. And such challenges may be used as an instrument of delay or vexation at every Assizes throughout the kingdom, and must be tried in the absence of the person by whom the panel has been formed, and consequently without any opportunity of answer or explanation; whereas the sheriff and the coroners are bound by the duty of their office to attend at the Assizes, and in fact almost invariably do so."

In *O'Connell* v. *The Queen*, 11 Cl. & F. 155, Lord Chief Justice Tindal, in delivering the unanimous answer of the Judges to the question, propounded to them by the House of Lords, as to the overruling and disallowing the challenges to the array, said: "The only ground upon which the challenge to the array is allowed by the English law is the unindifferency or default of the sheriff. But no want of indifferency in the sheriff, nor any default in him or his officers was assigned for the cause of challenge upon this occasion. The array of the panel is challenged in this case upon the ground that the general list from which the jurors' book is made up had not been completed in every respect in conformity with the requisites of the

statute, but that, on the contrary, the names of fifty-nine persons, duly qualified to serve on the jury for the county of the city of Dublin, were omitted from the general list, and from the special jurors' book of the said county; but the challenge contains no accusation against the sheriff or any of his subordinate officers. The challenge by each of the defendants alleges, indeed, 'that a list purporting to be a general list was illegally and fraudulently made out by some person or persons unknown;' and the challenge by Mr. Steele states further, 'that the names were left out for the purpose and with the intent of prejudicing the said Thomas Steele in this cause by some person or persons unknown,' but neither in the one case nor in the other is there the most distant suggestion that the sheriff is in default. The sheriff therefore being neither undifferent nor in default, the principle upon which the challenge to the array is given by law does not apply to the present case. The statute has in fact taken from the sheriff that duty of selecting jurymen which the ancient law imposed upon him, and has substituted instead a new machinery in the hands of certain officers, by whom the list is to be prepared for the sheriff's use. If the sheriff, when the jurors' book was furnished to him, had acted improperly, in selecting the names of the jury from the book, such misconduct would have been a good cause of challenge to the array, but that which is really complained of is, that the material of the book out of which the jury is selected by the sheriff, and for which the sheriff is not responsible, has been improperly composed. It is not, therefore, a ground of challenge to the array. And further, it is manifest that no object or advantage could have been gained if the challenge had been allowed, for if the challenge had been allowed, the jury process would have been directed to some other officer who would have been obliged to choose his jury out of the very same special jurors' book as that which the sheriff had acted on, for no other was in existence. The same objection might again be made to the jury panel secondly returned,

and so *toties quoties*, so that the granting of this challenge would, in effect, amounting to the preventing the case from being brought to trial at all. The very same difficulty might occur in England if, through accident, carelessness, or design, a single jury list directed to be returned by the overseers of any parish within the county were not handed over to the clerk of the peace, or if a single name should have been omitted in any list actually delivered to the clerk of the peace. The jury book must necessarily, in either case, be deficiently made up. But if such deficiency were allowed to be a ground of challenge to the array, the business of every Assize in the kingdom might effectually be stopped. That there must be some mode of relief for an injury occasioned by such non-observance of the directions of an Act of Parliament is undeniable, but the only question before us is, whether it is the ground of challenge to the array, and we all agree in thinking it is not, and therefore we answer this question in the negative."

The House of Lords gave no judgment upon the question, Lord Lyndhurst, L. C., and Lord Brougham agreeing with the opinion of the Judges, and Lords Denman and Campbell being of a contrary opinion.

The opinions of Abbott, C. J., and Tindal, C. J., are entirely applicable to the case in judgment, and shew that by the law of England the objection raised by the prisoner by way of challenge to the array was not a good ground of challenge to the array, and could not be properly so raised.

I therefore think that such challenge was rightly overruled and disallowed, and that judgment should be given for the Crown.

I refer also to *Regina* v. *Rea*, 16 Irish C. L. Rep. N. S. 428; *Brown* v. *Esmonde*, Irish L. R. 4 Eq. 630; *Regina* v. *Hays*, 2 Cox C. C. 105; *Regina* v. *Burke*, 10 Cox C. C. 519; and to *Mulcahy* v. *Regina*, L. R. 3 H. L. 306.

I have to add that, owing to the serious nature of the case, I have refrained from discussing the legality of the

writ of error, but this is not to imply any assent on my part to its legality.

CAMERON, J.—At the trial of the prisoner I gave the following judgment:—

"I overrule the objections on the ground that they are not causes of challenge to the array. Some of the jurors would be qualified, under any circumstances, as being of the body of the county, and errors or defects in the method of selection do not constitute a ground of challenge to the array. But were it otherwise, I think section 44 of 32-33 Vic. Dom. Acts, removes all difficulty. Although to a certain extent it may be said there is a delegation of authority to the Local Legislature in determining who shall be qualified to serve as jurors, it is not a direct authority to the Local Legislature, but is simply a legislative declaration on the part of the Dominion Parliament, that what the Local Legislature has done or may do will determine the qualification of a juror in criminal cases. This is a different thing from giving express power to the Local Legislature to fix the qualification of, and manner in which, a juror may be chosen. The distinction may be fine, but it appears to me to exist. I therefore overrule the challenge to the array, and direct judgment for the Crown to be entered on the demurrer to such challenge."

I have, after hearing the very full and able arguments on the errors assigned, found no reason to change the conclusion I arrived at on the trial, but further consideration of the question confirms me in the opinion I then formed upon both points.

With reference to the question of delegation of the functions of the Dominion Parliament to the Local Legislature, I will only add if the judgment of the Court of Appeal in the *Queen* v. *Hodge*, 7 A. R. 246, overruling the judgment of this Court, be good law, the power of delegation exists. For if a Legislature, which has a more limited jurisdiction than the Parliament of Canada, can, though its own powers of imposing punishment are expressly stated to be "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects over which the Legislature has jurisdiction," delegate the power of creating an offence, and fixing or determining the punishment for its commission, though

such offence be not an offence against any law of the Province, but against a by-law of a body with restricted local jurisdiction, *a fortiori* can the Parliament of the Dominion, which is not restricted in any way whatever as to the exercise of its powers over matters within its jurisdiction—in other words, over all matters not expressly placed within the exclusive powers of the Local Legislatures. I wish also to be understood as not holding the opinion that, where a question like the present has been reserved by a Judge at the trial, it may be the subject of a writ of error.

Judgment for the Crown.

[QUEEN'S BENCH DIVISION.]

WIDDIFIELD V. SIMONS.

Voluntary conveyance—Undue influence—Incapacity.

The defendant, a grandnephew of the plaintiff who was of advanced age and feeble mind, obtained from the latter a conveyance of certain land, her only property and means of maintenance, for a nominal consideration. He verbally promised to support her as a consideration for the grant. He brought a witness, who was a stranger, from a distance, to explain the deed and witness it, though other relatives in the neighbourhood were not consulted. It was explained to her that the defendant could not be legally bound to maintain her, as he was a minor. The deed contained no power of revocation:

Held, that the deed should be cancelled, on the ground that the plaintiff was not in a fit state of mind to understand its effect; but independently of this, that it had been made improvidently and under undue influence, and was wholly voluntary, and therefore could not stand.

THIS was an action to have a deed made by plaintiff to defendant declared void, on the ground of the vendor's state of mind, not knowing what she was doing, and also as having been obtained by undue influence and without value.

The case was tried before Hagarty, C. J., at the last Fall Assizes, at St. Thomas, without a jury.

Crothers appeared for the plaintiff.
McDougall for the defendant.

The plaintiff was an unmarried woman, aged about 84 years. She owned and lived on a place of about seven acres of land, worth from $800 to $1,000, in fee, and from $65 to $100 annual value. She had no other property.

Defendant was her grandnephew, living with his father and mother, about a mile or so from the plaintiff. Her brother and his wife also lived near.

On the 16th of April, 1881, a deed was executed by the plaintiff, conveying all this land in fee to defendant, in consideration of $1, registered 23rd April, 1881. The consideration attempted to be proved by defendant was, that he had verbally promised to support and maintain the plaintiff for the rest of her life. He was not then of age,

and was advised that he could not legally bind himself in writing, and he declared that he told this to plaintiff, and that she was satisfied to trust to his word.

She was then in her own house. About two days after she went, or was taken, to the house of defendant's parents. Early in the following July her brother and his wife took her to their house, where she had thenceforward remained.

On the 13th July two medical gentlemen attended her, and found her, as said, very old and feeble in mind and body; as it were, in "senili dementia," quite unfit to transact business. Dr. Gustin said that she must have been in that state for some time before; that he had seen her many times since, and his opinion was confirmed. Dr. McLarty was with her on the 13th July, and agreed as to her then state. He said that it was difficult to say, but he supposed she had been failing a length of time, and not fit to transact business.

Her sister-in-law said she had known her fifty years; that she had no education, was illiterate, could not read or write, and no more fit to make a deed or will than a two-year old child; that she had seen her late in March. Other witnesses corroborated this view of her unfitness to transact any business.

One witness, George Jones, who lived within a quarter of a mile, knew her for twenty years, used to see her every few days, and for the last two years she was unfit to make a deed. He said she had an adopted child killed in the civil war, who left two daughters, and down to the last two years had heard her say that she wanted one of these daughters to get her property.

On the defence witnesses were called, who said they considered her capable to dispose of her property.

Judgment was reserved.

November 11th, 1882. HAGARTY, C. J.—I do not think it necessary to go further through the evidence on the point of the plaintiff's capacity. Judging of the facts as a jury, I think I must come to a conclusion unfavourable to the

defendant, and that at the date of this deed her mind was not in a state to rightly understand the nature and effect of this instrument. I am also of opinion that, even without an express finding on this point, this deed cannot be allowed to stand.

Defendant, as already stated, was under age at date of the deed—about twenty. He admits that the matter began by her saying that she couldn't do her garden and other work, and he thereupon said that if she would make him a deed of the place he would look after the place and take care of her. She said he should have it. He told her he would get a deed drawn, if she would sign it. She said, yes.

After some little delay he went to a man named Pheffer, who lived from two to three miles from plaintiff, and who had no previous acquaintance with her, to act as a witness. They went to her to get from her a deed she held of the place. They then went into St. Thomas to a solicitor, and had this deed prepared. The solicitor told them to have it properly explained to the grantor.

They then went to plaintiff and told her they had the deed prepared; she said, all right; also they explained that the defendant, the grantee, could not legally bind himself to maintain her, being under age; that she was deeding her property away, and would have no more claim on it; that she said she did not expect to have any claim; that she would take his word, and trust him for her keep, and that she could depend on Pheffer as a witness. Pheffer said he would read it to her, and read part; she said to stop, that would do, that she was ready to sign it; that thereupon the deed was signed.

Defendant and Pheffer swear strongly that she fully understood it, and was quite competent to do this act. Defendant says she was only a little forgetful. No one else was present. No money was paid. Two days afterwards she came to defendant's parents' house.

Three or four days after defendant's brother, (who testified to her capacity,) asked her if she intended to go back home. She said she did not know, perhaps she would if

Walter, (defendant,) took her there; that he was her keeper.

I am of opinion that, according to my understanding of the principles of equity, such a deed cannot stand.

The conveyance I cannot look upon as other than wholly voluntary. It was made on the suggestion of the grand-nephew, and admittedly he could give no binding consideration. It was the whole of her property—her sole support—no power of revocation being inserted. She was at the best a feeble-minded, forgetful woman, of very advanced age. No person was referred to to look after her interests, or to advise with her, or to point out the utter unwisdom of the transaction on her part. A witness is specially selected from a comparative distance, unacquainted with the plaintiff, when persons with whom she was familiar could have been obtained. Her other relations were not informed or consulted, though living in the neighbourhood, and this lad and a stranger to plaintiff are alone present to obtain for defendant this great advantage.

I hardly think it necessary to go through the numerous cases bearing on this question. Since the celebrated case, *Huguenin* v. *Baseley*, there has been a stream of English authority flowing down to the present time, and the doctrine has received numerous and pointed illustrations. I refer to the copious references in the notes to that leading case in the last edition, (1877,) of *White and Tudor*, vol. 2, 556, *et seq.*

Our own Courts have also spoken on the subject. I refer to such cases as *Mason* v, *Seney*, 11 Gr. 447; *Dawson* v. *Dawson*, 12 Gr. 278; *Donaldson* v. *Donaldson*, 12 Gr. 431; *Beeman* v. *Knapp*, 13 Gr. 398; *Fallon* v. *Keenan*, 12 Gr. 388; *Hume* v. *Cook*, 16 Gr. 84; *Watson* v. *Watson*, 23 Gr. 70. In some of these the facts are somewhat like the case before me, and the chief English authorities are referred to.

The Courts have intentionally declined to define within any exact limits either what is undue influence, or what is to be considered a fiduciary relation between the grantor and grantee.

In the present case the defendant was a relation, and his own account of the transaction seems the best evidence of the trust which this grantor chose to repose in him, by accepting his proposition to divest herself of the whole of her property in his favour, and to accept his promise, though avowed to be not legally binding, to provide for her for the rest of her life, and afterwards to declare that she was to go where he took her, and that he was her keeper.

On the whole, I am of opinion that this deed must be held to be void as against the plaintiff, and must be delivered up to be cancelled; that the plaintiff should be restored to the possession of her property; and that the defendant must pay the costs of the suit.

I make no order as to mesne profits, or damages of any kind.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

In Re The Corporation of the Town of Ingersoll and Carroll.

By-law for taking gravel to repair streets—Award—Uncertainty.

Pursuant to a by-law of the town of Ingersoll, permitting that municipality to take gravel from C.'s land for repairing their streets, without mentioning the quantity, the award was made that the corporation should "pay C. thirty-two and a half cents for every load of gravel or stone they should take for the repairs of their roads, as and for compensation for the injury done, and that the right to take such gravel at this price should extend for five years."

Held, that the by-law should have defined the quantity of gravel required to be taken, and the award should have fixed the value of such quantity as well as the amount to be paid for the right of entry to take the same away, and therefore, that the award was bad.

November 24, 1882. *Walter Read* moved on notice to set aside the award in this matter, on the ground that the amount awarded was insufficient.

Wells (of Ingersoll), shewed cause.

December 12, 1882. Cameron, J.—I am of opinion the appeal against the award made between the parties must be allowed, and the award set aside. The material part of the award is as follows:

"We do hereby award, order, determine and direct that the said corporation of the town of Ingersoll shall pay the said Clarissa Carroll the sum of thirty-two and a half cents for every cord of gravel or stone they shall take, for the repairs of their roads, from the gravel pit on that part of her land in the said town of Ingersoll lying east of and adjacent to McCarthy street, and south of Cherry street, in Carroll's survey, as and for compensation for the injury done thereto by the removal therefrom of such gravel or stone: that the right to take such gravel or stone, at the price aforesaid, shall extend for five years from the date hereof."

The by-law under which the arbitration took place was as follows: "By-law No. 161.

"To take gravel and stone from the lands of Mrs. Daniel (Clarissa) Carroll, situate on lot number nineteen, in the Broken Front Concession of West Oxford, east of and adjacent to McCarthy street, in Carroll's survey, in the town of Ingersoll.

"Whereas it is necessary to provide material for keeping in repair the roads belonging to the town of Ingersoll; and whereas gravel and stone fit

for that purpose are to be found on the lands of Mrs. Daniel Carroll" (here followed a description of the land), "Be it therefore enacted by the Municipal Corporation of the town of Ingersoll, that search having been made on that part of lot number nineteen, &c., belonging to Mrs. Daniel Carroll, to ascertain if gravel or stone could be found thereon necessary for keeping in repair the roads belonging to the said town of Ingersoll, and the same having been found there, that entry be made on the said land by the said corporation to enable them to take such gravel or stone, and that the same be so taken therefrom for the purpose aforesaid, pursuant to the statute."

The by-law was passed under sec. 509, sub-sec. 7, of ch. 174, R. S. O., which authorizes, among other designated municipalities, the council of a town to pass by-laws, "for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for making or keeping in repair any road or highway belonging to any such municipality, and the right of entry upon such lands, as well as the price or damage to be paid to any person for such materials shall, if not agreed upon by the parties concerned, be settled by arbitration in the manner prescribed by this Act"

I am of opinion it is necessary for the corporation to define by the by-law, or by their notice to the owner of the material, the quantity required to be taken from the land of such owner for the repair of its streets or roads; and that the arbitrators should, by their award, have fixed the value of the quantity required, and also the amount to be paid for the right of entry to take the same away; and therefore, as the award in the present case does neither, and leaves it optional with the corporation to take as little or as much as it pleases, and extends that privilege for the period of five years, it is, in my opinion, an award quite in contravention of the spirit and intention of the statute. The appeal is allowed, with costs, to be paid by the corporation of the town of Ingersoll. It not being possible on the evidence to determine what quantity of gravel may be required, I cannot exercise the power vested in the Court of modifying the award, nor can I beneficially remit it back to the arbitrators for reconsideration and amendment.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA v. REEVES.

Cab driver—License.

Held, that R. S. O., ch. 174, sec. 415, which provides that the board of commissioners of police shall, in cities, regulate and license the owners of cabs, &c., used for hire, does not authorize the imposition of a license fee upon the driver of such vehicle; nor does the 42 Vict. ch. 31, sec. 23, which empowers the board to license any trade, calling, business, or profession, or the person employed in such trade, &c., give power over persons not within its jurisdiction before, so as to authorize the imposition of such a license fee.

THE defendant, Alexander Reeves, was convicted on the information of one Nicholas W. Peel, on the 10th October, 1882, before M. O'Gara, Esq., Police Magistrate of the city of Ottawa, for having at the city of Ottawa, on the 21st day of April, 1882, acted as the driver of a licensed vehicle for the conveyance of passengers for hire within the city of Ottawa, he, the said Alexander Reeves, not being the owner thereof, and without having received a certificate from the Board of Commissioners of Police for the said city of Ottawa authorizing him to act as such driver, contrary to the by-law of the Board of Commissioners of Police for the city of Ottawa in such case made and provided; and for the said offence the defendant was adjudged to forfeit and pay the sum of $1, to be paid and applied according to law; and also to pay to the said Nicholas W. Peel the sum of $1 for his costs. The fine and costs were ordered to be levied by distress and sale of the defendant's goods, and in default of sufficient distress the defendant was ordered to be imprisoned in the common gaol of the county for the space of one week, unless the said several sums, and all costs and charges of the distress, commitment, &c., should be sooner paid.

The conviction was returned into Court under a writ of *certiorari*, and *O'Sullivan*, on the 21st day of November, 1882, obtained an order *nisi* calling on the Police Magistrate and Nicholas W. Peel to shew cause why the said

conviction should not be quashed, on the grounds, among others, that the said Police Magistrate had no jurisdiction in the matter of the said conviction, and that the by-law, or those portions of it which provided that no person or persons should drive or act as the coachman, cabman, carter, or driver of any licensed vehicle for the conveyance of passengers for hire within the city of Ottawa, and not being the owner thereof, unless he should have first received a certificate from the Board of Police Commissioners authorizing him so to do, and for which he should pay the sum of $2, were *ultra vires* and invalid.

On the 1st day of December, 1882, *O'Sullivan* supported his order *nisi*.

Watson shewed cause.

December 15, 1882. CAMERON, J.—By sec. 415 of ch. 174, R. S. O., "the Board of Commissioners of Police shall in cities regulate and license the owners of livery stables and of horses, cabs, carriages, omnibuses, and other vehicles used for hire, and shall establish the rates of fare to be taken by the owners or drivers, and may provide for enforcing payment of such rates, and for such purposes shall pass by-laws and enforce the same in the manner and to the extent in which any by-law to be passed under the authority of this Act may be enforced."

The by-law of the Board of Police Commissioners, under which the conviction was made, was passed on the 27th day of March, 1880, and the clauses under which the conviction was had are as follow:

11. "No person shall act as the coachman, cabman, carter, or driver of any licensed vehicle for the conveyance of passengers for hire within the city of Ottawa, and not being the owner thereof, unless he shall first have received a certificate from the said Board of Commissioners of Police authorizing him to do so, which certificate may be granted upon petition to the said Board, stating name and address, with certificate of character if required, and for every such

certificate the applicant therefor shall pay to the treasurer of the said city the sum of $2, for the use of the corporation of the city of Ottawa, and it shall be the duty of the secretary to register the name of such certified coachman, cabman, carter, or driver in a book kept by him for that purpose; and every such certificate shall, unless previously forfeited or cancelled, expire on the last day of February next ensuing the date thereof."

101. "Any person who shall be guilty of any infraction or breach of this by-law, or of non-compliance with any of the provisions or requirements thereof, shall, upon conviction therefor before the Police Magistrate or Mayor, or any Justice or Justices of the Peace for the city of Ottawa, having jurisdiction in the matter, forfeit and pay such fine as the said Police Magistrate, Mayor, Justice, or Justices convicting shall inflict, of not less than $1 nor more than $50, together with the costs of prosecution; and in default of payment thereof it shall and may be lawful for the Police Magistrate, Mayor, or Justice, or Justices convicting as aforesaid, to issue a warrant under his or their hand and seal to levy the said fine and costs, or costs only, by distress and sale of the offender or offenders' goods and chattels, and in case of no sufficient distress being found to satisfy the said fine and costs, or out of which the same can be levied, it shall and may be lawful for the Police Magistrate, Justice or Justices convicting as aforesaid, to commit the offender or offenders to the common gaol of the county of Carleton at the said city of Ottawa, with or without hard labour, for any period in the discretion of the Police Magistrate, Mayor, Justice, or Justices convicting, not exceeding twenty-one days, unless such fine and costs be sooner paid."

The power given to the Board of Police Commissioners, by section 415, is only to regulate and license the *owners* of the several kinds of vehicles used for hire, and the rates of fare to be taken. No mention whatever is made of drivers, and it would seem to be a clear excess of authority on the part of the Police Commissioners to require a driver of

such vehicle to take out a certificate and pay a fee therefor. But it was contended that a more extended authority or power was given to the Board of Police Commissioners by 42 Vic. ch. 31, sec. 23, which provides that in all cases where under the Municipal Act, or any other Act the * * Board of Commissioners of Police in any city is authorized to pass by-laws for licensing any trade, calling, business, or profession, or the person engaged in such trade, calling, business, or profession, the said Board of Commissioners of Police shall have power to pass by-laws to fix the sum to be paid for any such license for exercising any such trade, calling, business, or profession in the municipality, and enforcing the payment of such license fee, and determining the time the license shall be in force. This provision does not extend the power of the Board of Commissioners of Police, so as to give it jurisdiction over persons not within its control before; it merely enables the Board to impose a license fee where before the power was doubtful. Without therefore considering whether or not there is a distinction between a license fee, as a matter of police regulation, and a tax for the purpose of revenue, which seems to have engaged the attention of the Courts of the United States in many cases with conflicting results, and may furnish room for much subtle argument, I am of opinion the conviction of the defendant is bad, on the ground that he is not a person with respect to whom the Board of Commissioners of Police has any power to make or pass a by-law, either requiring him to take out a certificate or pay a fee therefor. It is not necessary on this application to express any opinion as to whether it may not be within the power of the Board to accomplish the object had in view by the control it undoubtedly has over the owner of the vehicles, by requiring them to take out licenses for the drivers.

The conviction of the defendant must be quashed.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

OMNIUM SECURITIES COMPANY v. CANADA FIRE AND MUTUAL INSURANCE COMPANY.

Fire Insurance — Mortgagor and Mortgagee — Subrogation — Mortgagee's fraud in obtaining money.

M., who had mortgaged his property to the plaintiffs, subsequently, on 2nd April, 1881, insured with the defendants, loss, if any, payable to plaintiffs. Attached to the policy on a printed slip, dated 29th May, 1881, was the following clause: "It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy." A loss having occurred, the defendants disputed their liability, and the matter was referred to an arbitrator, who awarded in favour of the plaintiffs, after refusing to admit evidence for the defendants that the policy had been obtained by fraud.

Held, that the above clause provided only against future acts; that the defendants did not thereby guarantee the policy to the plaintiffs as indisputable, and therefore that they were not debarred from setting up that the insurance had been effected by fraud; and the case was remitted to the arbitrator for the admission of such evidence,

Held, also, that the clause did not amount to a new insurance in favour of the mortgagee.

ONE McMahon, by policy dated 7th April, 1881, effected an insurance with the defendants' company on certain property for $2,000—"Loss, if any, payable to the Anglo Canadian Loan Company, Hamilton, Ont."

By mortgage dated 23rd January, 1880, McMahon mortgaged the premises (with the realty) to the Anglo Canadian Company to secure $1,200, with covenant to insure, the mortgage being registered 8th July, 1880.

The Anglo Canadian Company ceased to carry on business, and all its estate, &c., vested in the present plaintiffs.

Attached to the policy was a printed slip, dated 27th May, 1881, which they called a subrogation clause:—

"It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or negligence of the mortgagor or owners of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy."

It was admitted that the Anglo Canadian Company was interested, as mortgagees, when the policy was effected. It was stated that the policy was sent to the mortgagees, with this subrogation clause attached, without any special application by them.

The premises were destroyed by fire on the 27th June, 1881. The defendants at first stated they would cause enquiry to be made, and then would pay.

McMahon appeared to have left the country, and proof could not be made by him. After much discussion and delay the defendants ultimately refused to pay, alleging fraud in procuring the policy, and lateness in furnishing proofs of loss, and that McMahon should have made them.

The dispute was referred to the decision of *E. Martin*, Q. C., who heard the evidence, and ultimately made his award in favour of the plaintiffs.

November 17, 1882. *Nesbitt* moved to set aside the award, objecting that the arbitrator erred in rejecting evidence tendered as to alleged fraud on McMahon's part in effecting the insurance, which would have avoided it as against him; also in holding that it was necessary that McMahon should furnish proofs of loss; and in holding that the proofs, after considerable delay, furnished by the plaintiffs were sufficient and in time.

McCarthy, Q. C., contra.

December 15, 1882. HAGARTY, C. J.—To take the last objection first. I agree with the learned arbitrator, who seems to have most carefully considered the case. I do not think that the proofs under the evidence should necessarily be furnished within the period provided in the conditions, or in the strict form there required; nor do I feel bound to differ from his conclusion, that under all the circumstances before him the time at which they did put in the proofs was not unreasonable.

He heard much evidence of discussion between the two companies. Some of the directors were common to each

company, and altogether the case was rather peculiar as to their communications. I think I ought not to interfere. In this view it is unnecessary to discuss whether the defendants had a right to insist on any proofs. I lean however to the opinion that they had a right to require some evidence of loss, if not strict proof.

It remains to consider the very serious question whether the defendants have the right to prove that the policy was obtained by fraud on McMahon's part. I must consider it as his insurance of his own interest, and although he makes the loss payable to the mortgagees, it does not thereby become the insurance of a mere mortgage interest.

Plaintiffs contend that the effect of the agreement between the parties by this subrogation clause, to which McMahon was no party, was in effect a new insurance as between them and the underwriters, and that the latter conclusively adopt and confirm it as such, irrespective of any fraud committed by McMahon. I do not think that the subsequent clause strengthens that view.

Without entering into that not very clear subject of "subrogation," we may treat it on the intelligible ground of a special bargain made, after McMahon had insured his premises, with his mortgagees, to whom he had made the loss payable.

For a consideration, sufficient in their estimation, the Insurance Company agree with the mortgagee that, so far as his mortgage interest is concerned, this insurance shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by any different or more hazardous occupation than the policy allows.

It seems to me that this provision only points to the future, and that insurers are not thereby debarred from setting up that the insurance had been effected by fraud. I think, so far as any knowledge on their part extended, they should be held to have elected to treat it as a valid subsisting insurance at the time of this bargain with the mortgagees.

In an ordinary case of loss payable to the mortgagee, we

can understand the latter agreeing with the insurers thus: "If you will protect me from losing the benefit of this from any act this mortgagor may do as to change of occupancy, or in fact from any act or neglect of his, I will make over my mortgage to you if you pay me the loss." And the insurers agree thereto. I do not think they thereby guarantee to him that his mortgagor has committed no such fraud upon them in effecting the insurance—they do not warrant it to be an indisputable risk.

I do not consider the subsequent provision in the clause, that whenever they pay any sum for the loss and shall claim that, as to the mortgagor or owner, no liability therefor existed, they shall be to the extent of payment subrogated to all the rights of the party to whom payment shall be made, and to all his securities, can affect the question.

A change of occupation, involving greater hazard or increase of risk, &c., might invalidate the insurance as against McMahon, or any person to whom he might alien or assign.

I repeat, I do not see how the insurers can be held to condone undiscovered fraud, or warrant the policy to be conclusively binding at the time of this bargain, any more than that they could insist that the mortgagees warranted the validity of the mortgage as to title, value, &c., &c.

I have carefully read and considered the learned referee's judgment, and the authorities cited by him. I do not think the case of *Allen* v. *Springfield Insurance Co.*, 43 New York, 389, warrants my accepting his view, and I hereinafter refer to a later case in favour of the defendants' view.

I feel great difficulty in holding this clause to amount to a new insurance, to all intents and purposes, by and with the mortgagees. I understand how in some cases, where the policy has been assigned with the insurers' assent, it may be so held as to future avoidance by the acts of the assignor. See *Burton* v. *Gore District Mutual Insurance Co.*, 12 Gr. 156, qualified by *Livingston* v. *Western Assurance Co.*, (in Appeal) 16 Gr. 9. None of

our cases seem to touch the case of defects in the original contract of insurance, in consequence of subsequently discovered fraud.

Suppose there was actually none of the property proposed for insurance in existence, and the company had been imposed on by forged documents or lying representations; if plaintiffs' contention be sound, the insurers could not be heard asserting the fraud. But it is said in such a case there would be no actual insurance, as there was nothing to insure. I fail to see an intelligible distinction between such a case. It is not shewn what may have been the frauds here relied on to avoid the insurance. It may have been represented that there was valuable machinery when there was in fact none, or not over one-twentieth of the value insured.

Graham v. *Fireman's Insurance Co.* This case is very important. I have found the full report in 87 New York App. 69. The learned arbitrator had only the note of the case in the *Insurance Law Journal*, January, 1882, and remarked that he had not the full facts or arguments. If he had had the full facts and arguments before him he might probably have taken a different view.

A policy was issued to Catherine E. Jack, represented to be the widow of Captain Jack, who was going to keep a first-class hotel. The policy insured Catherine E. Jack, loss, if any, payable to plaintiff, as mortgagee. A second policy was applied for. Plaintiff's agent said there was a mistake in the name of assured, that it should be Margaret, but that the policy was the same. The first policy was altered accordingly, and the second issued to Margaret E. Jack. It turned out that she had the title, but was an infant three years old, with no general guardian.

There was a clause in the policies exactly in the words of the clause in this case, as quoted in the first page of this judgment. The case was very fully argued, and the policies were held void for misrepresentation as to the ownership, and after discussing this mortgage clause, which was urged as completely sheltering the plaintiff, the mortgagee,

the Court said that "a policy obtained through misrepresentation as to the owner cannot fairly be considered as embraced within the meaning of the clause referred to, nor can such misrepresentation be regarded of itself as an act or neglect within the terms of the policy."

The ruling in this case, the latest I have seen, seems clearly to allow the defendants still to impeach the policy, as being obtained by fraud or misrepresentation.

I think the case must be remitted, with a direction to admit the evidence impeaching the original insurance. Costs to be reserved.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. NELSON.

Case reserved—Deposition of witness—Admissibility of—Proof of absence.

Upon a prosecution for uttering forged notes, the deposition of one S. taken before the police magistrate on the preliminary investigation was read, upon the following proof that S. was absent from Canada: R. swore that S. had a few months before left his, (R.'s, house where she (S.) had for a time lodged, that she had since twice heard from her in the U. S. A., but not for six months. The chief constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S. by means of personal enquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner or his wife.

Held, upon a case reserved, CAMERON, J., diss., that the admissibility of the deposition was in the discretion of the Judge at the trial, and that it could not be said that he had wrongly admitted it.

This was a case stated for the opinion of the Court, as follows:

The prisoner, James Nelson, was convicted before Patterson, J. A., at Hamilton, on the 11th October, 1882, of having forged a United States bill by putting the figure 5 over the figure 1, and so making a genuine one dollar bill appear at first sight like a five dollar bill. The bill was one of several similar bills uttered as five dollar bills by a woman name Kate Smith, and there was no sufficient evidence to connect the prisoner with the forgery without the evidence of Smith. She was not produced, but her deposition before the Police Magistrate, upon the examination of the charge against the prisoner, was read.

The question was, whether she was shewn by sufficient evidence to have been absent from Canada.

Kate Smith, who was not the wife of the prisoner, lived with him as his wife under the name of Mrs. Nelson, in lodgings in Toronto, for some time before the uttering of the bills. On the 27th or 28th of January, 1882, she and the prisoner left their lodging house together. On the same evening Smith uttered the bills in Hamilton, and was arrested when seated in a train about to start for Toronto. The prisoner was seated in the same compartment of the railway car with her. He returned that night to his lodgings, in Toronto, alone, and told his landlady that he had left Mrs. Nelson on a visit at St. Catharines.

Kate Smith was indicted at the Winter Sittings at Hamilton, and pleaded guilty, and was then, or shortly afterwards, discharged from custody. She then rejoined the prisoner at the same lodgings in Toronto, having been about two weeks absent.

The two remained there for three weeks longer, when the prisoner left telling the landlady that he and Mrs. Nelson could not agree. The prisoner was, some weeks after this, arrested for the forgery on information given by Kate Smith.

When the prisoner left the lodging house he went to live with a woman named Ross, and was living with her when he was arrested. He was examined before the Police Magistrate at Hamilton, on the 25th and 28th February, 1882, upon the charge of forgery. Kate Smith made the deposition in question upon that occasion. The landlady, at whose house they had lodged in Toronto was also present, and learning then for the first time the relation in which Smith stood to the prisoner, she refused to receive her again into her house. Thereupon Smith, who up to that time had occupied the original lodging as Mrs. Nelson, went to stay at the house of Ross, where the prisoner had been. Ross had no previous acquaintance with Smith beyond having seen her once or twice, one occasion being at the Police Court in Hamilton on the 25th February, when Ross was present, and at which she retained counsel for the defence of the prisoner.

The evidence of the absence of Kate Smith from Canada consisted of the statement of Ross, together with the evidence given by the Chief Constable of Hamilton and another member of the police force, of ineffectual attempts to find her by means of personal inquiries in some places, and correspondence with the police of other cities.

The statement of Ross was, that Smith left her house at the end of March last, to go to Boston: that Ross directed her where to go: that Smith had no friends where she went, and told Ross that one part of the United States was the same to her as another: that Ross had been at a place called Malden, near Boston, in Massachusetts, and told Smith of that place, and that since Smith left Toronto she had heard twice from her from Malden. Ross did not say, and was not asked, how she had heard from Smith: her statement merely was that she had heard from her twice, and that both those occasions were before the 24th April last, upon which day Ross was herself sentenced to six months'

imprisonment in the Mercer Reformatory without the option of a fine.

The prisoner was convicted and sentenced, but respited pending the decision of the point reserved.

November 25, 1882. *Osler*, Q. C., for the prisoner.—The question is, whether it is sufficiently shewn that the witness was absent from Canada so as to admit of her deposition. It arises under 32-33 Vic. ch. 30, sec. 30. This differs from the English Act, which does not provide for the case of absence. See *Regina* v. *Philips*, 1 F. & F. 105.

The learned counsel was here stopped by the Court, and *J. G. Scott*, Q. C., for the Crown, called upon. Is there strong evidence of absence? It is submitted there was, and the evidence was admissible. Analogous cases to guide the Court in construing the statute, are *Falconer* v. *Hanson*, 1 Camp. 171; *Sutor* v. *McLean*, 18 U. C. R. 490; *Earl of Falmouth* v. *Roberts*, 9 M. & W. 469.

Osler, Q. C., in reply, cited *Taylor* on Evidence, 7th ed., sec. 442.

December 9, 1882. HAGARTY, C. J.—The learned Judge submits for our decision the question whether on the evidence given the deposition of the absent witness, Kate Smith, was or was not properly received. The trial was in October last, at Hamilton. The evidence is fully stated in the case.

The witness Ross swore, in substance, that Smith left her last March, and that she had twice since that time heard from her from Malden, near Boston, but not since April 25th. She did not state, nor was she asked, how she had heard. Stated in this shape, and without objection made or explanation sought by prisoner's counsel, I think we must assume it was a fact that she did hear from her. It is also stated that evidence was given by two of the police force of ineffectual attempts to find her "*by means of personal enquiries in some places, and correspondence with the police of other cities.*"

By statute 32-33 Vic. ch. 30, sec. 30, the deposition may be read if it be proved on the oath of any credible witness that the witness is absent from Canada.

I presume this has to be left in the main to the judgment and discretion of the learned Judge whether it is so proved or not. I feel great difficulty in putting myself in his place, and ruling against or in favour of the sufficiency of the proof. "Personal enquiries in some places" are stated to have been made. We cannot say where these enquiries were made, whether in Hamilton, Toronto, or in Malden, Mass. The learned Judge did admit the deposition. He does not say whether he was satisfied or not with the proof offered.

It is impossible for me to say that he was wrong in admitting it as he did. The enquiries made may have been satisfactory.

The statute was passed to prevent the obstruction of justice by the absence of witnesses beyond the reach of the process of the Court. The facts of this case are peculiar, and accordingly as they struck the mind of the Judge, as presented to him at the trial, may have satisfied him as to the absence.

I do not think that as to the limits and precise nature of such an enquiry we can lay down any hard and fast rule. I cannot say that sufficient evidence was not given of such absence in the statements in the case reserved.

In *Regina* v. *Wellings*, L. R. 3 Q. B. D. 42, the Judge allowed a deposition to be read on the ground of the witness, in the words of the Act, "being so ill as to be unable to travel." The evidence given was reported in full. The Court of Queen's Bench held it sufficient, Lord Coleridge adding: "It is in each case a matter for the presiding Judge to determine. The presiding Judge has in this case decided that the evidence was sufficient to satisfy him that 'the deponent was so ill as to be unable to travel;' and we see nothing to lead us to the conclusion that he was wrong." The Imperial Statute 11 & 12 Vic. ch. 42, sec. 17, is worded as our Act, the latter having the additional clause, "or is absent from Canada."

The same rule as to the Judge's discretion is laid down in *Regina* v. *Stephenson*, L. & C. 167. Sir W. Erle, C. J., says: "We are all of opinion" (on a case reserved) "that the question, whether the illness proved is or is not within the statute, is a question for the determination of the presiding Judge; and that if to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, this Court ought not to interfere with his decision. Speaking for myself only, I may add that, in my opinion, the Court of Quarter Sessions acted rightly in receiving the deposition:" *Arch.* Crim. Ev., 19th ed., (1878,) 275; *Roscoe*, 8th ed., 1874.

ARMOUR, J., concurred.

CAMERON, J.—On the question of the admissibility of depositions of a witness taken before a magistrate, the authorities are neither consistent nor satisfactory. As to what would constitute proof of the absence of a witness from Canada, there has not, as far as I am aware, been any previous decision in our own Courts, and as there is no similar provision in the Imperial statute permitting the reception of depositions in evidence, we cannot look for direct assistance from English authority. The Imperial Act only authorizes their admission in two cases, namely, death of the witness, or his being too ill to travel. In this Province there is the additional case of absence from Canada.

The Imperial Act requires that the death or illness of the witness shall be proved upon the oath or affirmation of a credible witness, and in England it would seem that the fact of the death or illness need not be directly vouched for by a credible witness if it may be reasonably inferred from the circumstances or facts sworn to, and the sufficiency of these facts must be decided by the Judge at the trial, in whose discretion rests the admission or rejection of the deposition. Leaving the admission or rejection of the evidence a matter of discretion appears to me to be

highly unsatisfactory, and leads to wholly inconsistent and irreconcilable decisions, making the administration of justice, which ought to be reasonably certain and based upon well defined principles, precarious, and perhaps it would not be too strong to say whimsical. The following decisions on the admissibility of the depositions in cases of the alleged inability of the witness to travel through illness will illustrate what I mean:—

Regina v. *Harris*, 4 Cox C. C. 440, was a case before the Common Serjeant. A witness being absent, it was proved that she had come up from Hounslow and had gone before the grand jury on the first day of the session: that she went back at night and returned in the morning for two days, expecting the trial to come on, but that on the morning of the trial she had been seized with a bowel complaint, and when the policeman left Hounslow she was unable to travel.

The Common Serjeant.—"I do not think I should be justified in admitting this deposition. I am not satisfied that the witness is so ill as to be unable to travel."

Regina v. *Harney*, 4 Cox C. C. 441, was a case before Mr. Commissioner Gurney. During the trial it appeared that a material witness for the prosecution had been delivered of a child a week before, and she was at the time of trial unable to travel. Mr. Commissioner Gurney: "I do not see how I can shut out this evidence. It appears to me that every requisition of the Act of Parliament is complied with. I find that at the time of trial the witness is too ill to travel. That is proved substantially; and we have the fact, (which itself would be almost conclusive,) that she was confined only a week ago."

Regina v. *Ulmer and Hooper*, 4 Cox C. C. 442, was before the Common Serjeant. Homewood, a witness, had been examined before the magistrate. At the trial a constable made the following statement: "I saw Homewood last night about nine o'clock; he was in bed. I believe he is not well enough to be here to-day. He has had a cold and inflammation. I saw a medical man call upon

him a day or two ago. I believe he has been in bed two or three days. I saw him about ten o'clock three days ago in the tap room, and I believe he then went to bed. He was sitting up and was unable to stand. He appeared very unwell indeed. I enquired this morning and heard he was very bad."

The Common Serjeant: "I cannot say that my mind is convinced by this evidence that the witness is not now able to travel."

Regina v. *Welton*, 9 Cox C. C. 296, was before Byles, J. The evidence as to illness of the witness, was that of Thomas Harris, P. C.: "I know police constable Samuel King, and saw him this morning in his bed. He has fever. I have a certificate here. He has been confined to his bed about a fortnight, and the divisional surgeon, Mr. Tenby, is attending him. He is not able to get up yet."

Byles, J.: "Do you know of your own knowledge that he has been confined to his bed a fortnight?" Answer—"No; only from what somebody has told me. I saw him this morning, and yesterday morning; he was in bed. I had not seen him till yesterday since he has been ill."

Byles, J.: "I am of opinion, that to make this deposition admissible, there should be the evidence of a medical man upon oath, or other evidence upon oath, which the Court might think of equal value to sworn medical testimony. The constable, Harris, says he has been told King is suffering from fever. How can he know the illness is of such a nature as to render the witness 'so ill as not to be able to travel?' A medical man is the proper witness of that fact, and no medical man is called. The deposition cannot be read."

In *Regina* v. *Williams*, 4 F. & F. 515, the superintendent of police stated that he had seen the witness whose deposition was tendered in evidence, a policeman, on Monday, the trial being on Wednesday, in bed, and that he appeared to him to be ill, and when he tried to get out of bed he could not stand; but he was unable to state what was the matter with him, except that he believed it to be rheumatics. No

medical man was called, nor had the witness been seen since Monday The superintendent stated his belief that the policeman was so ill as to be unable to attend the trial.

Pigott, B., said, he thought it would not be proper to admit the deposition; that he could not say that he was satisfied that the absent witness was so ill as to be unable to travel; that there was no medical man present to be examined as to his condition; that the superintendent was not able to speak as to the nature or cause of the illness, and only saw him two days ago; that there was an interval of time during which the witness, even if before unable to travel, might have become able. The deposition was not read.

In *Regina* v. *Philips*, 1 F. & F. 105, there was a similar decision. Erle, J., said: "The evidence, no doubt, is as strong as it can be short of that of a medical man; but the case may be easily imagined of a person extremely unwilling to appear as a witness, and so well feigning himself to be very ill as to deceive any one but a medical man."

See to the like effect the opinion of Willes, J., in *Regina* v. *Walker*, 1 F. & F. 534. And in *Regina* v. *Riley*, 3 C. & K. 116, Patteson, J., laid it down that unless a witness was permanently disabled in a manner to which any one could speak as a pure, positive question of fact, the surgeon ought to attend to prove the illness.

Regina v. *Stephenson*, 9 Cox, C. C. 156. The prosecutrix was daily expecting her confinement, and her brother stated that she was poorly otherwise, and she was therefore too ill to travel. Erle, C. J., on a case reserved, after stating the evidence, proceeded: "The prisoner's counsel objected that the illness ought to have been proved by a medical man, and that the expectation of her confinement was not an illness within the meaning of the statute to admit the deposition. There may be incidents in regard to pregnancy which will bring the case within the statute, and we consider it is in the discretion of the presiding Judge to determine whether the deposition is admissible under the circumstances, for he is responsible that the

party be proved to be too ill to travel, and this Court ought not to reverse his decision."

The other Judges, Martin, B., Channell, B., Blackburn, J., and Keating, J., concurred, on the ground that it was a question for the presiding Judge to determine, and that if he thought the evidence of the illness sufficient within the statute, it was for him to act upon his discretion.

There is no doubt that when the depositions are offered in evidence, the Judge must then decide upon the question of their admissibility, but when he reserves the question I think the justices for whose opinion the case has been reserved totally abnegate their function, and fail in the discharge of the duty imposed upon them by the Legislature, if they refuse to decide the point reserved, and thereby fail to furnish a guide for future decisions by individual Judges holding criminal Courts.

In the present case I think the learned Judge most properly reserved the question of the admissibility of the deposition of the witness Kate Smith, and am of opinion that such deposition ought to have been rejected. Most of the cases decided in England have been badly reported, and in the case of *Regina* v. *Wellings*, L. R. 3 Q. B. D. 426, to which the learned Chief Justice has referred, the Court goes no further than to say that on the evidence in that case the Judge, in whose discretion the matter was, had not improperly admitted the depositions, upholding the view that pregnancy may be a source of such illness as to render a witness unable to travel, though the inability was not established by medical testimony.

The statute admitting depositions in evidence on the ground of absence of the witness from the country, is a clear innovation upon the common law rule of evidence, and should be construed so as to confine its operation to cases clearly brought within its provisions. An essential requisite under the statute, preliminary to the admission of the deposition, is that it be *proved on the oath or affirmation of a credible witness* that the person whose deposition has been taken is dead, or is so ill as not to be able

to travel, or is absent from Canada, all which things are capable of positive and direct proof.

In the present case, leaving out the question whether the witness Ross, an abandoned character and an inmate of a criminal reformatory, was a credible witness, it was not proved that Kate Smith, the witness whose deposition was admitted, was absent from Canada at the time of the trial or at any time after her deposition was taken. All that Ross swore to was that Kate Smith left Toronto saying she was going to the States. This was about the end of March, and she heard from her from Malden, a place where she herself had recommended her to go twice before the 24th day of April following, when she herself was sent to the Reformatory for six months. How she heard from Smith was not shewn in evidence. Suppose she, Smith, had written from any place in Canada that she was in the States, the witness would have said, and truly, as far as her belief was concerned, "I heard from her from the States." Her only other source of knowledge as to the place where the letter was written, if she heard by letter, would be the postmarks and stamp upon the letter, and the value of the witness's opinion, based upon this latter source, would depend entirely upon her knowledge of the stamps and postmarks, as to which in fact she might know nothing. A letter would be the weightiest kind of information of a hearsay character, as being the person's direct statement, for clearly if she had said I was told Smith was in the States by some third party, that would have been quite insufficient, on the ordinary principle of its being hearsay evidence, which in truth the letter itself would only be.

It may be said that it is improbable that Kate Smith would tell an untruth, in the first place, in saying she was going to the States, when she was not, and then write so as to confirm the impression in her correspondent that she had gone there, in the absence of any apparent motive for practising this piece of deceit. The Court is not permitted to speculate as to motives in such a case, and it has no means

before it of forming an opinion. She may have had the very strongest reasons for misleading, and wishing it to be believed she was not in Canada, when in fact she was. She, as was put by Erle, J., in *Regina* v. *Philips*, may have been extremely unwilling to appear as a witness. The evidence at the trial failed to disclose the source of Ross's information, and in all due deference to a contrary opinion, it appears to me it was for the prosecution offering the evidence to establish every essential to render the deposition admissible; and no omission of the counsel for the prisoner to seek, by cross-examination, the source of the witness's information, would make that admissible which would not not have been admissible if the prisoner had been without counsel. It was not, therefore, proved directly, nor by a chain of circumstances, the links of which were made to appear, established by the oath of a credible witness that Kate Smith was in the States. There was at most, assuming Ross heard from her by letter, room to infer, in the absence of a desire to mislead, the letter was written in the States, which would fall far short of proof. The enquiries made by the chief of police and other members or member of the police force add nothing to the weight of Ross's testimony. It seems to me the case for the admission of the depositions is not substantially stronger than it would have been if it had been rested upon the statement of Smith to Ross that she was going to the States, and the fact that the police had been unable to find her, after such statement, in the places where they searched for her. The fact, upon proof of which alone the deposition could legally be admitted, the absence of the witness from Canada, was wanting.

The Legislature, in using the language, "*if it be proved upon the oath of a credible witness* that the person making the deposition is dead, too ill to travel, or absent from Canada," cannot be taken simply to have meant, that if from circumstances stated in evidence there is reason to suspect or believe such person is dead, too ill to travel, or absent from Canada, the deposition of such person shall be read.

It must be assumed that the Legislature was familiar with the rules of evidence, and being so, meant exactly what the language used in its ordinary and plain significance purports, and if so, proved upon the oath of a credible witness, cannot be satisfied by the evidence in this case, which only goes to the extent of a witness swearing that the person making the deposition said she was going to the States. "I advised her to go to Malden, near Boston, in Massachusetts, and I heard from her from Malden twice some months ago." In some of the English cased cited it has been held that the illness of a witness whose deposition is offered must be proved by the evidence of a medical man, and that evidence of a layman as to the illness is not sufficient. The witness, though credible in the ordinary sense, from want of scientific knowledge would not be competent. There are many cases of incapacitating illness that may be simulated, and none but a medical man could say whether the illness was simulated or not. In these cases it would be unsafe to rely upon unskilled testimony to establish the illness; but a husband could scarcely be deceived as to his wife's pregnancy, and its apparent effect upon her health. So the decision in *Regina* v. *Wellings* was based upon very much stronger facts than are presented by this case; there was direct proof by a credible witness of the enabling fact. The husband deposed positively to his wife's illness, and unfitness to travel.

The case of *Regina* v. *Stephenson*, 9 Cox C. C. 156, was to the like effect. The witness there stated that the witness whose deposition was tendered in evidence was daily expecting her confinement, and was poorly otherwise, and therefore too ill to travel. In this country the magistrates who are called on to take depositions are frequently far from literate, and have no acquaintance with the rules of law and evidence, and so with the most earnest desire to do their duty fairly and properly, they may be quite ignorant of the importance of much that is said by a witness in cross-examination, and omit to record it. The accused may thereby be deprived of very impor-

tant evidence through the admission of the deposition, and has evidence given against him that ought not to go against him unqualified by the facts elicited upon cross-examination, unless he is prepared to shew that the evidence has been incorrectly taken down—a thing often quite beyond the power of the accused from his own ignorance of what should and should not be recorded, and the magistrate, if asked, would in general say that he had taken all the evidence down.

It strikes me that it may be much more important in the administration of criminal justice that prosecutions should fail through the absence of witnesses, than that a person accused of crime should be deprived of any of the safeguards that the law has surrounded him with so as to secure to him a just and fair trial, one of the essentials of which is the presence of those upon whose testimony his conviction is sought, in order that the Court or jury, as the case may be, before whom he is tried, may have the opportunity of judging of their credibility. Wherever this is not the case, it should be brought clearly within the rule that permits it, and I think that was not done in the present case.

The discretion of the Judge at the trial, referred to in the *Queen* v. *Wellings*, can not mean a discretion to admit the depositions in one case and reject them in another upon the same kind of evidence, but merely if the facts proved are sufficient in the opinion of the Judge, guided by the ordinary rules in respect to evidence, to establish the death, illness or absence, the Court will not review his decision. But surely an opinion of a Judge at the trial, that a witness was absent from Canada, solely based upon the statement of such witness that he or she was going away, on the question of the sufficiency being by him reserved for the opinion of Justices of any of the Courts, could not be held sufficient. The Judge, by reserving the case, asks the opinion of the Justices to whom the case is sent, whether, upon the facts shown in evidence, the depositions were admissible, and I think the Justices are bound to answer,

and have no right to say that was a matter solely for your discretion; it is no business of ours. If the Judge decided upon the credit to be given to a particular witness, who deposed to the absence of the witness making the deposition, against the testimony of one who swore the witness was in the country, his decision ought not to be reviewed, because he had the best opportunity, from seeing the witnesses, to judge to which credit ought to be given.

But if he admits the deposition on clearly insufficient evidence, it is clearly an improper admission of evidence, open to review, on a case reserved, in the same way as it would be if he admitted the testimony of a married woman against her husband in a case where by law she was not a competent witness. Or suppose the case had been that the witness whose deposition was admitted was shewn by the evidence for the prosecution to be in British Columbia, and so within Canada, would it be contended that on a case reserved the Justices would be at liberty to say it was a matter for the Judge to determine whether the evidence ought to have been admitted or rejected, and refuse to say whether it was rightly or wrongly admitted? If not, does it not come to the same thing if the evidence fails to establish, in the manner indicated by the statute, that the witness has ever left Canada? The English cases, as far as they have a bearing upon the question, would uphold the rejection of the deposition in the present case, and do not sanction, I must humbly submit, the conclusion that my learned brothers have arrived at, that the question on the facts presented of the admissibility or inadmissibility was entirely within the discretion of the learned Judge at the trial.

Conviction affirmed.

[QUEEN'S BENCH DIVISION.]

REGINA v. BISSELL.

Neglect to support wife—Conviction—Wife's evidence—Admissibility of—Reservation of case.

Held, ARMOUR, J., diss., that the evidence of a wife is inadmissible, on the prosecution of her husband for refusal to support her, under 32-33 Vic. ch. 20, sec. 25.

Under Consol. Stat. U. C. ch. 112, any question of law which may have arisen on the criminal trial, may be reserved for the consideration of the Justices of either of Her Majesty's Superior Courts of common law.

Quære, per ARMOUR, J., having regard to the provisions of the Judicature Act, whether a reservation to the Justices of the Queen's Bench Division of the High Court of Justice was authorized.

November 24, 1882. *Neville* moved to quash the conviction in this case.

The defendant was convicted at the Sessions on an indictment for wilfully, &c., refusing and neglecting to provide his wife with necessary food, clothing, and lodging, he being able to provide the same.

There were subsequent similar counts as to the children.

The evidence of his wife was admitted under objection. The charges were proved by a number of witnesses, but she was the only one to prove that she had received nothing from him since he left her in February, 1877, and that he then refused her any support. She was evidently the principal witness.

It did not however appear that the case without her testimony would have necessarily failed.

The main question was whether this was a case falling within the exception to the rule, that the wife cannot be a witness against the husband on a criminal charge.

Neville, for the prisoner. This case, being one of personal violence to the wife, is not within the exceptions to the rule that wives cannot testify against their husbands in criminal cases: *Reeve* v. *Wood*, 10 Cox C. C. 58; *Regina* v. *Rugg*, 12 Cox 16; *Regina* v. *Chandler*, Dears. C. C. R. 453; *Regina* v. *Hogan*, 2 Den. C. C. 277; *Regina* v. *Phillpott*,

Dears. C. C. R. 179. It does not appear that the charge could not be proved without the wife's testimony, and upon the counts for neglecting to provide, &c., for the children, the wife's testimony is clearly inadmissible. If the prisoner had committed bigamy and deserted the first wife for a second wife, the former could not give evidence against him for the bigamy, and a *fortiori* she could not do so for the neglect, &c., to provide food, &c., for her owing to the desertion.

Fenton, contra. The first part of section 25 of 32-33 Vic. ch. 20, is not in the corresponding English Statute. It was in the Bill as introduced into the House of Lords, but was struck out by the Commons: *Greaves* Consolidated Criminal Acts, 56; *Taschereau* Criminal Acts of Canada, vol. i. p. 257-258. The crime charged in this case is therefore not an offence under English law, and as there can be no English decision as to the admissibility of the wife's evidence in a case like the present, we must have recourse to the analogies furnished by the rules of the common law.

The text writers quite approve of this decision, and it has never been overruled: *Russell* C. & M., vol. iii., 4th ed., 635; *Arch.* Crim. Pl., 19th ed., 605; *Taylor* on Evidence, 7th ed. 1151. The modern doctrine is broadly stated, that a husband or wife is competent as a witness against the other at common law, where one is charged with an offence against the other, and were it not for this exception the wife would be exposed without remedy to serious injury: *Paley* on Convictions, 6th ed., 114; *Starkie* on Evidence, 4th ed., 142. The case of *Reeve* v. *Wood*, 10 Cox C. C. 58, was not a charge for an injury to the wife, but for an offence against the parish, under the Vagrant Act, 5 Geo. 4 ch. 83; and the wife could not, of course, be called to prove her husband was a vagrant, or had by his misconduct made her chargeable to the parish; and in *Sweeney* v. *Spooner*, 32 L. J. (N. S.) M. C. 82, Crompton, J., doubted whether she could not be a witness against the husband even in such case. The duty of a husband to provide necessaries for his wife is a natural duty, and the neglect of

natural duties is criminal. See in the case of an apprentice, *Regina* v. *Smith*, 8 C. & P. 153; and in the case of an aged and infirm woman, *Regina* v. *Marriott*, 8 C. & P. 425; and sec. 25 of 32-33 Vic. ch. 20, expressly makes such neglect of the wife a crime on the part of the husband. It is, therefore, a crime committed by him against her, and by rules and analogies of the common law she is competent to testify. The argument as to the crime of bigamy is not in point, because such a public and notorious fact as marriage can easily be proved without the evidence of the first wife. It would be obviously dangerous to allow either an alleged first husband or wife to testify in such cases, for upon their sole testimony any innocent person might be convicted of bigamy and a valid marriage declared void. In the present case the statute requires that the refusal or neglect to provide necessaries must be *wilful and without lawful excuse*; and it is submitted that in almost every conceivable case the wife herself is likely to be the only person who can prove that the refusal or neglect happened "wilfully and without lawful excuse." To prevent wives from testifying in such cases is to deny the benefit of the statute to the persons it is designed to protect, and amounts to a practical repeal of the Act.

December 9, 1882. HAGARTY, C. J.—The case nearest in principle is *Reeve* v. *Wood*, 5 B. & S. 304, 10 Cox 58. The defendant was charged on an information, laid by the Board of Guardians of the Poor, for wilfully neglecting, &c., to maintain his wife and children, whereby they became chargeable on the Poor Law Fund. The wife was offered as a witness for the prosecution. The Justices rejected her evidence, being of opinion that the offence consisted in creating a chargeability to the Union and not in a wrong done to the wife. A case was stated for the Queen's Bench.

Counsel insisted that it was a personal wrong to herself to refuse to maintain her. Crompton, J., remarked that the offence was rather against the parish to which she is made chargeable than against herself.

Crompton, Blackburn, and Mellor, JJ., held the rejection was right, Crompton repeating that it was rather an offence against the parish.

Blackburn, J., noticing the general rule as to exclusion and the exception, says the exception "went on the principle, that where the offence charged touched the person of the wife, and where, therefore, she must be cognizant of it, and perhaps the only person cognizant of it, she was an admissible witness. Two cases of abduction have been mentioned, but in them there must have been an actual carrying off of the women, and therefore, even although no personal injury were inflicted, they may well be considered within the principle I have mentioned. However that may be, I am clearly of opinion that this case is not within it. It may be questionable whether the law upon this head is satisfactory, but that is for the Legislature, and not for us."

Mellor, J., takes the same view as Blackburn, J. Neither Blackburn nor Mellor, JJ., speak of the case as Crompton, J., does, as to the offence being against the parish and not against the wife.

In the preceding year the case of *Sweeney* v. *Spooner*, 3 B. & S. 332, was a somewhat similar case, for leaving the wife chargeable to the parish. The wife's evidence had been rejected. The conviction was affirmed on another point.

Crompton, J., says: "The Act with which the respondent was charged was clearly criminal, and in such cases a wife cannot be heard to give evidence against her husband; but possibly the act was also a wrong to herself in proof of which she might be examined, and therefore there is some doubt about the point."

The conviction under *Reeve* v. *Wood* was under the Vagrant Act, 5 Geo. IV. ch. 83, sec. 3, which declares certain persons to be deemed idle and disorderly persons, under the Act, and may be convicted by any Justice of the Peace, and sent to the House of Correction for any time not over a month.

The indictment in this case is under sec. 25, ch. 20, 32-33 Vic., declaring it to be a misdemeanour in any person legally liable as husband, guardian, master, nurse, &c., to provide for any person as wife, child, lunatic, apprentice, &c., necessary food, clothing, or lodging, wilfully and without lawful excuse refuse or neglecting to provide the same * * or unlawfully or maliciously doing bodily harm to an apprentice or servant, &c.

In *Regina* v. *Wakefield*, 2 Lew. C. C. 287, it was held "that a wife is competent against her husband in all cases affecting her liberty and person. She may prosecute, exhibit articles of the peace against him. It would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury."

Taylor on Evidence, 1151 (7th ed.) notices the cases and states she is competent for any offence against her liberty or person, citing Hullock, B., in *Regina* v. *Wakefield*.

1 Hale P. C. 302 states the cases in which she has been admitted: *Lady Fullwood's Case*, Cro. Car. 482; *Haagen* v. *Swendsen*, State Trials, Vol. v., p. 453, a case of forcible abduction and marriage; *Brown's Case*, 1 Vent. 243, S. C., 3 Keble 193; 2 Hawkins P. C. 601.

Russell C. & M., 5th ed., Vol. iii. p. 625. "It seems to be now settled, that in all cases of personal injuries committed by the husband or wife against each other, the injured party is admissible against the other. This rule seems to be confined to cases where the charge affects the liberty or the person of the wife."

Jagger's Case is there cited, as to the wife being allowed to prove the husband gave her a poisoned cake, on a charge of attempt to poison.

In that case it is said Holroyd, J., said that she could be only admitted to prove facts that could not be proved by any other witness.

In *Rex* v. *Sergeant*, Ry. & Moo. 352, Abbott, C. J., refused to admit the husband as a witness on a charge of conspiracy to marry him to defendant. He refers to *Rex* v. *Locker*, 5 Esp. 107, where on indictment for conspiracy

to procure a lady, a ward in Chancery, to marry, the wife was held incompetent (by Lord Ellenborough) for one of the co-defendants if her evidence might enure to acquit her husband.

Abbott, C. J., said it was the safest course not to admit the husband.

In Buller's *Nisi Prius*, 286, the subject is briefly discussed in a light adverse to the admission.

In *Phillips* on Evidence, 10th ed., Vol. i., p. 82, it is said, it was customary to admit this evidence in prosecutions under the Vagrant Act. But, as is pointed out by the Judges in *Reeve* v. *Wood*, at page 83, the same author says: "The exception as to the admissibility of the wife is confined to cases of personal injuries effected by violence or coercion."

The general principle of the law is, that the wife is incompetent as a witness against her husband. It lies on the prosecution to shew that the case falls within the exceptions allowed to the general rule.

Force or injuries to her person or liberty, forcible or fraudulent abduction, or inveigling into a marriage procured by friends, have been held to be admitted exceptions.

I have not met with any case, where the charge was wholly of non-feazance, decided to be an exception to the rule. It is said, not very directly, that there is also an exception from necessity, where the offence cannot be proved except by the wife.

Conceding for the argument that it is so, the case presented to us does not shew any such necessity. The charge against defendant is stated to have been proved by other witnesses. The wife was called to prove the non-supply of money from a named date, with a refusal so to do. In cases like these it may be that the charge can be fully made out without the wife's evidence.

It is also said that the wife can exhibit articles of the peace against her husband. This merely shews that she can invoke the aid of the law to guard her against anticipated violence to her person; in other words, to prevent a crime which if committed would clearly render her competent.

In *Reeve* v. *Wood*, Mr. Justice Crompton seems to mark a distinction in its being a prosecution by the parish for the injury done to it by the wife becoming chargeable.

The other Judges do not seem to rest their judgment on this. Blackburn, J., does not refer to it, and seems to decide against her competency on general grounds; and from the tenor of his remarks, I should gather that he would have decided against her competency, irrespective of such a distinction.

We have no poor rates in this Province to which this woman could be chargeable, nor poor law officials who could prosecute the husband. But we have a high misdemeanour created by law, punishable by some years imprisonment with hard labour, with which the husband is charged. His crime is wholly one of omission. He has committed no violence to the person or to liberty, nor any fraudulent abduction.

I do not think that, because it may be that she alone can prove the offence, that must decide the question of her competency. It is notorious that there are many criminal cases in which the wife may be the only witness to prove a matter either fatal to her husband or in full vindication of him. Her exclusion turns the scale against him, and perhaps insures his conviction.

Mr. Justice Crompton's distinction is very technical. She is equally wronged by the husband's neglect of a plain duty, whether there be or be not some other person legally liable for her support. She is more fortunate in having the Poor Law to provide for her in one country, than in a country where there is no such provision.

But the charge against the husband, so far as the injury to the wife, is the same in both cases, viz., the non-feazance as to doing what the law says he ought to do.

The evidence is rejected in a case open to a summary conviction in the prosecution of the Poor Law officer. I am unable to see why it should be admitted because this is a case of a serious misdemeanour. It does not appear who is the prosecutor, whether the wife or some friend.

The text writers speak on this subject with no very certain sound. They seem simply to point to the decisions that have been made.

I am unable to satisfy myself that any of these authorities warrant my holding this case to fall within the exceptions to the general rule. As a matter of opinion it might be wiser to allow the evidence. But, as Lord Blackburn said on this same point, "that is matter for the Legislature, and not for us."

I think on the whole the conviction cannot be sustained.

ARMOUR, J.—The prisoner was indicted at the General Sessions of the Peace for the county of York, on the 21st day of September, 1882, under 32-33 Vic. ch. 20, sec. 25, for wilfully and without lawful excuse refusing and neglecting to provide necessary food, clothing, and lodging, for his wife, he being legally liable to provide the same. At the trial the learned Chairman admitted the wife of the prisoner to give evidence against the prisoner; and he reserved the question, whether she was a competent witness for the consideration *of the Justices of the Queen's Bench Division of the High Court of Justice for Ontario.*

Under the Consol. Stats. of U. C. ch. 112, any question of law which may have arisen on the trial may be reserved for the consideration of the Justices of either of Her Majesty's Superior Courts of Common Law; and it is a serious question now, having regard to the provisions of the Judicature Act, whether a reservation, such as this is, to the Justices of the Queen's Bench Division of the High Court of Justice is a legal reservation, and whether the Justices of the Queen's Bench Division of the High Court of Justice have any authority to deal with a case so reserved. This question was not urged by either the Crown or the prisoner; and I proceed to give my judgment on the question reserved, without determining the initial question above mentioned; but it is not, therefore, to be understood that I acquiesce in the propriety of the reservation, or of the authority to deal with it.

I think the wife was a competent witness against her husband on two grounds: 1st, from the necessity of the case; and, 2nd, because it is a crime committed by her husband against her; and the second ground really springs from the first, for the reason of the wife being admitted as a witness against her husband where a crime has been committed against her by her husband, is from the necessity of the case; for, were she not admitted, the crime might go unpunished; and in all the authorities that I have been able to examine upon the subject, I find necessity to be the foundation for the admission of a wife to testify against her husband; and if on a prosecution such as the one I am now considering, a failure of justice must take place unless the wife is admitted to testify, I think she is competent to testify.

The law under which the prisoner was indicted is, to my mind, a most wholesome enactment, and it must, in my opinion, in nearly every case like the present, be a dead letter unless the wife, against whom the offence is committed by her husband, be permitted to testify against him.

In *Brown's Case*, Vent. 243, he was indicted upon the statute 3 Hen. VII, ch. 2, for the forcible taking away and marrying one Lucy Ramsay, of the age of 14 years, having to her portion £5,000. It was at first doubted whether the evidence of Lucy Ramsay was to be admitted, because she was his wife *de facto*, though not *de jure*, and one of the reasons for admitting her given by the Judges was, "As such cases are generally contrived, so heinous a crime would go unpunished unless the testimony of the woman should be received."

In a comment upon this case, in 1 Hale's P. C. 301, the reason given above is thus stated: "Because otherwise the statute would be vain and useless, for possibly all that were present were of the offender's confederacy."

In *Bacon's* Abr., vol. 3, p. 204, it is stated that exceptions have been allowed to the general rule excluding the evidence of the wife against the husband, especially in cases of evident necessity.

In Rex v. *Luffe*, 8 East 193, an order of bastardy was made upon the oath of the wife, *as otherwise.* It was objected to this order that the wife was examined generally and alone to the fact of non-access, and that the order was founded on her evidence alone. Lord Ellenborough, C. J., said: "This objection is grounded upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter affecting his interest or character, unless in cases of necessity, where from the nature of the thing no other witnesses can probably have been present; but exceptions of that sort have been established; and that it is necessary, and on that account allowable, to examine her as to the fact of her criminal intercourse with another has been held by various Judges at different periods; for this is a fact which must probably be within her own knowledge and that of the adulterer only. And by a parity of reasoning it should seem that if she be admitted as a witness of necessity to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove that the adulterer alone had that sort of intercourse with her by which a child might be produced within the limits of time which nature allows for parturition. Certainly, however, it is competent for her to prove the fact of her connexion with that person whom she charges as being the real father of her child." See *Walton* v. *Green*, 1 C. & P. 621; *Cooper* v. *Lloyd*, 6 C. B. N. S. 519.

In *Regina* v. *Wakefield*, 1 Lewin 279, Hullock, B., at p. 287, said: "A wife is competent against her husband in all cases affecting her liberty and person. This was decided in Lord Audley's Case, having been before that for a long while doubted; but it has since been established by a long series of cases that she may prosecute and exhibit articles of the peace, &c.

"It would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury: our law recognizes witnesses *ex necessitate*, and it would be strange indeed that the husband should be allowed to

exercise every atrocity against the wife, and her evidence not be admitted. Suppose after this marriage the husband had proceeded to any other violence, would she have been precluded by this supposed marriage from giving evidence of the circumstances prior as well as subsequent to the marriage? It would be unreasonable to say so."

It has been held that the wife is a competent witness against the husband for the purpose of exhibiting articles of the peace against him, for assisting at a rape committed upon her, for an assault and battery upon her, for maliciously shooting, for attempting to poison her, and for a conspiracy to carry her away.

The cases of *Sweeney* v. *Spooner*, 3 B. & S. 330, and *Reeve* v. *Wood*, 5 B. & S. 364, were relied on as authorities against the competeney of the wife. These were cases where informations had heen laid under the Vagrant Act, 5 Geo. IV., ch. 83, in the first of which the respondent was charged with running away from the parish of B., whereby his wife became chargeable to that parish, and in the second the respondent was charged with neglecting and refusing to maintain his wife and children, being able to do so.

In the former case the Justices had rejected the wife's evidence, and Crompton, J., said: "If we thought the evidence of the wife had been improperly rejected, the case could only be sent back to the magistrate. The act with which the respondent was charged was clearly criminal, and in such cases a wife cannot be heard to give evidence against her husband; but possibly the act was also a wrong to herself, in proof of which she might be examined, and therefore there is some doubt about the point,"

In the latter case the Justices were of opinion that the offence consisted in creating a chargeability to the union and not in a wrong done to the wife, and therefore the evidence could not be received.

In the course of the argument, Blackburn, J., said: "The principle of the decisions on this subject," (that is, the wife's competence as a witness against her husband,) "seems to

have been that the injury must be one which is, or is likely to be, within the *exclusive* knowledge of the wife." In giving judgment, Crompton, J., said: "I think that the magistrates were right in this case. In early times an exception was made to the general rule that a wife is not an admissible witness against her husband, namely, in the case of personal wrongs inflicted by him upon her. That arose partly from the mischief which would have followed from her exclusion, partly from necessity, and partly from the consideration that she was in reality the prosecuting party. This case is not, it seems to me, within the exception. The instance of abduction, which has been referred to, is distinguishable, for there there may well be considered to be what is equivalent to an actual personal injury. Here there is nothing of the sort, and indeed the crime is rather against the parish to which the woman becomes chargeable than against herself. Nor does the case come within the rule of necessity, for the offence may certainly be made out without the wife's evidence." Blackburn, J., said: "In criminal matters, from an early period, an exception was admitted to the rule, which went on the principle that where the offence charged touched the person of the wife, and where therefore she must be cognizant of it, and might perhaps be the only person cognizant of it, she was an admissible witness. Two cases of abduction have been mentioned, but in these there must have been an actual carrying off of the woman, and therefore, even although no personal injury were inflicted, they may well be considered within the principle I have mentioned."

The decision of these cases did not at all depend upon the determination of the question raised in this case, for the crimes there charged were crimes not against the wife, but against the parish, and the decisions are therefore not applicable to the case in hand; but there is nothing in these cases against the wife being a witness against her husband in the case of a crime committed by him against her, or at all events in the case of a crime such as that charged against the prisoner. The crime charged here is certainly

"a wrong" to the wife: it is an "injury which is or is likely to be within the exclusive knowledge of the wife:" it is "a personal wrong inflicted by him upon her:" it is an "actual personal injury:" it "touched the person of the wife:" she was "cognizant of it, and might perhaps be the only person cognizant of it." I do not understand by the language used by the Judges in these cases, that they at all intended to convey the idea that the crime committed by the husband against the wife must be accompanied by a battery to entitle the wife to be a witness against her husband, and I see nothing in these cases overruling any previous case.

In *Rex* v. *Jagger*, Russ. C. & M. 5th ed., vol. iii., 625, the prisoner was indicted for attempting to poison his wife by giving her a cake which contained arsenic, and the wife was admitted to prove the fact that her husband had given her the cake, and all the Judges held that she was rightly admitted. I see but little distinction in principle between that case and the case in hand. The wife was admitted *ex necessitate* in that case, and I think the wife was rightly admitted *ex necessitate* in this, for it was in this case, and would be impossible in any other case, to prove the offence charged here without the evidence of the wife.

I do not think that we ought, by declaring the wife to be incompetent, to render the very salutary Act under which the prisoner was convicted, "vain and useless." In my opinion the conviction ought to be affirmed.

CAMERON, J., concurred with HAGARTY, C. J.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

GILES v. MORROW.

Dower—Husband's absence—Presumption of death—Damages for detention of dower.

Held, that the presumption of death arising from continued absence of the demandant's husband, unheard of for seven years, is sufficient to sustain an action of dower as against the objection that he is still living.

Quære, whether damages for detention of dower, or for arrears of dower, can be recovered under the Dower Act.

This was an action of dower, brought upon the presumption of the husband's death, after seven years' unexplained absence, tried before Osler J., without a jury, at the last Peterborough Assizes.

The plaintiff was the wife of Philip Giles, who resided, about a mile from Peterborough, on the property in question, until August, 1874, when he left his home suddenly, without telling his wife or any member of his family, since which time he had not been seen or heard of, except that one John Montgomery, who had known him in Peterborough, swore that he, (Montgomery), was in Rochester, N. Y., attending the races, in August, 1874, and that he met Philip Giles near the railway station in that city, and that Giles told him he was going to New York to buy heaters for his green-house: that Montgomery asked him to drink with him, which Giles declined, saying he would see Montgomery again on his way back from New York. It was shewn that the plaintiff and her husband were married in 1842, and had been married 32 years, when the latter disappeared: that they had always lived amicably together during that time: that he would at the date of the trial be 67 years of age: that he was not a strong man, though not an absolute invalid: that the only means his family had taken to find him were making inquiries when they saw in the newspapers, on one or two occasions, that a man of the same name had been killed; but in each case it turned out to be some one else: that he had a nursery,

and often spoke of going to New York to get new heating apparatus for it: that he had gone there and other places on several occasions before on short notice, and without any clothes other than those he wore, as he did on the last occasion. The plaintiff, and other members of his family, swore they believed he was dead.

On the part of the defence it was shewn that he had mortgaged his property for $4,250 the day before he went away: that when he got the cheque for the amount he immediately went to the bank and drew the money, although it was late in the afternoon, and it was suggested to him that he had better leave it in the bank: that as far as could be learned he had taken this money with him. It was also sworn that the plaintiff had said to the defendant Hatton, that if it had not been for a servant girl in her husband's house he would never have left, but the plaintiff denied this; and it was also shewn that this girl had been in the neighbourhood since. It was sworn that Giles was a reticent man, who would be likely to go away without saying anything about it, and that he had been in the habit of going away and staying for months at a time. He left sufficient property to pay all his debts.

G. T. Blackstock and *C. W. Sawers*, appeared for the plaintiff.

Hector Cameron, Q.C., contra.

Judgment was reserved.

November 6, 1882. OSLER, J.—The death of the demandant's husband is sufficiently proved for the purposes of the action. I found at the trial he had not been heard of since the 12th August, 1874, and the presumption of death arising from continued absence, under such circumstances, is sufficient to sustain the action as against the objection that he is still living. See *Scribner* on Dower, vol. ii., 211, 215; *Park* on Dower, 247; *Re Phene's Trusts*, L. R. 5 Ch. App. 139. Damages are claimed for the detention of dower from the 1st September, 1881. The amount, even with reference to

the improved rent, is trifling, and the demandant's right to some damages was hardly contested, so that I shall not scrutinize it too closely. But it may be noted that there is no evidence that the husband died seised, the date of his presumed death not being proved, nor any evidence of demand of dower. The present Dower Act, while it seems to recognize the right to demandants to damages for detention of dower, does not expressly confer any right either to such damages or to damages for arrears of dower, or mesne profits. It is at least questionable whether damages for detention can, under such circumstances, be recovered: *Linfoot* v. *Duncombe*, 21 C. P. 484; *Cook* v. *Philips*, 23 U. C. R. 169; *White* v. *Grimshawe*, 23 U. C. R. 75; *Biggar* v. *Howie*, 23 U. C. R. 399.

I assess the damages at $22 from 1st September to date. I have no authority to assess a yearly sum in lieu of dower to be charged on the premises, there being no reason that I can see why dower may not be assigned by metes and bounds.

I shall refer it to the Local Master at Peterborough to ascertain and set it out in the usual way, unless the parties desire to proceed under the 30th and following sections of the Dower Act. Costs to plaintiff.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

IN RE WHITE AND THE CORPORATION OF THE TOWNSHIP OF SANDWICH EAST.

Drainage by-law—Assessment of land benefited not within the petition—Objection to by-law—Discretion of Court.

A petition for a drainage by-law was signed by a majority of the owners of the land designated in the petition, but the applicant was not one of the petitioners, nor was his land part, nor did he reside on any part of the land described in the petition, but the surveyor who made the examination and prepared the estimates reported that his land would be benefited by the works, and he was accordingly assessed, and the by-law was finally passed.

Held, that the by-law was valid.

Held, also that the question whether the lands are in fact benefited is one for the Court of Revision, or the Judge of the County Court on appeal therefrom.

It was objected that no copies of the by-law or notices attached were posted up as required, but the applicant knew of the by-law before it passed, and appealed from his assessment to the Court of Revision.

Held, that the objection should not be given effect to.

THIS was an application, on notice of motion, to quash by-law No. 105 of the Corporation of the Township of Sandwich East, being a by-law to provide for the draining of part of the Township of East Sandwich, by the construction of the 7th concession road drain, south of the Talbot road, and for borrowing on the credit of the municipality the sum of $2,084, for completing the same.

The passing of the by-law was petitioned for by six persons. The petition indicated the point of commencement, course, and end of the drain, the last being defined by going along Brassett's creek far enough for a good outlet; and the petition then set forth that the ditch was to be constructed to take the surplus (surface) water from the following lots and parts of lots—namely, the south half and the north west quarter of lot No. 302, south of the Talbot road; the east halves of Nos. 3, 4, 5, 6, and 7 in the 6th concession; the west halves of lots Nos. 3, 4, 5, and 6, in the 7th concession; making in all 11 parts of lots to be drained.

On this petition, the council of the corporation employed one James S. Laird, a Provincial land surveyor, to make an examination of the locality proposed to be drained; also plans and estimates of the work, and an assessment to be made by him of the real property to be benefited by the construction of the drain, and also the proportion of benefit which in his opinion would be derived, in consequence of such drainage, by every road and lot, or portion of lot. The report of this surveyor was embodied in the by-law, and shewed that 47 parts of lots held or owned by different persons would be benefited, some of the lands being south of Talbot road, and some in the 5th, 6th, 7th, and 8th concessions; and they were all set forth in a schedule to the report. Notwithstanding that so many more lots would be benefited than those set out in the petition, the council finally, after appeal against the assessment, passed the by-law. Some of the parties interested in the lands mentioned in the by-law and surveyor's report, appealed to the Court of Revision against their assessment. Among those who so appealed was the applicant Peter White, who succeeded in getting his assessment reduced by the sum of $5. He resided, and his land was, outside of the lots mentioned in the petition. He appealed on the ground that his land was not benefited by the proposed drain. The by-law was finally passed on the 5th day of August, 1882. The notice appended to the by-law of the holding of the Court of Revision contained a notice that any one intending to apply to have the by-law or any part of it quashed, must within ten days after the final passing of the by-law serve a notice in writing upon the reeve or other head officer, and upon the clerk of the municipality, of his intention to make application for that purpose to one of Her Majesty's Superior Courts of law at Toronto, during the term next ensuing the final passing of the by-law. This notice was in accordance with the requirement contained in sec. 531 of ch. 174, R. S. O.

It appeared from the affidavit of the applicant and was not disputed that his land assessed for the said drain was

not within the lands mentioned in the petition, and that he did not reside on any of the lands therein mentioned. He therefore contended that the by-law embracing more land than was included in the petition on which it was based was invalid, and he was improperly and prejudicially affected by it.

December 12, 1882. *Caswell*, for the applicant, contended that the petition only had six signatures: that forty-seven persons were charged with the expenses: that a majority of the persons to be benefited was necessary: that the statute clearly meant a majority of the persons to be benefited, and in this case twenty-four persons were necessary; that on the council finding forty-seven persons were liable, they should have obtained a new petition before passing the by-law: that the evidence shewed the surveyor had not taken lateral levels, and his survey was therefore not a proper one; and that lot five in the 7th was assessed twice under the by-law. He relied upon and distinguished *Montgomery and The Township of Raleigh*, 21 C. P. 381, and several sections of the Municipal Act.

Aylsworth, contra, contended that only eleven persons were in the part of the township originally intended to be drained, and six of those having signed the petition, that the surveyor having deemed it necessary to make the drainage more extensive did not invalidate their petition or render a new one necessary: that the applicant had appealed to the Court of Revision and should have gone to the County Court Judge, and that all the objections here taken should have been by appeal to the County Judge; and he relied upon the judgment of Gwynne, J., in *Re Montgomery and Township of Raleigh* 21 C. P. 381, and several sections in the Municipal Act and amendments.

December 26, 1882. CAMERON, J.—Whether the contention of the applicant is valid or not must depend upon what is the proper construction to be put upon the power of the council under the drainage provisions of the Muni-

cipal Institutions Act. As the tax for such drains is a local tax and the work can only be authorized on the principle of local taxation, in the first place, at the instance of a majority of those whose lands are to be improved or benefited, it may be with much force contended that only those petitioning and the minority coming within the express terms of the petition can be made liable to pay for the cost of the work; but it seems I am precluded from so holding under the authority of Montgomery and Raleigh, 21 C. P. 381, where the question was considered, though upon facts presenting the converse of this case, as there the complaint was, that all the parties to be benefited had not been assessed under the provision of the by-law. I refer to the following language of Gwynne, J., in giving the judgment of the Court, at page 394: "Treating the by-law, with the schedule thereto annexed, to be a finding by the council impliedly that these are the only lands in Raleigh benefited by the work, the petition appears to have been signed by a majority of the resident owners of the property assessed. However, in my opinion the objection is not open to the applicants upon this application. The by-law recites that a majority of the resident land owners of the lots numbered, &c., (stating the lots assessed by the by-law as the lands, and impliedly, as I think, the only lands, benefited by the work in Raleigh) have petitioned, &c. We are not prepared to say that if a municipal council, in violation of the apparent fact that a sufficient number to put the council in motion had not petitioned, such fact being made apparent in the manner indicated in the 194th and 195th sections of the Municipal Institutions Act 29 & 30 Vic. ch. 51, should nevertheless proceed to pass a by-law imposing rates, that such a by-law could be sustained upon a motion, shewing these facts, made to quash it; but in the absence of all suggestion of fraud, and of all opposition to the by-law, when before the council, upon the ground taken, I think that a by-law which recites that a sufficient number had petitioned should be taken to be true, unless at least the recital be clearly established to be glaringly

untrue, so as to afford a presumption of fraud in the proceedings of the council. In some future case it may become necessary to determine what majority is sufficient to procure the action of council. Four concessions in a township may be interested in different degrees in a work which would drain all the lands in those concessions, but it might be of more importance to the owners of the lands in one of those concessions than to all the owners of the lands in the other three to procure the construction of the work. As at present advised, we do not see that a majority of the resident owners in the one concession would not comply with the terms of the Act—namely, "In case a majority in number of the resident owners, as shown by the last revised assessment roll, of the property to be benefited *in any part of any municipality*, do petition the council."

The provisions of the present Municipal Institutions Act, ch. 174, R. S. O., are, with respect to drainage, substantially the same as those under the consideration of the Court of Common Pleas in the above case, and the decision is binding upon me as far as the facts presented by this case bring it within the principle or *ratio decidendi* in it. It is somewhat difficult to determine what was the exact intention of the Legislature as embodied in section 529 of ch. 174 R. S. O. It may be, and perhaps was, the intention that, on a petition by certain owners of land wishing to have their lands drained, or by a majority of the owners of the lands the petitioners wished to have drained, the council might, in its discretion, incur the expense of procuring an examination to be made by an engineer or provincial land surveyor of the locality to be drained, and of the plans and estimates of the work and assessment of the real property to be benefited; and then, if on the report of the engineer the council should be of opinion the work would be desirable, it should have power to perform it, and impose the burden of paying for it upon all whose lands would be benefited, quite irrespective of the petitioners or the owners of lands they wished to affect. This

would seem to be the view that has in practice been acted upon. Or it may be that the Legislature only intended to permit the imposing of the burden of paying for such work upon the lands designated in the petition; and the council, before acting upon such petition, should inform itself by the report of an engineer whether it would be desirable, having regard to the extent of the work and the value of the lands to be benefited—that is, the lands designated in the petition—to incur the liability on the part of the municipality of borrowing the money required to pay for the work. The Court of Common Pleas, in the judgment referred to, seems to adopt the former view, as Mr. Justice Gwynne, in the case put by him of four concessions being benefited, said: "As at present advised, we do not see that a majority of the owners in the *one* concession would not comply with the terms of the Act;" that is, that a majority of the owners of land to be benefited in one concession by petitioning would empower the council to impose the burden of paying for the work on all the owners of land benefited in the whole four concessions, and to pass the necessary by-law therefor. In that view the petition in this case is not open to objection, nor is the by-law based upon it The petition was signed by a majority of the owners of the and designated in the petition, and the by-law properly recites the fact; and though disputed by the applicant's affidavit, is supported by those in answer.

The other objections alleged against the by-law are quite untenable. The first is, that the surveyor did not take any lateral levels in ascertaining the lands to be benefited. Neither the council nor the Court had or has anything to do with that. It is quite impossible to say that the mere omission to do this, assuming it was not done, rendered it impossible for him to ascertain what lands were benefited by the work, and the question as to whether the lands are in fact benefited is one for the Court of Revision, or the Judge of the County Court on appeal from the Court of Revision.

The next objection is, that no copy of the by-law and notices attached were posted up conspicuously in three or more places in the municipality. This is an application not of strict legal right, but to the discretion of the Court, and the only object of publishing the by-law is to give notice to persons who may be affected by it, so that they may object to its passage by the council. The applicant does not say that he had no notice of the by-law before it was passed, and it appears abundantly clear to my mind that he knew all about it, as he took the necessary steps before the Court of Revision to get rid of his assessment, and having only partially succeeded, gave notice of appeal to the County Judge, but did not do so in time, owing to his having been informed at the Court of Revision that he had a longer time to appeal than the law in fact gave him. Assuming that he was so misinformed, a matter that is denied in the affidavits filed, it would not be any ground *per se* for setting aside the by-law, nor is it a ground on which the exercise of the discretion of the Court could be reasonably invoked in favour of the application.

The ground that lot number 5, in the 7th concession, was twice assessed is equally untenable as an objection to the by-law. The affidavits filed on showing cause to the motion shew that thirty of the persons out of the forty-seven interested in the lands benefited approve of the drain. Two of the persons so approving are shewn by the affidavits in reply to have given such approval under a misapprehension, leaving twenty-eight still in favour of the work. Thus it appears that the council could be put in motion now by a majority of all the owners of the lands to be benefited; and the Court should not be astute in finding grounds on which the by-law might be held defective, but should rather uphold the action of the body which under the law has the first right of exercising a discretion in the matter, under, as Mr. Justice Gwynne has expressed it, in the case already quoted from, at p. 392, an Act which "confers so useful and beneficial a jurisdiction upon municipal councils." The motion must be dismissed

with costs. As I have come to the conclusion that the application must fail on the merits, I have not considered the objection urged by Mr. Aylesworth against the motion, that it was not made in time, and give no opinion thereon.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. DACGETT.

REGINA V. FORTIER.

Lord's Day Act—Conveying travellers—Who are travellers.

The defendants, owner and captain respectively of a steamboat, advertised that they would carry excursionists on Sundays. A number of passengers left Buffalo, in the State of New York, on a Sunday morning, and proceeded by rail to Niagara, whence they were carried by the defendants' steamboat to Toronto and back the same day. The defendants having been convicted therefor of an offence under R. S. O. ch. 189,

Held, that the passengers were "travellers" within the meaning of the exception in sec. 1 of the Act: that there is no distinction in such a case between travellers for pleasure and for business; and that the convictions were therefore bad.

APPEALS from the convictions respectively of the Police Magistrates of Toronto, and two Justices of the Peace at Niagara.

The facts, as agreed upon, were as follow:

Henry Jefferson Daggett was convicted by the Police Magistrate of Toronto, on the 8th day of August, 1882, for having, on Sunday, the 23rd day of July last, at Toronto, unlawfully done and exercised his ordinary calling as sailing-master of the steamboat City of Toronto, by sailing the said steamboat, for carrying passengers, who were not travellers within the exception of the statute, to Toronto, and from Toronto to Niagara, on that day, contrary to the statute in such case made and provided.

James Paterson Fortier was convicted by W. Kirby and S. H. Follett, Justices of the Peace at Niagara, on the 25th day of August in the same year, for a similar offence at Niagara, namely, for having on Sunday, the 30th day of July, 1882, followed his ordinary occupation of carrying passengers, who were not travellers, on the same steamboat, from Niagara to Toronto and back, contrary to the Revised Statutes of Ontario, chapter 189.

A fine of $40 was inflicted in each case.

The convictions were removed by *certiorari* into the Queen's Bench Division of the High Court of Justice, on the application of the persons convicted, and a rule to quash the convictions was obtained.

The facts upon which the conviction took place were these.

The steamer, up to the 23rd day of July, had been running daily, (Sundays excepted,) between Niagara and Toronto, in connection with the Canada Southern Railway trains, which left Buffalo, in the State of New York, in the morning, and about 10.30, a.m., reached Niagara, where passengers took the steamer at 10.45, a.m., for Toronto, the terminal point of the route. In the afternoon the steamer returned from Toronto, to connect at Niagara with an afternoon or evening train of the Canada Southern Railway, for Buffalo.

The Canada Southern Railway ran passenger trains between Buffalo and Niagara, as well on Sundays as on the other days of the week, and desiring to make a through daily connection with Toronto, arranged with the owner of the steamer to have their passengers carried to Toronto and back to Niagara in connection with their regular trains on Sundays, as well as other days. In pursuance of this arrangement the defendants began to perform the service on Sunday, the 23rd day of July, and repeated it on the 30th.

The railway company had notified their various railway connections that they would carry passengers from Buffalo to Toronto, and from Toronto to Buffalo and intermediate

points, on Sundays as well as other days, and it was shewn that the arrangement with the steamer had been made by the railway company for the *bonâ fide* purpose of making a through connection between Buffalo and Toronto over the Canada Southern Railway, on Sundays as on other days, which the railway company contended it had the right to do, and not merely for carrying so called Sunday excursionists.

Some of these connections availed themselves of this route, and on the days in question persons had been carried on tickets from beyond the terminal points of the Buffalo and Toronto route.

The railway company advertised excursion rates on through tickets between Buffalo and Toronto for Sundays, as well as other days of the week, and "Sunday excursions" to Toronto and return on Sunday by this route were advertised in Buffalo, and elsewhere in the United States, in an especially prominent manner.

Tickets for these "Sunday excursions" were issued by the railway company at Buffalo for Niagara Falls, the town of Niagara and Toronto, and return on the same day, at reduced rates and with special conditions.

A large number of persons, on one occasion three or four hundred, were carried on Sunday excursion tickets from Buffalo to Toronto and return on the same day. Some few of the passengers travelled on other tickets, and among those carried some had no luggage, some only hand-bags or satchels, and one or two only had trunks.

It also appeared that the word "excursion" was only used to denote a special rate for the return journey, which was available on every day of the week, without distinction, and regardless of the number carried, and that some of the tickets allowed passengers to lie over at Toronto till next day, or for two or three days.

There was no specific evidence given as to the object with which the passengers were abroad. No questions were asked by any officials on board the boat as to whether persons who came on board were travelling for pleasure,

health, on business, or otherwise. All were carried who chose to come on board with railway tickets or to pay their fare.

The question for the decision of the Court was whether the acts for which the defendants Daggett and Fortier were convicted were not the conveying of travellers within the meaning of the exception in the Lord's Day Act, and whether the convictions ought not therefore to be quashed.

November 28, 1882. *Cattanach*, in support of the rules. It is conceded that the only statutes ever in force in this country bearing on the offence charged are 29 Char. II. ch. 7; 8 Vic. ch. 45, afterwards consolidated in C. S. U. C. as ch. 104; and R. S. O. ch. 189; that the 8 Vic. ch. 45 has superseded the Statute of Charles; and that it makes no difference whether the conviction was under the Revised Statutes of Ontario or under the Consolidated Statutes, which the Legislature of Ontario assumed to repeal on the revision of the statutes, as their terms are identical; and the only question in issue is, whether the exception in R. S. O. 189 sec. 1, allowing the "conveying" of "travellers or Her Majesty's mail by land or by water," permits steamboat owners to carry on their ordinary calling on Sunday, so far as foreign passenger traffic is concerned.

Fenton, contra. The case of *Regina* v. *Tinning*, 11 U. C. R. 636, has never been overruled, but it only applies to the running of ferry boats between Toronto and the island, which was the peninsula referred to in that case. In the present case there was the conveyance of Sunday excursionists from a foreign country to Toronto and return the same day. It is obvious that if such excursions are allowed Canadian cities and towns may be overrun with off-scourings of American cities upon the Lord's Day, and its sanctity amongst us seriously impaired. Our Lord's Day Act Consol. Stat. U. C. cap. 104, was expressly intended to prevent any such desecration. Its title is "An Act to prevent the profanation of the Lord's Day in Upper

Canada," and its recital is, "Whereas it is expedient to make a law against the profanation of the Lord's Day, commonly called Sunday, which day ought to be duly observed and kept holy." The first section, which prohibits all persons from exercising the worldly labour, business, or work of their ordinary calling on that day, excepts the conveying of travellers, &c., by land or water, &c., "and other works of necessity," &c. The original Act, 8 Vic. ch. 45 sec. 1, uses the words "and such other works of necessity." In both statutes the exception as to conveying travellers, &c., is classed as a work of necessity, and the evident intent is to allow all necessary travelling on the Lord's Day. In the present case it is clear that the travelling was not only unnecessary, but an innovating and wanton violation of the spirit of our Sabbath laws and observances, got up solely for greed of gain, by the company whose servants these defendants are. It must be admitted that the English decisions under the "Alehouse Acts," *Fisher* v. *Howard*, 10 Cox C. C. 144, and other cases collected in *Burn's Justice* (Alehouse), 128, 129, and similar decisions in which the term "traveller" has received a legal construction and definition, would bring within the exception of our Lord's Day Act, as "travellers" all of these Sunday excursionists. But it is submitted that our Act implies that the "travellers," if allowed to be conveyed on Sunday, are such only as are conveyed from necessity, because to this exception is added the words "and such other works of necessity," so that the conveyance of these Sunday excursionists being wholly unnecessary is not within the exception, and the defendants are therefore rightly convicted.

December 30, 1882. HAGARTY, C. J.—The convictions are in effect the same, for Sunday trading, and the facts are very fully and fairly stated in the case agreed upon by Mr. Fenton, for the Crown, and Mr. Cattanach, for the defendants.

It is conceded that "travellers" may be lawfully carried

on Sunday, and also that if *bonâ fide* travellers were being carried on the occasion in question, we cannot enquire whether they were travelling on business or merely for pleasure.

It is admitted that on this boat there were numerous people who left Buffalo, in the State of New York, early Sunday morning, came down to Niagara by the Canada Southern Railway, embarked on defendants' steamer, crossed to Toronto, and returned the same evening to Buffalo.

It is urged that the bulk of them were what are called "excursionists," and that Sunday excursions by this line were widely advertised, and the steamboat people carried all who offered to come, asking no questions.

We must find great difficulties in holding that persons coming from a foreign country and travelling therefrom some 60 or 70 miles to Toronto, are not to be considered "travellers."

The meaning of the word has been chiefly illustrated by the English decisions as to who are travellers under the statutes regulating the sale of liquors.

Our statute, R. S. O., ch. 189, from Consol. Stat. U. C. ch. 104, in effect forbids any person to do or exercise any worldly labour, business, or work of his ordinary calling, but excepts "the conveying travellers or Her Majesty's mail by land or by water."

An Imperial Act 37 & 38 Vic. ch. 49, sec. 10, declared that no person for the purposes of the Act should be deemed to be a *bonâ fide* traveller, unless the place where he lodged the preceding night was at least three miles from the place where he demands to be supplied with liquor: *Coulbert* v. *Troke*, L. R. 1 Q. B. D. 1.

There were several cases in the Common Pleas, such as *Taylor* v. *Humphries*, 17 C. B. N. S. 539; *Peache* v. *Coleman*, L. R. 1 C. P. 324; *Davis* v. *Scrace*, L. R. 4 C. P. 175; *Morgan* v. *Hedger*, L. R. 5 C. P. 485; *Copley* v. *Burton*, L. R. 5 C. P. 493, where it was held that where the prohibition clause contained the exception, the burden of proof that the

case did not fall within the exception was on the informant. A subsequent Act, 35 & 36 Vic. ch. 94, was passed introducing the exception in a subsequent clause; and as Blackburn, J., says, (in *Roberts* v. *Humphreys*, L. R. 8 Q. B. 489,) the enactment seems pointed against the Common Pleas decisions, and make it incumbent on the defendant to prove any exception in his favour.

As to the definition of "traveller," in *Atkinson* v. *Sellers*, 5 C. B. N. S. 442, Cockburn, C. J., says: "As the Legislatures have thought fit to use an ambiguous term, and there is no explanatory section, we can only apply our minds to the facts submitted to us. * * Of course a man could not be said to be a traveller who goes to the place merely for the purpose of taking refreshment; but if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, and the inn-keeper is justified in supplying it." The case contains a number of dictionary explanations of the word "traveller."

In *Taylor* v. *Humphreys*, 10 C. B. N. S. 429, Erle, C. J., held that persons who had walked four miles, on business or pleasure, might be lawfully supplied with refreshment as travellers; and in *Taylor* v. *Humphries*, 17 C. B. N. S. 549, Erle, C. J., at some length, quotes approvingly the argument that the word "travellers" ought to be construed to include all who fare abroad, either from a desire to enjoy country sights and sounds, or from any other motive of business or pleasure, except desire for excessive drinking."

The case is well worthy of attentive consideration.

The only case that I am aware of under our Canadian statute, 8 Vic. ch. 45, is *Regina* v. *Tinning*, 11 U. C. R. 636. There the Court held that the exception as to conveying travellers or the mails, by land or by water, "will really not suffer us to doubt that persons making it their ordinary business to ply within the harbour of a town, not for any purpose of carrying travellers or the mail, were intended to be restrained by the Act. We think it clear that the persons carried on a Sunday between the city

(Toronto) and the peninsula cannot be called travellers within the meaning of the exception. They are persons notoriously seeking mere recreation."

All the cases, from 5 C. B. N. S. downward, that have been cited are subsequent in date to *Regina* v. *Tinning*, and certainly are not in accordance with the restricted definition of the word "traveller" in the case in this Court.

It seems impossible to uphold a substantial distinction between a traveller for pleasure and for business.

In *Fisher* v. *Howard*, 10 Cox C. C. 144, it was held that as soon as a man had taken his ticket for a railway journey he became a "traveller," even before the train was in motion, and could lawfully be given refreshments on the Sunday at a refreshment room at the railway station. Crompton, J., says: "We must deal with such a case as men of common sense, and according to the common understanding of mankind such a person is a traveller."

In *Peplow* v. *Richardson*, L. R. 4 C. P. 168, a man walked two and a half miles from his residence to drink mineral water at a spa, and while there he got some ale at the hotel. It was held that he was a traveller, not having gone there for the mere purpose of drinking ale.

These cases are referred to for the purpose of defining the term "traveller" used in a statute.

I think we must accept them as affording a definition to the term when used in a statute like the one before us.

It is not easy to see any intelligible distinction between the "traveller" to whom a publican is allowed to give refreshment on Sunday and the vessel owner who may carry a "traveller" on Sunday.

I have no doubt whatever that persons—excursionists and others—who come from Buffalo, U. S., by rail and steam, to Toronto are "travellers" in the sense of the exception in our statute.

It matters nothing, in my judgment, whether they travel wholly for pleasure, fresh air, relaxation from work, or with or without luggage, or actually on important business—they are travellers within the meaning of the statute.

To draw any distinction between persons according to the purpose which induced them to travel would, as it seems to me, be a vain attempt, leading to impossible and irritating enquiries, and tending to bring a useful and salutary enactment into contempt.

We think both the convictions must be quashed.

ARMOUR and CAMERON, JJ., concurred.

Convictions quashed.

[QUEEN'S BENCH DIVISION.]

LETT, ADMINISTRATOR OF LETT v. THE ST. LAWRENCE AND OTTAWA RAILWAY COMPANY AND HINTON v. ST. LAWRENCE AND OTTAWA RAILWAY COMPANY.

Lord Campbell's Act—Death of wife—Husband's right of action—Pecuniary damages—Collision at crossing—Proof of negligence.

The plaintiff sued under Lord Campbell's Act, on behalf of himself and his children, for the death of his wife occasioned by the defendants. The wife had some separate estate from which she derived an income, but the jury allowed no damages in respect thereof. It was not shewn that the wife afforded any pecuniary assistance either to the husband or her children. The jury found for the plaintiff and apportioned the damages amongst the plaintiff and some of his children.

Held, ARMOUR, J., dissenting, that the verdict was wrong; for the plaintiff was not entitled either for himself or the children to recover compensation for anything but pecuniary loss, or the loss of a reasonable probability of pecuniary benefit.

Per ARMOUR, J. The loss to be compensated is the loss of some benefit or advantage capable of being estimated in money, as distinguished from a *solatium* for wounded feelings and loss of companionship; and the loss to the husband of the wife's performance of her household duties, and to the children of a mother's education, are both losses which can be estimated by a jury.

Per ARMOUR, J., the jury were rightly directed, under the facts stated below, that the defendants had laid down the track on which the accident happened, in the city of Ottawa, without authority, it being a third track or switch for use in connection with their station, for purposes of shunting, &c., and if illegally laid down no acquiescence, except by by-law, would make it rightful as against the father.

Per HAGARTY, C. J. Having been there for many years with the knowledge and acquiescence of the corporation, its existence could not alone make defendants liable, but it was properly left as a circumstance to be considered by the jury.

A Judge is not bound, under the Judicature Act, to submit questions in writing to the jury.

The train was backing at the time. *Per* ARMOUR, J. The jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing; and having regard to the fact that they had without authority increased the number of tracks there, it was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precautions.

The plaintiff, in the first mentioned suit, sued as administrator of all and singular the goods and chattels, rights and credits of Maria Lett, his wife, deceased, and claimed damages from the defendants, for the benefit of himself and his seven children, for the alleged negligence of the defendants in causing the death of his said wife, the mother of his said children.

The plaintiff, in the secondly mentioned suit, claimed damages from the defendant for the alleged negligence of the defendants in causing her personal injury. Both causes of action arose at the same time, and out of the same alleged negligence, and the pleadings in both cases were substantially alike.

The case was tried, at the last Ottawa Assizes, before Osler, J., and a jury, when the following facts appeared:

Mrs. Lett, Mrs. Hinton, and a son of the latter were driving with a horse and phaeton northwards up Dalhousie street, which runs north and south in the city of Ottawa, and at the crossing of that street by McTaggert street, the defendants' railway being upon McTaggert street, a train of fourteen or fifteen cars, moving from east to west towards the station grounds of the defendants, propelled by an engine at the east end thereof, or behind them, struck the phaeton, and the result was the death of Mrs. Lett and the injury of Mrs. Hinton. Mrs. Hinton was driving the horse, and was not aware that there was a railway crossing at this point. Mrs. Lett was well aware of it. The station, station grounds and buildings connected therewith, of the defendants, were situate to the west side of and adjoining Dalhousie street, and comprised that part of McTaggert street lying to the west of Dalhousie street, and between it and Metcalfe street, and the railway entered the city from

the east along McTaggert street. From the river Rideau to their station there is a double track, one track, the original or main track of the railway, having been laid down some time between 1851 and 1854, and the second track, to the north of the main track, some time afterwards, but before 1869. The track upon which the train was moving that caused the injury was a switch constructed from the main track, and to the south thereof, from a point a short distance east of Dalhousie street to the station grounds. It was not shewn when exactly this switch was built, but it was shewn that it was built after 1869. This switch was built for use in connection with the station grounds, and was used for the purpose of shunting, and the engine which propelled the train that caused the injury was engaged at the time in shunting cars for the purpose of making up a train.

A by-law of the town of Bytown, passed on the 20th day of October, 1851, was put in, which, after reciting that application had been made in behalf of the Bytown and Prescott Railway Company for authority to level certain streets in Bytown, and to allow the railway track to be laid down thereon, enacted that the said company should be allowed and they were thereby authorized "to level such streets as their railway line passed over, and to lay down their railway track in any direction upon any such streets, either crossing or along the streets in the direction of their length: Provided always, that this authority does not extend further than the levelling of such streets for the railroad track, and the direction of the track upon such streets, the said company being in no other respect released from the provisions contained in the third section of the Act incorporating the said Bytown and Prescott Railway Company." A by-law of the city of Ottawa was also put in, passed on the 9th day of December, 1869, stopping up that portion of McTaggert street lying to the west of Dalhousie street, and between it and Metcalfe street, and authorizing its sale to the defendants.

The evidence as to damages, so far as necessary to be

considered, was given by the plaintiff, and was to the following effect: That he was married October 21st, 1849: that his wife was in her 53rd year when she was killed: that he was nine years her senior: that she enjoyed the very best of health: that they had nine children, seven of whom were living, aged respectively, 30, 22, 21, 19, 16, 14, and 11: that the five younger children (to whom the jury awarded damages) lived at home, and were not doing for themselves: that his wife managed the whole business of the house, made all purchases and repairs, and did everything about the house: that he did nothing, and had nothing to do while she lived, except attend to the business of his office: that she did a great deal of the housework, but they always kept one servant: that she mostly always milked the cow in preference to allowing the servant to milk her, who did not understand her. Q. "Was she a careful mother?" A. "Very much so." Q. "As regards the education of her children?" A. "Yes."

Bethune, Q.C.—Q. "I don't suppose that is an element?"

McCarthy, Q.C.—Q. "That is one of the elements, education and social advantage."

OSLER, J.—"I don't see how a jury can estimate that."

McCarthy, Q. C.—"Education is of just as much importance as social advantage."

OSLER, J.—"So it is in some respects."

In cross-examination.—Q. "I suppose the household affairs have gone on in her absence the same as when she was alive?" A. "The best we could." Q. "You have two daughters living with you, one about 21, and the other about 15?" A, "Yes." Q. "I suppose the one of 21 has completed her education?" A. "Yes." Q. "And runs the house?" A. "Yes." Q. "Probably trained in domestic affairs by her mother during her life?" A. "Yes."

At the close of the plaintiff's case counsel for the defendants objected that there was no evidence of negligence to go to the jury: that there was sufficient evidence of contributory negligence to warrant the case being withdrawn from the jury, and that there was no evidence of

pecuniary loss. At the close of the whole case the same objections were renewed, and the learned Judge was requested to submit questions to the jury, which he declined to do. The parts of the jearned Judge's charge to which exception was taken were as follows:

"The Legislature has provided several means by which persons who are crossing highways shall be warned of the approaching of a train, and the railway is bound to comply with the directions contained in the Act. Now, one of the precautions mentioned in the Act is that a railway company shall sound a whistle or ring a bell—they are not bound to do both—at a distance of eighty rods from where the railway crosses the highway on a level; and they are to keep ringing the bell or sounding the whistle at intervals until the engine has crossed the road. There is nothing expressly said in the Act as to the case of a train being pushed by the engine; that is to say, the case of a train proceeding reversely, which we have all heard of in this case. There is nothing specially said about that; but it would appear to me—and so far as this case is concerned I shall direct you—that the whistle should be sounded or the bell rung by the engine at the distance of eighty rods from the nearest point of the train to the place of the crossing; for instance, the bell should be rung or the whistle sounded when the part of the train which is forward and proceeding in the direction in which the train is going reaches the distance of eighty rods from the crossing, although the engine may be the length of the train further away. I think they are bound to take care to sound the whistle when any part of the train which is moving in that direction reaches a point eighty rods from the crossing. That is one thing which the plaintiff says the defendants did not do; the statute requires that they shall do it. Another thing is that, although the train was moving reversely the defendants did not have a man stationed on the rear car to warn passengers of the approaching train. That is another thing which the plaintiff says the defendants did not do, although the statute requires it.

"Then, as to the train moving reversely without a man being stationed on the rear car, the evidence for the plaintiff is that there was no one on the rear car. Are you satisfied that the evidence of the man who was cleaning the windows in the Hamilton House, the evidence of Bourque and others, is sufficiently met by the evidence of Campbell and the evidence of Powell. The witnesses for the plaintiff say that there was not a man on the rear car, and that from the position they saw the men in there could not have been a man on the rear car at the time of the accident. Powell says that Campbell was on the rear car, and that he had received a signal from him; and Campbell says that he was on the rear car; but I do not think the fact that he was on the rear car is sufficient to exonerate the defendants from the charge of negligence, unless he was there for the purpose of warning passengers. The statute does not require that he shall be at any particular end of the car, but as a fact he was at the wrong end

to warn passengers. He was at the far end of the car, and instead of attempting to warn passengers, he appears to have passed the signal on, in the excitement of the moment, towards the engine, to 'slack ahead quick;' that is, to reverse the motion of the engine. Was he on the car for the purpose of warning passengers? If he had been at the rear end of the car he would be thirty or thirty-three feet ahead of where he was at the time of collision, and possibly might have been able to give some warning to the persons in the carriage. Was he then on the car for the purpose of warning passengers of the approaching train? If, I say, you find that in any of these particulars the defendants have not complied with the statute, there is evidence from which you may come to the conclusion that there was negligence. Now, even if you find that the defendants complied with all these precautions—even if you find that the defendants complied with all these statutory precautions—plaintiffs say that is not sufficient to exonerate them. They say the position of their road was such as to cause peculiar danger to passengers and persons crossing the highway at this particular place, and they urge that because the crossing was of so dangerous a character the defendants ought to have provided other precautions than those whioh the statute requires. Now, except with regard to the precaution of ringing the bell and sounding the whistle eighty rods away, I should have told you that, if the accident had occurred on any other crossing except the southernmost crossing, there was nothing to shew that the defendants were guilty of negligence if they had complied with the statutory requirements; that is to say, that they were not bound to take any other precautions than those which the statute has required railway companies in that position to take. An exception must be made as to the requirement of sounding the whistle and ringing the bell, for there is evidence from which it may appear that the train was set in motion within eighty rods of the place where the accident happened. Now, it is intended by sounding the whistle and ringing the bell that these noises should be made at a sufficient distance from the crossing to warn passengers of the approach of the train, and if the bell is sounded or the whistle rung for the first time at a distance within eighty rods from the place where the train crosses, although that may be the spot from which the train originally starts, and it was not set in motion at all before then, I should say that if an accident happened the jury would have the right to say whether that was a sufficient precaution to have taken, ringing a bell at a point within eighty rods. Should they, under these circumstances, have taken any other precaution to give warning to the public, because persons approaching the crossing have not had the chance of hearing the train approaching for a distance of eighty rods? If you think the train started at a distance within eighty rods, ought they to have taken any other precautions? Then passing from that part of the case, the plaintiffs say that even if you are in the defendants' favour on the point to which I have last addressed myself—that is, if you think the train started at a distance of more than eighty rods from the crossing, and if in other respects they complied with the statutes—plaintiffs say there is

evidence from which you may nevertheless find them guilty of negligence; and the ground on which they say so is this, that the accident happened at the southernmost crossing, and that crossing was a crossing not across the road in the line of the railway, but a crossing which ran diagonally to the other tracks, and crossed the road into some yard of the defendants; a track which, in fact, they used for their own purposes, and a track which they had not obtained the leave of the council to lay down, if the council could have given them leave to lay down such a track. They put it down for their own purposes, and apparently without anybody's leave; and so far as this case is concerned I direct you that that track was laid down without the authority of the council, and that the defendants had, so far as we can see, no right to put it there. What they did on that track is charged to have been done negligently, and it is still in that way that you will look at it. Now, did this particular track on which the accident happened render the crossing more dangerous than the other crossing would have been? You have heard described about how close this crossing proceeds to Bourque's hotel; so that persons going north along Dalhousie street, as these people were going, would be very unlikely—in fact could not until they were almost on the rails—see whether an engine and cars were approaching. Ought they, then, not being lawfully on the track so far as this case is concerned—ought they to have taken any other particular precaution at this place to warn people who were approaching the track? It appears to me that they did have a flagman at one time, and at this particular time they had not. Ought they to have done something more than the statute requires with regard to crossings which they have a right to make? That is altogether for you to say."

The jury found a verdict for the plaintiff and $5,800, dividing as follows: to the plaintiff, $1,500, to the five younger children as follows: Anna Eliza, $600; Maria, $1,200; Frederick Austin, $400; Norman H., $800; Robert, $1,300. In answer to questions by the learned Judge they said they found nothing in respect of the income from the house: that they found the defendants guilty of negligence in not sounding the whistle or ringing the bell: that they were not going more than six miles an hour: that they were moving reversely without a man stationed on the rear car to warn passengers that there was not a sufficient sign-board; and that it was an unusually dangerous place.

May 17, 1882. *Bethune*, Q.C., obtained an order *nisi* in the first mentioned case, calling upon the plaintiff to shew cause why the verdict should not be set aside and a new

trial had between the parties, on the following grounds: (1) That the learned Judge should not have taken a general verdict, but should, as requested by the defendants, have submitted questions findings upon which would have determined the issues of fact raised by the pleadings. (2) On the law, evidence and weight of evidence. (3) That no cause of action was established by the plaintiff, there being no pecuniary loss established. (4) That there was no right to recover on behalf of the children, as the death of Mrs. Lett was no pecuniary injury to the children, even if established to have been an injury to the plaintiff, her husband. (5) That the damages were excessive. (6) That Mrs. Lett was guilty of contributory negligence such as to disentitle the plaintiff to recover. (7) And for misdirection of the learned Judge, in telling the jury that the defendants had laid down the track on which the train was running at the time of the accident without the authority of the council of the city of Ottawa, and that the defendants had no right to put it there. (8) And for misdirection in telling the jury that the defendants were bound to sound the bell or whistle when the nearest part of the train was eighty rods from the crossing, and to keep sounding at intervals until the locomotive crossed the track, the train in this case having started within eighty rods from the crossing. (9) And for misdirection in telling the jury that it was for the jury to say whether, having regard to the nature of the crossing, it was not the duty of the defendants to station a man at the crossing, or to take some other precaution to prevent accidents other than the precautions mentioned in the statute. (10) And for misdirection in telling the jury that the defendants were bound to station a man at the extreme end of the car, and that it was not sufficient that he should be at the other end of the car. And for non-direction in not telling the jury that there was no evidence that the statute was not complied with as to the sign boards at the crossing.

Bethune, Q. C., also obtained an order *nisi* in the secondly above mentioned case for a similar purpose, and on the

same grounds as those upon which he obtained the order *nisi* in the first mentioned case, except those numbered 3, 4, and 5.

May 30, 1882.—*Bethune*, Q.C., supported the orders *nisi*. Under the O. J. A. there must be findings, and there can be no general verdict. Plaintiff was guilty of contributory negligence; *Johnston* v. *Northern R. W. Co.*, 34 U. C. R. 432; *Dalton* v. *South Eastern R. W. Co.*, 4 C. B. N. S. 296. On the question of damages, see *Pym* v. *Great Northern R. W. Co.*, 4 B. & S. 396; *Franklin* v. *South Eastern R. W. Co.*, 3 H. & N. 211; *Shearman & Redfield* on Negligence, sec. 614; *Duckworth* v. *Johnston*, 4 H. & N. 653. There was no proof of the value of the deceased's services to her husband, the plaintiff. Apart from the statute it is clear no action lies: *Osborn* v. *Gillett*, L. R. 8 Ex. 88; *Baker* v. *Bolton*, 1 Camp. 493. The sums awarded to the children are not within the statute. They are not, as the husband is, entitled to their mother's services.

McCarthy, Q. C., contra. As to the findings of the jury the procedure is to be the same as before: O. J. A. sec. 45. There was evidence of neglect to go to the jury. In the first place, the rate of speed was too great for the city. Then, no bell was rung or whistle sounded, as required. Then again, the statute requires the man to be on the rear car. If he was on that car, the train backing, he was on the front car. The statute never meant that railway companies were to turn highways into stations; they can cross, but cannot make station grounds of them: *Bilbee* v. *Brighton, London and South Coast R. W. Co.*, 18 C. B. N. S. 584. As to damages, see *Pym* v. *Great Northern R. W. Co.*, 2 B. & S. 759. Mrs. Lett's services to her husband could be estimated; that was a question for the jury. The children are in the same position as the husband. They have been deprived of a mother's care, which cannot be replaced. They were in the enjoyment of these, which are a loss to them, and which can be measured by money, just as loss of social position, which is said to be capable of

being compensated for in money. See *Saunders* on Negligence, 227, as to the principle on which damages are said to be assessed. See also *Condliff* v. *Condliff*, 22 W. R. 325; *Groves* v. *London and Brighton R. W. Co.*, cited in 2 *Redf.* on Railways, 3rd ed., 208.

December 30, 1882. ARMOUR, J.—The first ground taken in the rule is not, I think, tenable. It was argued from certain provisions in the Judicature Act that it was to be inferred that a Judge was bound to submit questions in writing to the jury, and upon their findings in respect of such questions to enter the verdict, but there is nothing in the Judicature Act from which such an inference can be fairly drawn, and such a course, experience shews, would tend to make trial by jury much more complicated and uncertain than it now is.

The second ground of objection to the verdict cannot, in my opinion, and according to the views hereinafter expressed, prevail.

I will now proceed to consider the third, fourth, and fifth grounds, which are applicable only to the Lett suit.

This suit is brought under the provisions of the R. S. O. ch. 128, which contains the same provisions as are contained in the Imperial Act, 9 & 10 Vic. ch. 93, entitled "An Act for compensating the families of persons killed by accidents," commonly called Lord Campbell's Act, the preamble of which is as follows: "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him."

The circumstances under which this Act was passed, and the object and intention of it, can be best learned from what was said by the promoters and supporters of it when the bill was being passed through the House of Lords.

It was first introduced into the House of Lords by Lord Lyttelton, in the session of 1845, who in moving its second reading thus stated its object:—

"At present a person who suffered by an accident arising from the negligence of another might obtain compensation in damages if he recovered from the injury, but if he died the right of action died with him. By this bill his family or his parents, if he left no wife or child, would be entitled to the same remedy as he would (if he had survived) have been entitled to. This was the law already in France, and as the value of a man's life was calculable juries would soon get into the habit of assessing damages quite as well as for an injury to his person."

The bill did not become law during that session, but in the following session it was again introduced into the House of Lords, this time by Lord Campbell, who, in moving its second reading, said:—

"Under the existing law the relatives of the person killed could receive no compensation, no matter what the degree of negligence occasioning the death might be. * * He had a great respect for the common law, but still he felt that there could be no doubt that some of its doctrines were not applicable to the present state of society. One of these doctrines was, that the life of a man was so valuable that they could not put any estimate upon it in case of a death by accident, and therefore if a man had his leg broken on account of negligence on the part of coach proprietors, or of a railway company, he had his remedy in a Court of justice; but if the negligence were still grosser, and if a life were destroyed, there was no remedy whatever. In Scotland and in foreign countries the general rule was, that where there was a wrong which worked injuriously to another, the law gave compensation, and that law had been acted on in a recent instance in France —the trial of Mr. de Beauvallon on a charge of murder— but in this country if death ensued, the civil injury merged in the felony, and this state of the law was, he thought, highly discreditable."

Lord Brougham said: "The law of England was, with regard to the subject of compensation for loss of life, an exception to the law of every other country, and this very

fantastical reason was given for a very bad law—the badness of the law being only equalled by the badness of the reason—that the value of life was so very great that nothing could be a compensation for it; because they could not give an infinite value for a life they refused to give any value at all for it. The argument, in fact, blew hot and cold, because it made life either infinitely valuable or of no value whatever."

The bill originally provided that the compensation granted by juries should go to the next of kin; but it was amended in the House of Commons, making the compensation go to and be apportioned among those persons mentioned in the Act.

In *Blake* v. *Midland R. W. Co.*, 18 Q. B. 93, this Act first came under discussion before a Court in banc, and the Court there held that a jury, in trying an action under this Act, were confined, in giving damages, to injuries *of which a pecuniary estimate might be made*, and could not add a solatium in respect of the mental sufferings occasioned by such death: that the measure of damage was not the loss or suffering of the deceased, but the injury resulting from his death to his family: that the language of the Act seemed more appropriate to a loss of which *some estimate might be made*, than to an indefinite sum, independent of all pecuniary estimate, to soothe the feelings: that the learned Judge at the trial ought more explicitly to have told the jury that, in assessing the damages, they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband; and that, as the damages certainly exceeded any loss sustained by her admitting of a *pecuniary estimate*, they must be considered excessive.

In *Franklin* v. *South-Eastern R. W. Co.*, 3 H. & N. 211, it was held that the damages should be calculated in reference *to a reasonable expectation of pecuniary benefit*, as of right or otherwise, from the continuance of the life.

In *Dalton* v. *South-Eastern R. W. Co.*, 4 C. B. N. S. 296, it was held that *the reasonable expectation of pecuniary*

advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed, and the *probable pecuniary loss* thereby occasioned.

In *Duckworth* v. *Johnson*, 4 H. & N. 632, it was treated as decided that a reasonable prospect of pecuniary benefit might be taken into consideration by the jury.

In *Pym* v. *The Great Northern R. W. Co.*, 2 B. & S. 759, the Chief Justice who tried the the case had told the jury that they might take into consideration the loss of the advantages of superior education, social position and personal comforts of which the father's income, had he lived, would have secured the benefit and enjoyment to the family; and also the loss of that provision which it was to be presumed that the deceased, as a prudent father of a family, would have made by saving from his income for the benefit of his wife and younger children; and the Court held that as the benefit of education and the enjoyment of greater comforts and convenience of life depend on the possession of pecuniary means to preserve them, the loss of these advantages, is one which is *capable of being estimated in money, in other words, is a pecuniary loss*; and therefore the loss of such advantages arising from the death of a father whose income ceases with his life, is an injury in respect of which an action can be maintained on the statute; *a fortiori*, the loss of a pecuniary provision which fails to be made, owing to the premature death of a person by whom such a provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed.

In the same case in the Exchequer Chamber, 4 B. & S. 396, the Court said: "The principle which governs these cases, appears to us to be, to consider whether there was evidence of a *reasonable probability of pecuniary benefit* to the parties if the death of the deceased had not occurred. * * I take it to be in evidence that at the time of his death the deceased was living with his family in the ordinary manner, bringing up his children in the position in

society which that income would command. The jury were bound to give damages for the deprivation of these advantages, because the *reasonable probability of pecuniary benefit* from them had been taken away by the death of the deceased. * * The cases further establish that the *reasonable probability of pecuniary benefit* to individuals, if the life of the deceased had continued, is an item which the jury may take into consideration when estimating the damage occasioned to them by his death."

In *Sykes* v. *North Eastern R. W. Co.*, 44 L. J. C. P. 191, the father sued for damages for the death of his son, who was twenty-three years of age, and was under a contract of hiring at fixed wages with his father. The Court held he could not recover. Brett, J., said, "The plaintiff gave no evidence of a *pecuniary benefit* accruing to him from relationship. The son worked for his father, who appears to have paid him a full amount of wages. The plaintiff sustained no loss entitling him to sue under 9 & 10 Vic. c. 93." Grove, J.: "The plaintiff was bound to prove a *benefit accruing to him from his relationship* with the deceased, but he merely shewed that he derived an advantage from a contract with his son."

In *Hetherington* v. *North Eastern R. W. Co.*, L. R. 9 Q. B. D. 150, *a reasonable expectation of pecuniary advantage* was held to be necessary.

In *Condon* v. *Great Southern & Western R. W. Co.*, 16 Ir. C. L. R. 415, the Chief Baron said: "It is now established by a series of decisions, first, that in such an action as the present the damages must be estimated with reference to *pecuniary loss* alone; and, secondly, that in estimating such pecuniary loss the jury are to consider, when the evidence warrants their so doing, *the reasonable probability of pecuniary benefit* accruing to the party claiming the damages, if the death of the deceased had not occurred."

It is quite clear to my mind that what is meant by pecuniary loss in all these cases is the loss of some benefit or advantage which is capable of being estimated in money, and this is what is said in so many words in *Blake* v. *Mid-*

land R. W. Co., and is the definition of these words given by Cockburn. C. J., in *Pym* v. *The Northern R. W. Co.*

What the Courts were guarding against was the giving of damages as a solatium for wounded feelings and loss of companionship, and they used the words pecuniary loss in contradistinction to sentimental loss.

The husband is a person specially named in the Act as a person for whose benefit an action is maintainable under the Act, and I do not think that we should, by construction, hold the word husband to mean only a husband who has a rich wife, as Chief Baron Pollock seemed to intimate at *Nisi Prius* in *Gillard* v. *Lancashire & Yorkshire R. W. Co.*, 12 L. T. 336.

In *Cotton* v. *Wood*, 8 C. B. N. S. 568, an action was brought under this Act by a husband for the death of his wife, and it was proved that the deceased had by her industry contributed to the extent of about ten shillings weekly towards the maintenance of the family, and no objection was taken that there was no evidence of pecuniary loss to sustain the action. Surely if a wife stays at home and manages her husband's house and household affairs, which, if she did not manage, he would be obliged to hire some one to manage, she earns money for him by saving it for him, just as much as if she went away from home into service at wages, and brought the wages home to him.

In my opinion what Mrs. Lett did for her husband in the management of his house and household affairs was a benefit and advantage to him, and was such a benefit and advantage as was capable of being estimated in money, and therefore her death was a pecuniary loss to him. I quite agree that the relationship of master and servant does not in law exist between husband and wife; but the relationship of master and servant has nothing to do with this action, which is a creation of the statute. I also think that there is an education in religion, morals, and virtue, which owing to the peculiar confidence inspired by the relationship of mother and child can be imparted to the child by the mother alone.

I think that such education is a benefit and advantage to the child, and is capable of being estimated in money, and that the deprivation of such education by the death of the mother is a pecuniary loss to the child.

In *Tilley* v. *The Hudson River R. W. Co.*, 24 N. Y. 471, upon a similar statute to ours, a similar action was brought to the one I am considering, and the Court there said: "The injury to the children of the deceased by the death of their mother was a legitimate ground of damages, and we do not agree with the defendants' counsel that they ought to be nominal. The difficulty upon this point arises from the employment of the word pecuniary in the statute but it was not used in a sense so limited as to confine it to the immediate loss of money or property, for if that were so there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded, and the word *pecuniary* was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grevious to be borne, cannot be measured or recompensed by money. It excludes also those losses which result from the deprivation of the society and companionship of relations which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture and of intellectual, moral, and physical training, and of such instruction as can only proceed from a mother. This is, to say the least, as essential to their future well being in a wordly point of view and their success in life as the instruction in letters and other branches of elementary education, which they receive at the hands of other teachers who are employed for a pecuniary compensation. Suppose a person under obligation to furnish a minor apprentice with common school instruction for a given

period, would not the violation of that duty furnish a claim for damages? The injury would be of the same character which a child suffers from the loss of the training and instruction which it is entitled to receive from its parents. The injury in those cases is not pecuniary in a very strict sense of the word, but it belongs to that class of wrongs as distinguished from injuries to the feelings and sentiments, and in my view, therefore, it falls within the term as used in the statute. It is argued by the defendants' counsel that there should be no recovery on these grounds, because the father is obliged to provide what the children have been deprived of by the loss of their mother. But this is not an adequate answer. The children have been deprived of that which they were entitled to receive by the wrongful act of the defendants. Their loss may or may not be made up to them from another source, but in the meantime they are entitled to a fair and just compensation from the wrongdoers by the provisions of this statute."

This case was carried to appeal, and the decision of it sustained. See 29 N. Y. 252. See also *McIntyre* v. *New York Central R. W. Co.*, 37 N. Y. 287.

I think there was evidence to go to the jury of damages to the plaintiff, as husband, and of damages to the children, such as are within the true construction of the statute, and that it was impossible for the Judge to have properly withdrawn the case from the jury.

I think that if I should hold otherwise, and hold that the defendants were bound to pay compensation for Mrs. Hinton's bruises but nothing for Mrs. Lett's life, I would be placing the law in the same discreditable position that Lord Campbell found it when he set about making it creditable by the passing of this Act.

I think, moreover, that there was ample evidence to warrant the jury in finding damages both in favour of the husband and of the children; and having regard to the amount of damages which the Courts here and in England have held not to be excessive, and having regard to what

railway companies have in this country voluntarily paid in similar cases, I cannot say that the damages assessed by the jury are such as twelve reasonable men ought not to have assessed, nor are they in my own opinion excessive, but are moderate and reasonable.

The sixth ground taken in the rule cannot be sustained. The question of contributory negligence was a question for the jury, and I see no fault to find with their determination of it.

The seventh ground taken in the rule is limited to this, that the learned Judge misdirected the jury in telling them "that the defendants had laid down the track on which the train was moving at the time of the accident without the authority of the council of the city of Ottawa, and that the defendants had no right to put it there." It is not at all objected that, assuming it to be as the learned Judge directed, he in any way misdirected the jury as to any result flowing from such illegal act. It is only necessary therefore to enquire whether the learned Judge was correct in stating that this track was illegally on the highway. I think it quite clear that the learned Judge was quite right in so stating. The original corporation was the Bytown and Prescott Railway Company, and was incorporated by the Act 13 & 14 Vic. ch. 132, sec. 3 of which Act provided that the said company should not carry the railway along any street or existing highway, but merely across the same in the line of the said railway, except upon leave obtained from the proper municipal authority of some county or town; and sec. 11 of which provided that no land should be taken by the said company from any public highway, except only as thereinbefore provided, but their right should be limited to laying down across the same, that is, in the line of the said railway, at whatever angle it might intersect such highway, the rails and other contrivances forming part of the said railway, subject to the limitations mentioned in the third and fifth sections or any other part of that Act.

The provisions allowing this railway company thus to

interfere with highways in the line of their railway are provisions affecting the rights of the public to the highways, and are to be construed strictly; and the by-law of the town of Bytown, given in evidence, only authorized the company to level such streets as their railroad line passed over, and to lay down their railway track upon any such streets either crossing or along the said streets in the direction of their length, and provided that such authority should not extend further than the levelling of such streets and the direction of the track upon such streets, the company being in no other respect released from the provisions contained in the third section of the Act incorporating the company.

The company, it will be observed, was not asking the town council to give them authority to appropriate or use any highway, or any part of it, for the use of their station grounds, but they were asking them only for authority to level certain streets, and to lay down their track thereon; and all that the town council gave them authority to do was to do that in *the line of their railway* under the provision of the third section of the Act. It may, and I think it did, limit the company to laying down only one track, but it certainly limited them, as the statute also did, to laying it down in the line of their railway in its transit from one terminus to another, and neither it nor the statute gave them power to lay down a track, out of the line of their railway, upon a highway, for purposes connected with their station, such as the third track or switch in question, such third track or switch having been built, as was proved, for use in connection with their station grounds for the purpose of shunting. I think, also, that the license granted by the town council of Bytown to the Bytown and Prescott Railway Company, even if it did allow that company to lay down more than one track, did not enure to the benefit of these defendants—who were incorporated by the Act 31 Vic. ch. 20, and who, since that time, laid down the track or switch in question—so as to entitle them to lay it down without getting a license for that purpose from the city of Ottawa.

The council could only acquiesce by by-law in its being laid down, and it having been illegally laid down, no acquiescence otherwise could give any right to the company to keep it there against the public.

I think, as to the eighth ground, that the learned Judge put the proper construction upon the statute in directing the Jury as he did, and as therein complained of.

Having regard to the fact that the railway company had without authority increased the number of tracks across the street where the accident occurred, and thereby increased the danger to travellers on the highway, I do not think that the learned Judge misdirected the jury as complained of in the ninth ground of objection taken in the rule. I do not find from the learned Judge's charge that he directed the jury in the manner complained of in the tenth ground of objection taken in the rule; and as to the eleventh ground which is taken in this rule—that of non-direction—I think the learned Judge did all that he was legally entitled to do. He told the jury what the requirement of the law was as to the signboard, and left to the jury to find the fact whether it had been complied with, and I think there was evidence which he could not withdraw from the jury that it had not been complied with.

I think the orders *nisi* in both cases should be discharged, with costs.

HAGARTY, C. J.—The plaintiff sues as administrator of his wife, on behalf of himself and his children, for damages resulting from the death of the wife killed by a train on defendants' railway.

The deceased owned some property in fee producing about $14 per month, or $168 a year, conveyed to her in 1872.

She died intestate; the husband continues to receive the rents, and it was conceded that damages were not claimed therefor, and the jury did not allow any damages in respect thereof.

I propose to consider the question firstly as to the right of damages to the children irrespective of this property.

Our earliest formal declaration of the law seems to be in *Blake* v. *Midland R. W. Co.*, 18 Q. B. 93, (1852). It was there very distinctly laid down that mental suffering or loss of society cannot be estimated, but the compensation must be for pecuniary loss only.

The Court held that the Act does not transfer the same right which the person injured would have had but for his death, but that it gives to his representative a totally new right of action on different principles. It was said, p. 111: "There may be a calculation of the pecuniary loss sustained by the different members of the family from the death of one of them; but if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of defendants. We must recollect that the Act we are construing applies not only to great railway companies but to little tradesmen who send out a horse and cart in the care of an apprentice."

In *Franklin* v. *South Eastern R. W. Co.*, 3 H. & N., 211, (1858) the Court of Exchequer held "that damages were not to be given merely in reference to the loss of a legal right * * they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life * * such reasonable expectation might well exist, though from the father" (the plaintiff) "not being in need the son" (deceased) "had never done anything for him * * a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life."

In *Dalton* v. *South-Eastern R. W. Co.*, 4 C. B. N. S. 296, the Court say that *Franklin's* Case was decided with their full concurrence, and that the reasonable expectation

of pecuniary advantage may be taken into account, and damages given in respect of the expectation being disappointed, and the probable pecuniary loss thereby occasioned.

They held that funeral expenses and mourning could not be allowed: "There is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss."

Pym v. *Great Northern R. W. Co.*, 4 B. & S. 396, Ex. Ch. (1863,) adopts the same principles: "Our judgment sanctions the principle that the right to damages is based on the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased."

In the same cause in the Court below, 2 B. & S. 767, Cockburn, C. J., after noticing the pecuniary loss limit, says: "We are of opinion that as the benefit of education and the enjoyment of the greater comforts and conveniences of life depend on the possession of pecuniary means to procure them, the loss of these advantages is one which is capable of being estimated in money, in other words, is a pecuniary loss; and therefore the loss of such advantages arising from the death of a father whose income ceases with his life, is an injury in respect of which an action can be maintained on the statute."

Duckworth v. *Johnson*, 4 H. & N. 653, may be noticed.

In *Gillard* v. *Lancashire and Yorkshire R. W. Co.*, 12 Law Times, 356, Pollock, C. B., remarks that the wealthiest man losing a wife who had a pension could sue for damage under this Act, while the poorest peasant who may lose nothing at all by the death of his wife cannot sue at all, though the mental anguish for the loss may be equal; but without pecuniary loss no damage. The Act was never intended to give compensation to a parent for mere deprivation of his son, or to a widow for that of her husband.

Plaintiff's counsel observed: "In that view a widower would not be entitled to sue for the loss of the society and comfort of his wife." The Chief Baron said: "Clearly not,

unless her death is the cause of a pecuniary loss by the husband."

See the remarks on this case by the same Judge in *Pym* v. *Great Northern R. W. Co.*, where he retracts his view expressed on another point of the case.

In *Cotton* v. *Wood*, 8 C. B. N. S. 568, the husband sued for the death of his wife. It was proved that deceased had by her industry contributed to the extent of about 10s. weekly towards the maintenance of the family. Plaintiff had a verdict for £25—£10 to himself, £15 to his three children.

Nothing was said as to the right to damages. The whole case turned on whether there was or was not negligence. See also, apparently on the same point, *Manchester R. W. Co.* v. *Fullarton*, 14 C. B. N. S. 54.

Bramall v. *Lees* is a case mentioned in *Dalton* v. *South-Eastern R. W. Co.*, as a *Nisi Prius* decision shortly noticed in 29 Law Times, 82, 111, and 166. A father recovered £15 by verdict against a druggist for giving a wrong medicine to his daughter, a child aged twelve years, causing her death. There was, apparently, no pecuniary damage shewn; the child was incapable of earning anything; but it was urged that in a year it could get employment in a neighbouring factory, and earn wages. On objection in Term a rule was granted, but it was ultimately allowed to drop, the Court apparently discharging it.

Sykes v. *North-Eastern R. W. Co.*, 44 L. J. C. P. 191, and *Hetherington* v. *North-Eastern R. W. Co.*, L. R. 9 Q. B. D. 160, may be also noticed.

Condliff v. *Condliff*, 22 W. R. 325, is an action setting out a recovery by defendant, as administrator of his wife, killed in a railway accident. The son sues the administrator, averring the recovery, and that he, the son, had a large pecuniary interest in the mother's life. The facts do not appear except in the pleadings.

Evans v. *Brind*, Law Times, July 8, 1882. There is merely a short note of the trial, stating that the husband sued for pecuniary loss sustained by the death of his wife, not stating the facts or evidence.

In *Boulter* v. *Webster*, 13 W. R. 289, the father sued for the death of his child. The jury found no pecuniary damage in respect of the child's present or future earnings. They gave £5 for funeral expenses and £2 for medical attendance. Cockburn, C. J., directed a verdict for defendant. The Court held it right, Blackburn, J., adding that there could not be nominal damages, as the only right was given by statute, the law not implying damage in such a case.

In *Condon* v. *Great S. & W. R. W. Co., of Ireland*, 16 Ir. C. L. 415, the mother, a widow, sued for the death of her son, a small boy of fourteen. Although not actually earning wages, it was sworn that he might earn sixpence a day. Verdict, £10. The judgment of the Court is very full, and in accordance with the English cases cited, and they refused to interfere—the charge being correct. It had been shewn that the boy had been in the habit of rendering small services to his parents. The Court further says: "It was suggested that any service, however small, of the deceased, which had been withdrawn from his mother by his death, such as might, if rendered by a daughter to a parent, enable the parent to sustain an action for her seduction, would constitute a sufficient ground to entitle the plaintiff to damages in such a case as the present. We desire not to be understood as giving any sanction to that argument. Between the small amount of service which may be sufficient in many cases to save the plaintiff from a nonsuit on the technical ground on which the action of seduction is still held unsustainable without some proof of service, * * and the pecuniary loss which must be proved in an action on Lord Campbell's Act, there is no sort of analogy."

Our text books do not discuss the question very fully. They merely give us the result of the decided cases: *Saunders* on Negligence, 229; *Campbell* on Negligence, 20; *Addison* on Torts, 404; *Mayne* on Damages.

The American Courts seem to have taken a more extensive view of the right to damages in this class of cases. The remedy is governed by statutes of the different States.

The subject is discussed in 2 *Sedgwick* on Damages, 534, 7th ed., 1880.

He points out that in New York and most of the States the damages are given for pecuniary injuries only. In New York the statute says: "The jury may give such damages as they shall deem a fair and just compensation, not exceeding $5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person."

In *Tilley* v. *Hudson River R. W. Co.*, 24 N. Y. 471, 1862, the husband sued for damages for his wife's death leaving five children, four minors, the youngest nine years old.

It was held that the value of her earnings and the probability that the children would have received an estate increased by such earnings on the death and intestacy of the father, could not be considered—it was too remote.

Denio, J., says, "The word pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most grievous and painful to be borne, cannot be measured and recompensed in money. It excludes also those losses which result from deprivation of the society and companionship of relatives, equally incapable of being defined by any recognized measure of value."

But he considered the loss of nurture, of intellectual, moral, and physicial training, and of "such instruction as can only proceed from a mother," as essential to the future well being of the children, as falling within the term pecuniary as used in the statute.

Three Judges concurred in this, two dissented.

This decision is followed in *McIntyre* v. *New York Central R. W. Co.*, 37 N. Y. 289, and the same principles expressed. There the mother out of her earnings provided clothes, &c., for some of her children living away from her. This was held a pecuniary loss.

In *Mitchell* v. *New York Central R. W. Co.*, 2 Hun 535,

the husband sued for the death of the wife. No pecuniary damage was shewn, nothing beyond that she was his wife, 22 years of age. The Court held there could be no recovery.

Mr. *Sedgwick* says that the doctrine of Denio, J., seems to have been generally adopted by the Courts.

He says, "The decisions are not in entire harmony, and many of them go further in the allowance of damages than a correct interpretation of the statute would seem to justify."

In *Dickson* v. *New York Central R. W. Co.*, 23 N. Y. 158, the husband could not recover for loss of his wife's services, as the statute only applied to the widow and next of kin, and he did not come under that description.

I am unable to find anything in my examination of the authorities binding upon us to support a claim by the children of a deceased mother, unless such claim be based on pecuniary loss, such as the benefit of separate property of the mother or of her earnings, which had availed for the support, comfort, or education of the children.

However great the loss may be of a mother's care, instruction, or moral training, I consider that this statute gives no claim therefor according to the interpretation that has been heretofore put upon it.

Where income has been lost or lessened by the death of the parent, then, as pointed out in the words already cited from *Pym* v. *Great Northern R. W. Co.*, the benefit of education and the enjoyment of the greater comforts and conveniences of life depending on the possession of pecuniary means may be considered in estimating the damages.

If we are to attempt to estimate the value of a mother's care for her children, apart from her enjoyment of pecuniary means, it seems to me that we at once plunge into the difficulty which the Courts in England seem to have steadily refused to encounter. It would be as hard a task for a jury to place a value upon a mother's care, &c., as to estimate the amount proper to be awarded for the sorrow and affliction caused by the loss of affectionate relatives. Sir John Coleridge, in *Blake* v. *Midland R. W. Co.*, point-

edly shews the grave difficulties in the way of such estimates, and the danger of allowing such claim for damages on an Act equally applicable to a small tradesman sending out a cart in charge of an apprentice as to a great railway company.

The differences between a good and loving mother and a careless indifferent mother would have to be considered, and also whether the care and training of the deceased parent could not be obtained from some other source much to the advantage of the children.

I am unable to adopt the ruling of Denio, C. J., either as in accordance with the law of England or my own judgment, as to the proper construction of the statute.

The plaintiff holds the office of city clerk in Ottawa, at a salary of $1,600; his age, 62; that of his wife, 53.

She was shewn to have been an excellent mother, and careful in her care of her children. She managed the household with the aid of a domestic servant.

Damages were claimed in respect of all her children, the eldest, a married daughter, aged 30, the next a son of 22, having separate employment, but living at home. It was said that she assisted the daughter to the extent of $100 a year, and the son $50 per year.

The jury did not allow anything for either of these children. They gave $600 to the second daughter, who became 21 after the accident, but before the trial.

The jury declared that they did not allow anything in respect of the loss of income from her separate estate.

It appeared that she had raised $1,000 by mortgage on it, which money went to assist her husband, who pays the interest on the loan, and says he has to repay the principal.

It was strongly objected at the trial that no claim for damage was shewn coming under the decisions on this statute.

The jury were charged that the husband could only claim as a money loss the loss of the services of his wife, not for the loss of her society, or for his sufferings from such loss, and they were left to say what value she was

to him, considered to have been as a servant. The learned Judge also said they might consider the saving caused to the father by her attending to the children's education.

As to the claim of the husband for damages, the case presents much difficulty in my mind.

I have not found any case where the husband has recovered expressly on the ground of the loss of the wife's services, or of her having done a servant's work, or saved the expense of employing a servant in the management of the house, or in the education of the children.

It has been decided that a master could not recover for the loss of service caused by the killing of his daughter and servant, where the death was instantaneous from the injury. This was held as late as 1873, in *Osborn* v. *Gillett*, L. R. 8 Ex. 88. The case does not appear to have been under Lord Campbell's Act, but at common law.

Plaintiff claimed for the loss of service and expenses in conveying the body to his house, and the expense of burial.

Plea, that the deceased was killed on the spot.

On demurrer, Kelly, C. B., and Pigott, B., held the answer was a bar. Bramwell, B., dissented.

Lord Ellenborough's *Nisi Prius* decision is cited—*Baker* v. *Bolton*, 1 Camp. 493 : "In a civil Court, the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop with the period of her existence." The husband recovered for his own injuries, and also from the time of the injury to her death, a month or so afterwards.

Bramwell, B., points out, p. 98, that where the injury is from the death of the wife there is no relation of master and servant. "If the wife had lived she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine," &c. And at p. 97: "It is obvious that the case of master and servant raises a different question from that of wife and husband."

Pigott, B., speaking of the recital in Lord Campbell's Act, that no action is maintainable against any person for

wrongfully causing the death of another, says that it gives the remedy "to the deceased's personal representatives for the benefit of wife, husband, parent, and child only. Yet it must be manifest that numerous other cases in which special damages of various kinds are sustained (master and servant being one) must have been present to the minds of the framers of the statute, and if such had been the intention an express remedy would have been afforded in cases where proximate special damage resulted from the death so caused. * * We are not at liberty to disregard the law thus established so long ago and expressly recognized by the Legislature, nor in effect to add, by the decision of this Court, another clause to Lord Campbell's Act."

Kelly, C. B., says that they must leave it to the Legislature to provide for a case like this, and "we ought not to take upon ourselves to create a new cause of action, which would be to make and not to expound the law."

A perusal of this case at once suggests the question, if damages for loss of services, which might in some respect be looked on as pecuniary damage, could be recovered, why was not the action brought under Lord Campbell's Act?

The father is one who may sue for pecuniary damage from the death of his child.

It has the aspect of having been brought at common law, with the knowledge that such damage could not be recovered under the Campbell Act.

The Court specially notice the Act, and speak of not having the right to add another clause to it to meet such a claim.

It is true the declaration is on the relation of master and servant, and for loss of service. There is nothing said as to the action being misconceived, or that it should have been for damages recoverable under the Act.

Then the very learned Baron Bramwell points out that the case of husband and wife differs from that of master and servant, and involves a different question.

It is difficult to separate the idea of the claim for compensation for loss of the wife's services in managing and

assisting in the performance of household duties, and the claim of a master for the loss of a servant's assistance.

We are told that the husband does not stand in the master's position. His claim must rest on the loss of assistance and help of which, although he could not command, he could reasonably expect to receive the benefit if the life had not dropped, and that this would be in the nature of pecuniary loss and damage, *i. e.*, the loss of money's worth.

The only case in which I have seen a recovery by the husband under the statute was that already noticed of *Cotton* v. *Wood*, where it was proved that the wife earned wages, 10s. per week, which she applied to the family's support.

If there could be a recovery for loss of her services it would be hard to understand the language of Pollock, C. B., in the case already cited, as to a poor man whose wife had been killed being able to recover nothing, as opposed to the case of a rich man sueing for the loss of his wife, who enjoyed a pension. And the same learned Judge expressly states that the husband could recover nothing but pecuniary loss on his wife's death.

It appears to me, on the whole, that Courts from the earliest attempt to claim compensation for the loss of a life under this statute, have steadfastly adhered to the view that pecuniary loss alone was recoverable.

They felt the extreme difficulty of adopting any other basis of damage. Where the husband claims for the wife's loss, the same principle is to govern. It may be said, are not damages given for the loss of the *consortium* in such actions as criminal conversation? To this it may be answered that there is a great moral and social wrong inflicted.

Lord Campbell's Act is, in practice, chiefly applicable to claims for unintentional killing, and we cannot too often refer to the language of Sir John Coleridge, already cited, that the right to compensation equally applies to the small tradesman sending out his cart, or the farmer entrusting his waggon and horses to a teamster, as to the great railway

companies. It may with much reason be urged that there ought to be some sharply defined rule for estimating the damages recoverable for unintentional negligence which, if left at large to the sympathetic feelings of jurors, might be pressed to ruinous amounts.

On the whole, I think a nonsuit should be entered.

As already pointed out, we cannot reduce the verdict to nominal damages.

The plaintiff Hinton was injured by the same accident which was fatal to Mrs. Lett.

The case went to the jury on the question of negligence, subject to all the same objection and the same direction as were given in the other case.

The learned Judge was pressed by plaintiff's counsel to rule that the third rail was laid by defendants without authority, and that its being there was a wrongful act by defendants, aud that as the train causing the accident was on that third rail they must be thereby liable therefor.

The learned judge refused so to direct. He said that in his opinion the defendants had no right or lawful authority to lay down that rail, but that was not to be the test of liability: that the question was, whether the accident was caused by defendants' negligence, and that negligence was the question for the jury.

We have carefully examined the charge, and we have fully discussed it with the learned Judge, and he has satisfied us that he did not in any way leave it to the jury as depending on the lawfulness or unlawfulness of this third rail. Its existence was remarked on as an element in considering the danger of the crossing, and properly so in my opinion, as it most probably had the effect of increasing the risk to persons crossing there: it diverged from the main line, coming much nearer to the angle of the buildings, and a train running upon it towards the station-yard would not be seen by persons crossing at so great a distance as a train running on the main track, and would be, as it were, sooner upon them.

We do not therefore think that his charge is open to the

objection urged; and even if we thought his opinion so expressed as to this third rail was wrong, we do not think we should, therefore, disturb the verdict.

It seems a case that we may consider as coming within the 289th sec. of the C. L. P. Act: "A new trial shall not be granted on the ground of misdirection * * * unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned on the trial of the action."

If the learned Judge had actually ruled as is suggested by defendants, I think it would have been wrong. The third rail had been in use for many years with the full knowledge, and, as I think, with the acquiescence of the corporation, and the plan shewing its existence was produced from their official records, and in the absence of any interference by them or the Crown, I cannot understand that its user must, by itself, apart from negligence, render the railroad company responsible for an accident like this. But such was not, as we think, the direction given to the jury.

But where neither the government, under the general law, nor the corporation, had ever interfered to prevent this, I hardly see how, after many years user, the right of a private person to recover against the company for negligence in working this railway, can be made to depend on the absolute lawfulness or unlawfulness of this third track.

Being there, it may have increased the danger of the crossing, and may have called for extra care and precaution; but the mere fact of an accident happening by a train running on it cannot alone give a right of action.

There was quite sufficient evidence in plaintiff's favour to support her verdict, the damages are confessedly moderate, and we do not think we should interfere.

CAMERON, J., concurred with Hagarty, C. J., being of opinion, in *Lett* v. the above named defendants, that the children had no right to compensation, but doubted whether the husband had not.

In *Hinton* v. the same defendants, he also concurred with Hagarty, C. J.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

LOTT V. DRURY.

Slander—Imputation of Insolvency—Actionable words—Nonsuit.

The defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers (meaning the plaintiff) had run away owing money to him and others: that he, the defendant, had come in to catch the plaintiff, but that he had gone or cleared out. At the trial a nonsuit was entered, on the objection that the words were not shewn to have been used with reference to the plaintiff's business, and no special damage was proved.

Held, that the nonsuit was wrong, for the words used cast an imputation upon the solvency and financial standing of the plaintiff, and it was for the jury to say whether they were spoken in reference to his business, and calculated to injure him therein.

SLANDER of the plaintiff in his trade and business as a miller and grain buyer, the words being to the effect that one of the big millers—naming the plaintiff as the one indicated—had run away owing money to defendant and others: that defendant had come on to catch the plaintiff, but that he had gone or "cleared out."

The case was tried at Barrie, before Burton, J. A., and a jury.

It was proved that the plaintiff carried on business as a miller, grinding for farmers, and buying and selling grain: that he had dealings with defendant, who was pressing him for payment of a debt: that defendant stated that the plaintiff, a big miller, naming him as such, had run away—had cleared out, &c.

No special damage was proved with any clearness.

It was objected that there was no case to go to the jury: that the words complained of were not used in reference to the business or professional capacity of the plaintiff; and that he was confined to special damages.

The learned Judge ruled that the words were not shewn to have been spoken, as alleged, in reference to the business or occupation of the plaintiff, and that there was no evidence for the jury of special damage, and a nonsuit was entered.

November 23, 1882. *Lount*, Q. C., moved to set aside the nonsuit.

November 29, 1882. *Lount*, Q. C., supported the order *nisi*. The words certainly affected the plaintiff's business *status*, and are therefore clearly actionable, and the Judge was wrong in his ruling, and the nonsuit should be set aside: *Davis* v. *Lewis*, 7 T. R. 17; *Jones* v. *Littler*, 7 M. & W. 423.

McCarthy, Q. C., contra. The words were not defamatory. A late case is *Miller* v. *David*, L. R. 9 C. P. 118. Then see *Doyley* v. *Roberts*, 3 Bing. N. C. 835, where they were not held actionable. See also *Lumby* v. *Allday*, 1 Cr. & J. 301.

December 30, 1882. HAGARTY, C. J.—In *Lumby* v. *Allday*, 1 C. & J. 301, some very abusive words, imputing incontinency, were spoken of plaintiff, who was a clerk in a gas company, and it was charged that the words were designed to shew that he was unfit for his situation, and of bad character, &c. A nonsuit was asked and refused, and the jury were told to find for the plaintiff if they thought the words might probably have occasioned the loss of his situation, and the plaintiff had a verdict. Leave was reserved.

A rule to set aside the verdict and enter a nonsuit was discharged, because it was held there could not be a nonsuit where the facts in the declaration were proved, but they granted a rule to arrest judgment. This technical rule as to nonsuiting does not now exist.

Bayley, J., said: "Every authority which I have been able to find, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputa-

tion with the plaintiff's office, trade, or business." He held the action not maintainable, because there was no imputation on his conduct as a clerk, or implying the want of any qualities a clerk should possess.

Ayre v. *Craven*, 2 A. & E. 2, quotes this rule of Bayley, J., and on demurrer a declaration was held bad, as not shewing that the scandalous conduct (adultery by defendant, a medical man,) was imputed to him in his profession, and did not set forth in what manner it was connected by the speaker with that profession.

Doyley v. *Roberts*, 3 Bing. N. C. 835, was an action by an attorney charging that words declaring that he had defrauded his creditors and been horsewhipped off the racecourse, were spoken of him of and concerning him in the way of his profession and business. Parke, B., left it to the jury, who found, in answer to questions, that the words were not spoken of him in his business of an attorney, but had a tendency to injure him morally and professionally, but negatived special damage attempted to be proved, and a verdict was entered for the plaintiff, with leave to move. After argument, Tindal, C. J., said: "There was evidence to go to the jury whether or not the words were spoken of the plaintiff in his profession, and that question the Judge was obliged to leave to the jury."

The jury found they were not spoken of him in his business of attorney. The Court therefore arrested judgment.

Miller v. *David*, L. R. 9 C. P. 118, was on demurrer to a declaration. Judgment was for defendant, the words not being in themselves defamatory, nor connected by averment or implication with plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them. The Court say that the language of Bayley, B., in *Lumby* v. *Allday*, has since been repeatedly approved of.

Jones v. *Littler*, 7 M. & W. 423, (decided in 1841,) is the nearest to the present case. The plaintiff was a brewer: the words were to the effect that Mr. Jones had been in a

sponging house for debt within the last fortnight. Defendant was asked did he mean Mr. Jones, the brewer, of Rosehill, and he answered yes. The words were charged as being spoken of the plaintiff in the way of his trade as a brewer. The case was tried before Rolfe, B., who stated (p. 425) that he "put the question to the jury whether the words were spoken of the plaintiff in his trade, and they found that they were."

No special damage was proved. A nonsuit was asked and refused, and the plaintiff had a verdict, which the Court refused to disturb.

Parke, B., said: "The case of *Stanton* v. *Smith*, 2 Ld. Raym. 1480, is directly in point. It was there held actionable to say of a tradesman, 'He is a sorry, pitiful fellow. He compounded his debts at five shillings in the pound;' though there was no *colloquium* of his trade; but if the question was put to the jury, and they found it to have been spoken of the plaintiff in his trade, there is an end of the matter."

The learned Baron, in giving judgment says: "It is quite clear the rule ought to be discharged, for the only ground on which it was granted has failed, inasmuch as the learned Judge did leave the question to the jury whether the words were spoken of the plaintiff in his trade; and indeed it is plain that the words were so used from the fact that in the conversation in question the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton* v. *Smith* is an authority to shew that the words would have been actionable, because they must *necessarily* affect him in his trade. It is there said, 'We are all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore they were actionable.'" He distinguishes *Ayre* v. *Craven*, 2 A. & E. 2, and *Doyley* v. *Roberts*, 3 Bing. N. C. 835, and adds, "But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious;

for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton* v. *Smith* appears to me to be good law notwithstanding the observations of Coltman, J., in *Doyley* v. *Roberts*."

Lumby v. *Allday* is noticed in the argument.

Assuming this to be good law, it would seem impossible to distinguish it in substance from the present case. If the defendant said of the plaintiff, naming him as one of the big millers, that he had run away owing money to defendant and others: that he had come in to catch him, but believed he had gone: that he was "clearing," &c., it seems to have been at least as direct an imputation on his solvency and financial standing as to impute that he had been arrested for debt, or had compounded for 5s. in the £.

The law as propounded by Lord Wenslydale—and few could speak with greater authority on such matters—is quite consistent with the approved doctrine of Bayley, B. It is necessary either to shew an imputation of the want of some general requisite, as honesty, capacity, fidelity, &c., *or* the words must connect the imputation with the plaintiff's office, trade or business.

The latter clause of the rule I think clearly covers a case like that before us. See also *Davis* v. *Lewis*, 7 T. R. 17.

The subject is fully discussed, and the cases reviewed in *Folkard*, 123, *et seq.* *Starkie*, 159, is to the same effect.

We are of the opinion that the case should have been left to the jury. The authorities shew that it is for them to say whether the words proved were spoken in reference to plaintiff's trade and business, and calculated to injure him therein.

Of course a man may say of a trader that he has run away or cleared out, and it may appear in evidence that they were not spoken in reference to his trade or his credit, but in reference to his leaving for some reason wholly unconnected therewith, *e. g.*, on some personal criminal charge. All this would be for the jury.

It is not necessary that the words should disparage the plaintiff as to his unfitness for business, want of capacity, or unskilful conduct therein. It is sufficient to maintain an action to impute insolvency, or anything calculated to impugn his financial credit or standing. Special damage is not necessary to be proved.

The nonsuit is set aside, costs to be costs in the cause.

ARMOUR and CAMERON, JJ., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA v. CHAPMAN.

Selling land by auction—Conviction—Interest of magistrate—Quashing conviction.

The defendant, having sold land by auction under a decree of the Chancery Division, was convicted of a breach of the by-law of the county of Huron, passed pursuant to the Municipal Act, R. S. O. ch. 174, sec. 465, sub-sec. 2, providing that it should not be lawful for any person to sell by public auction any wares, goods, or merchandise of any kind without a license.

Held, that the conviction was clearly bad, for the by-law did not refer to lands; nor would the statute have authorized such a by-law.

Two of the four convicting Justices were licensed auctioneers for the county, and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one Justice.

Held, that they were disqualified, and in quashing the conviction on that ground, also, the Court ordered them to pay the costs.

THIS was a motion to quash a conviction of the defendant, "for that without license or legal authority he offered for sale and sold by public auction certain lands in the township of Wawanosh, in the county of Huron, being at the time of such sale an unlicensed person for the sale of property or premises by auction in the county of Huron, contrary to the by-law of the county and the statutes of this province, in that case and provided."

Several objections were taken to the conviction. The only ones which need be referred to were: (1) That two of

the four convicting Justices were disqualified by reason of interest, being themselves licensed auctioneers for the county of Huron. (2) That neither the statute nor the by-law under which the magistrates convicted, required an auctioneer's license to be taken out for the sale of real property.

It appeared that the defendant was not a licensed auctioneer, and that he had been appointed by the local Master at Milton to sell certain land by auction, under a decree for sale in a cause in the Chancery Division of the High Court. Under the order of the Master he accordingly sold the land in question by auction. An information was laid against him for selling as auctioneer without license. Four magistrates sat to hear the case. The facts were admitted, and objection was then taken to any Justice acting who was himself an auctioneer. Two of the Justices were licensed auctioneers for the county. The objection was overruled, and all four Justices heard the case, convicted the defendant, and imposed a fine of $26 and costs.

December 22, 1882. *Aylesworth* supported the motion. No one appeared contra.

January 9, 1883. OSLER, J.—The Municipal Act, R. S. O. ch. 174, sec. 465, sub-sec. 2, enacts that the county council may pass by-laws "for licensing, regulating, and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise, or effects by public auction; and for fixing the sum to be paid for every such license, and the time it shall be in force."

The by-law under which the justices have assumed to convict the defendant provides that it shall not be lawful for any person to exercise the calling of an auctioneer, or to expose or offer at public auction any wares, goods, or merchandise of any kind, before having first obtained from the treasurer of the county a license authorising him or her to sell; and that any person "acting, selling, or offering for sale by public auction any goods, wares, or merchan-

dise, or in any way exercising the calling of an auctioneer, without license, shall forfeit $20, with costs, to be recovered before any justice of the peace for the county."

It is clear that this conviction must be quashed. If the by-law had assumed to prohibit any one from selling land by auction without having first taken out a license it would have been illegal, and a conviction under it could not have been supported, because the Municipal Act only authorises the council to pass a by-law relating to and licensing auctioneers or others selling or putting up for sale goods, wares, merchandise, or effects. No license is or can be demanded for the right to sell lands by auction. The by-law in the present case does not go beyond the Act, and there seems to be no pretence whatever for the conviction.

The next question is, whether Messrs. Scott & Holmes, two of the convicting justices, were disqualified from acting by reason of their being themselves licensed auctioneers for the county. I think they were disqualified, and could not with propriety have taken any part in the proceedings. They had, it is true, no direct pecuniary interest in this particular case, but they are indirectly interested in the result of it, in so far as it was to their interest either to limit the number of persons acting as auctioneers in the town of Wingham, or to confine the business of selling lands by auction to persons holding, as they did, auctioneer's licenses.

In *The Queen* v. *Justices of Great Yarmouth*, L. R. 8 Q. B. D. 525, the chairman of the magistrates, at a special sessions for the hearing of appeals against a poor rate, was himself an appellant in one of the cases for hearing, and he took part in the decision of all the cases except his own. When his own case was called on he left the bench and went into the body of the Court, and conducted the case himself. It was held that being a litigant in a matter similar to the other matters before the Court, he was disqualified from acting as a justice in those matters. Field, J., said: "The administration of justice ought not only to be pure

in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that unconsciously to himself a bias adverse to the due administration of justice might take possession of his mind."

In *The Queen* v. *Meyer*, L. R. 1 Q. B. D. 173, Blackburn, J., at p. 177, said: "The question is was Mr. Meyer really substantially interested, though not in a pecuniary sense, in the proceedings as to which these informations were one step, so as to be likely to have a real bias in the matter? * * In the case of a justice having any pecuniary interest, the Court was compelled to quash the conviction; but though disqualifying interest is not confined to pecuniary interest, the, interest if not pecuniary, must be substantial. The effect of our judgment in *Regina* v. *Rand*, L. R. 1 Q. B. 230, was that, though pecuniary interest in the subject matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not *ipso facto* avoid the justices' decision; and we thought that though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias."

I think the proceedings in this case disclose a strong probability of the existence of a real bias on the part of the two justices who were objected to, arising from their indirect interest in the proceedings."

On both grounds the conviction must be quashed.

As to costs. The rule *nisi* asks for costs, and though it is not usual to give them on quashing a conviction, there is no inflexible rule on the subject. See *Regina* v. *Johnston*, 38 U. C. R. 556; *Paley* on Convictions, 5th ed., 437. These two Justices persisted, contrary to the defendants' objection that they were disqualified, in sitting with two other Justices and hearing and determining a case which might

have been disposed of by one Justice only, and where, therefore, their presence, besides being improper, was entirely unnecessary. In *The Queen* v. *Meyer*, *supra*, costs were given against the Justice under similar circumstances on quashing the conviction, and I can see no reason why the defendant should not have them in the present case. Following that precedent, I make the rule absolute, with costs against Scott and Holmes.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

RE ELLIS P. PHIPPS.

Extradition—Ashburton Treaty—Forgery.

The prisoner was the superintendent of an almshouse in the city of Philadelphia, U. S., which was supported by the city. Certain persons furnished goods to the almshouse and were entitled to receive warrants for the price thereof. These warrants, duly prepared and signed in favour of the parties entitled, were in the hands of W., the secretary of the almshouse, to be delivered to the proper parties on their signing the counterfoils of the warrants. The prisoner obtained possession of the warrants by falsely representing to W. that he had authority to sign the names of the respective parties entitled, and by signing such names on the counterfoils. The warrants were then cashed at the city treasury.

The district attorney of Philadelphia, who was examined before the County Judge, swore that according to the criminal code of Pennsylvania, established by statute there, which was produced, and at common law, as there interpreted, the facts shewn made out the crime of forgery.

Held, CAMERON, J., dissenting, that the offence amounted to forgery within the meaning of the Ashburton Treaty, and that the prisoner should be remanded for extradition.

Per HAGARTY, C. J.—The evidence disclosed a *primâ facie* case of forgery sufficient to warrant the commitment for trial of the prisoner if the crime had been committed in Canada.

Per ARMOUR, J.—The treaty was not intended to include the crime of forgery only where that crime is common to both countries. In framing the treaty the high contracting parties were dealing both with the present and future, and the general term forgery should include every thing in the nature of forgery, and which thereafter might be held to be forgery at common law by the decision of the Courts, or might be declared to be forgery by the statute law.

Per CAMERON, J.—The statutory crime of forgery is the only kind of forgery within the treaty, but it was not intended to embrace any act or offence made forgery by any statutory law of either nation passed

after the execution of the treaty. The offence in this case was the obtaining a cheque by falsely pretending that the prisoner had authority to sign the counterfoil, and was not within the treaty.

Held, also, that the original warrant, within the meaning of 31 Vict. ch. 94 sec. 2 (D.), is not the first of two or more consecutive warrants, but is any warrant issued in the United States of America.

Ellis P. Phipps, the superintendent of the Blockley Alms House, Philadelphia, was arrested at Hamilton for forging the names of Seeds & Ferguson, A. J. Bellows & Co., and Walter L. Murphy, on 1st September, 1882, to receipts for money warrants, amounting to $595, $377.80, and $389, respectively, payable to them, or bearer, as contractors for goods furnished by them to the alms house, by means of which forgeries the prisoner obtained the amounts payable to them under the warrants, in fraud of the city of Philadelphia and the contractors.

The prisoner was brought before James Shaw Sinclair, Esq., the Judge of the County Court of the county of Wentworth, on 26th September, 1882, who, after several examinations, in which three different sets of evidence were taken, committed him for extradition.

1. The first set of evidence, "A," was a transcript of the depositions of the witnesses upon whose testimony a bill of indictment had been found by the grand jury of the Court of Oyer and Terminer, in Philadelphia, in September, 1882. These witnesses were sworn before the Clerk of said Court, at Philadelphia, and their evidence reduced to writing and signed by each of them, and they were then, taken before the grand jury and re-sworn, and their depositions read over in their presence to the grand jury, who thereupon returned a true bill against the prisoner for the forgeries in question. A bench warrant for the apprehension of the prisoner was then issued upon the indictment, which warrant was also produced. George S. Graham, the District Attorney for Philadelphia, was present and personally superintended the whole of these proceedings, and he attended at Hamilton and proved the same before the County Judge.

2. The second set of evidence, "B," consisted of the depositions of the same witnesses and other witnesses, proving

the offences charged, taken on 30th September, 1882, before the Hon. Joseph Allison, President Judge of the Court of Common Pleas, at Philadelphia, and certified by him to be the original depositions so taken, upon which he issued a warrant (also produced) for the apprehension of the prisoner. These proceedings were also all taken in the presence of Mr. Graham, who attended and proved the same before the County Judge on 6th October, 1882.

3. The third set of evidence, "C," consisted of copies of the second set of proceedings, certified to be such copies and proved in like manner by Mr. Graham on 6th October, 1882, before the County Judge.

The facts fully appear in the following judgment of the learned County Court Judge:

SINCLAIR, J.—The prisoner is confined in [the common gaol of the County of Wentworth under a warrant issued on three several charges of forgery, said to have been committed by him in the city of Philadelphia, in the State of Pennsylvania, on the first day of September, 1882. The proceedings in this country were instituted under the statutes giving effect to the treaty ratified on the 30th of October, 1842, popularly known as the Ashburton Treaty.

The information of one Percival E. Bell, a detective, was taken before me on the 26th of September, 1882, wherein he swore that he was informed and believed that Ellis P. Phipps, late of Philadelphia, in the State of Pennsylvania, one of the United States of America, a person found within the limits of Canada,, to wit, in the city of Hamilton, did theretofore, to wit, on the 1st of September, 1882, commit the crimes of forgery and the utterance of forged paper within the jurisdiction of the United States of America, to wit, at the said city of Philadelphia, for that the said Ellis P. Phipps did, at the date last aforesaid, and at the said city of Philadelphia, feloniously forge a certain written instrument in the words and figures following, that is to say:—

"GUARDIANS OF THE POOR.

$595 $\frac{\times}{100}$ 3/27 - 1882.

No. 968.

Item. Seeds and Ferguson.

Received above Warrant.

SEEDS AND FERGUSON"—

to the prejudice of the said Seeds and Ferguson, and with intent to defraud, said written instrument being a receipt for a certain warrant for the payment of the sum of $595 for goods and merchandize theretofore supplied by the said Seeds and Ferguson to a certain institution for the

care of paupers, in the city of Philadelphia, and known and called "The Blockley Almshouse," which said institution was then and there under the control of a body of persons known as the Board of Guardians of the Poor, and for the payment of which sum the said warrant had been duly drawn in favour of the said Seeds and Ferguson by the said Board of Guardians of the Poor upon the Treasurer of the said city of Philadelphia.

The second charge of forgery and the utterance of forged paper, as disclosed by the information, is in terms the same as the first charge, setting forth the alleged commission of such crimes by the forgery of a similar receipt in the name of one A. J. Bellows for a similar warrant, payable to the firm of A. J. Bellows & Co., for the sum of $377.80.

The third and a similar charge to the other two is that of the prisoners having, with a like intent, forged the name of one W. L. Murphy to a similar receipt for a warrant payable to Walter L. Murphy, for $389.

These last two forgeries are charged to have been committed by Phipps at the same time and place as the first offence charged.

The oral testimony given by Mr. Graham, the District Attorney for the county of Philadelphia, and the depositions admitted in evidence, (subject to the objection of counsel for the prisoner to their proper reception,) disclosed the following facts. That at the time of the alleged forgeries the prisoner was the Superintendent of the Blockley Almshouse, a charitable institution supported by the city of Philadelphia: that such institution was managed and controlled by twelve gentlemen appointed by the Municipal Council of Philadelphia, who were known and called the Board of Guardians of the Poor: that during such superintendency by the prisoner certain persons became contractors to furnish goods and merchandize to the almshouse, and that they did furnish the same and were entitled to receive from the city certain sums of money therefor. The evidence further disclosed the fact that such contractors were Walter L. Murphy, Seeds and Ferguson, and A. J. Bellows & Co., and the same persons whose names the information charged the prisoner with having forged, and who were respectively entitled to receive for the goods and merchandize so delivered the respective warrants, and for the respective amounts which the information charged as their being entitled to receive: that such warrants were duly drawn, signed and countersigned, and numbered 968, 969 and 972, in favour of said parties: that such warrants were in the hands of one R. S. Williamson, the Secretary of the said Board of Guardians, to be delivered to them upon each person or firm signing a marginal stub such as that set out in the foregoing description of them in the information: that the prisoner obtained possession of the warrants by falsely representing to Williamson that he had the authority of the respective persons entitled to such warrants to sign such receipts in their names, which as a fact the depositions shew he had not: that on getting possession of the warrants he, or some one to whom he transferred them, obtained from the funds of the city of Philadelphia the respective amounts for which they were drawn. Subsequently the prisoner went to Murphy's office and paid him the money, which he, (Phipps) had received on Murphy's warrant. In the other two cases of A. J. Bellows & Co. and Seeds

and Ferguson, no part of the moneys had been paid back. The depositions further shewed that the Board of Guardians as such had charge of the almshouse and cared for the same, and received the accounts from all persons furnishing materials or supplies, and they had authority to approve or reject such accounts, and when approved to present the same to the Board, so that warrants or orders might be drawn on the city Treasurer for payment of the same: that the warrants in all cases were countersigned by the city Comptroller and held by the Secretary of the Board, and only to be delivered by him upon a receipt being given by the person entitled thereto.

The depositions of Walter L. Murphy, Andrew J. Bellows and John A. Seeds, of the firm of Seeds & Ferguson, respectively, shewed that the signatures to the receipts were forgeries, and the deposition of John Huggard, the President of the Board of Guardians, stated that he was familiar with the handwriting of the prisoner and had seen it frequently, and that the names W. L. Murphy, Seeds & Ferguson, and A. J. Bellows were signed to the said receipts by the prisoner. This corroboration is also found in the depositions of William S. Janney, a Coroner of the city of Philadelphia, and William Murphy. It further appeared that these receipts given by the contractors were taken and preserved by the Board of Guardians as vouchers or evidence, if necessary, of the due payment by them of moneys to which parties may be entitled.

The first depositions, which were filed on this investigation on the 26th of September last, were taken at Philadelphia on the 19th of that month. There is appended to them the certificate of Judge Allison as Judge of the Court of Quarter Sessions for the County of Philadelphia, verifying such depositions and stating the fact that a true bill for forgery had been found against the prisoner at such Court. No warrant appeared to have issued upon such depositions.

The second set of depositions appeared to have been made on the 30th of September last, and to which was attached a warrant for the apprehension of the prisoner for the alleged forgery of the instruments described in the depositions, under the hand and seal of Joseph Allison, one of the Judges of the Court of Quarter Sessions for the County of Philadelphia, and as such a Justice of the Peace in and for the County and City of Philadelphia, dated the 4th day of this present month of October.

It was strenuously urged by Mr. Osler for the prisoner that neither of the sets of depositions should be read. Counsel gave several reasons for their rejection on account of their informality. The statutes allowing deposition testimony to be given in such cases as this are remedial in their nature, and should be construed with reasonable liberality. We should be slow to exclude them because in form not according to our practice and open to objections more of a technical than a substantial nature. No particular form of caption, jurat or other part, is prescribed by any statute, and if a substantial compliance with the law is observed, that, I think, is all that is required.

It is proved by Mr. Graham, one well competent to give an opinion on the subject, that these depositions were duly taken according to the law

and practice which obtain in the State of Pennsylvania. When he says, for instance, that A. Wilson Henozey, who signed "pro Clerk", had, under the circumstances, authority to take the oath and subscribe the depositions, I think I must assume that he had. See *In re Counhaye*, L. R. 8 Q. B. 410; *Reg.* vs. *Browne* 31 C. P. at page 497.

After referring to the different statutes bearing on the question of the depositions, and in view of the recent case of *Regina* vs. *Browne*, 31 C. P. 484, 6 A. R. 386, I am of opinion that I should not reject these depositions and discharge the prisoner on the objections taken to their formality. See *In re Tivnan*, 5 B & S. 645—67 5. It was urged by Counsel that the prosecution should have produced oral testimony to establish the offence, and that the prosecution was instituted for political purposes. Were I to give effect to the first objection the statutes might as well be repealed, which allow depositions to be received, and as to the second, it is an argument that can find no place in my judgment.

This brings me to the question whether the depositions and oral testimony make out a case of forgery, as understood by the high contracting parties to the treaty, in the light of the criminal law as generally understood by both countries at the time of the treaty in reference to the prescribed offences.

It was strongly argued for the defence that if the Legislature of Pennsylvania had changed the character of the crime of forgery and made it a different offence to what it was when the treaty was confirmed, that in so far as that State of the American Union was concerned, and for that particular offence, there could not be extradition.

On cross examination of Mr. Graham, prisoner's Counsel proved the criminal code of Pennsylvania as applicable to the crime of forgery *by statute*, and a copy of the Act was put in as admittedly showing what the statute law there was on the subject. Mr. Graham admitted it to be so, but at the same time stated that the offence disclosed was one for which the prisoner could be tried under the statute or at Common Law.

If I might be permitted to express an opinion on the construction to be placed on the 169th section of this code, in view of the 164th and other sections up to and inclusive of the 178th, and independently of the expert testimony of Mr. Graham, I would say that I do not think forgery at Common Law is a thing of the past, or that it was legislated out of existence by the sections of this code to which I was referred. But in any view of it I do not see what difference the provisions of this criminal code can make in this case. It was urged that forgery was by the 169th section reduced from the rank of felony to the lower grade of a statutory misdemeanour. Forgery was only a misdemeanour at Common Law, and I cannot find it declared either in the treaty itself or in any of the Imperial or Canadian statutes enacted for carrying out its provisions that it should only apply to cases of forgery declared to be felonies. The changing of the name of the offence or lessening the degree of punishment cannot change the offence itself. It is to the facts we must look, and by whatever name the offence may be called in any particular State, we must

determine whether after all such facts make out the charge of forgery as understood by the contracting parties in 1842. See *In re Caldwell*, 5 P. R. 217.

During the argument Mr. Osler argued so earnestly in support of his view of this question that I asked him if the Legislature of Pennsylvania could virtually abrogate the treaty in its application to crimes committed within that State.

He admitted that such could virtually be done if his argument was correct. But that view of the question must have been urged without the light of well recognized authority. I find a clear answer to that argument in the case of *In re Windsor*, 6 B. & S. 522. At page 528 Cockburn, C. J., says: "The true construction of this statute," (the Extradition Act, 6 & 7 Vict. ch. 76.) "is that its terms, specifying the offences for which persons may be given up, must be understood to apply to offences which have some common element in the legislation of both countries. And where a part only of one of the two nations thinks proper to make certain acts an offence which do not fall within that offence as known to the general law of both, it will not be sufficient to bring a case within the statute." Further on the same learned Judge, in the same case, says: "We ought to interpret the statute according to the intention of both parties, and it would be going far to assume that before passing it the Legislature of this country went into an elaborate enquiry as to what by the law of every State of the American Union amounted to forgery, and made this statute with the intention to include each of them within its operation. I believe that in point of fact that was not done, and we ought not to assume that it was. We must assume that the terms used by the parties to this treaty, especially as they were parties speaking the same language and with laws so like, used them in the sense which they bear in our own law and in the law of the United States, and not in that which they have in any particular State of the Union."

Blackburn, J., in the same case, says: "We have only power to surrender under Statute 6 & 7 Vict., ch. 76, which does not say that all criminals are to be given up, but that for some specified crimes they may. The crimes thus specified are those defined in a treaty previously entered into by the two high contracting parties. The charge against the applicant is, that being a clerk in a bank he did embezzle or steal a large sum of its money; that he made an entry in a book stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to forgery. Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. Telling a lie does not become forgery because it is reduced to writing. Here this man has not made any false statement purporting to be on behalf of any other person, but a statement purporting to be what it is. It is true the statute of New York says that such conduct shall be deemed forgery in the third degree, and observations have been made to shew that the act done here was not within that statute. I am inclined, however, to think it was; but then, does the New York Statute saying this make him guilty of forgery within the meaning of

the Extradition Act? Two very high contracting parties make a treaty on which the Extradition Act is founded; but we must construe that treaty according to the words used by them when fairly understood, especially when we find both peoples speaking the same language. Forgery is one of the crimes specified, and that must be understood to mean any crimes recognized throughout the United States and in England as being in the nature of forgery.

'Piracy' is another, which means offences committed on the high seas, and it is so understood by both. But I do not think, if either country were to say that some crime committed on land should be piracy, this would come within the meaning of the treaty. The meaning of the New York Statute is, the party shall be punished *as if for forgery*. I, therefore, agree with the Lord Chief Justice."

Such is the opinion of two very eminent Judges on the question of enlarging the operation of the treaty, and the principles they enunciate must have equal application to a case of this kind, where it is contended that one of the American States can, within its jurisdiction, restrict or even abrogate and annul the provisions of the treaty. A very different question would arise if it could be shewn that on the facts appearing here this case never was within the treaty. See Imperial Act 33 & 34 Vict. ch. 52, sec. 9. It is not under any treaty with the State of Pennsylvania (if that were possible), that rendition is asked for here. It is not by the Governor of that commonwealth that extradition is sought, but it must be by the President of the United States, the executive of that power which was one of the contracting parties, and for an offence which, at the formation of the treaty, was from the genius of the law of both countries understood to be forgery.

No power is reserved to any dependency of Great Britain, or any State of the American Union, to abridge, restrict, or change any part of the solemn compact of the two nations.

The 10th article of the treaty and the 1st section of our Act 31 Vict. ch. 94, declare that the right of extradition can only be invoked upon evidence of criminality according to the laws of the place where the fugitive or person charged should be found, and which should there justify his apprehension and commitment for trial if the crime or offence had been there committed. (See also the recital to the Imperial Act 6 & 7 Vict. ch. 76.)

This brings us to the question whether or not a *primâ facie* case for forgery has been made out, (*In re Bennett G. Burley*, 1 C. L. J., N. S. 34). I do not propose to go over the definitions of forgery as given in several works on "Criminal Law," but take these definitions which I find in the latest reported case that I have been able to discover. In *The Queen* v. *Ritson*, L. R. 1 C. C. at page 203, Kelly, C. B., thus defines the crime. "The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but, adopting the correction of my brother Blackburn, that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists

in the fact that it is made in a false name, or that the pretended date when that is a material portion of the deed, is not the date at which the deed was in fact executed."

Blackburn J. says: "There is no definition of 'forge' in the statute" [24 & 25 Vict. ch. 98,] "and we must, therefore, enquire what is the meaning of the word. The definition in Comyn's (Dig. Title Forgery A. I.) is, 'Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another.'"

Forgery is defined in Russell on Crimes, Vol. ii., 5th ed., p. 618, to be, "the fraudulent making or alteration of a writing to the prejudice of another man's right; or, more recently, as a false making, a making *malo animo* of any written instrument for the purpose of fraud and deceit."

Were these receipts "written instruments" within the meaning of these definitions? It was not argued by counsel for the accused that they were not. They were receipts for the money warrants only to be handed to the persons entitled to receive them upon such receipts being first given. They were to be vouchers in the hands of the Board of Guardians for the moneys which they had a right to draw from the Exchequer of the city of Philadelphia, and although contained in a few words and figures, they were as easily understood and as important as if written in the most formal manner. The late case of *Reg.* v. *Harper*, L. R. 7 Q. B. D. 878, shows how far the common law doctrine of forgery has gone. There the prisoner was indicted for forging an indorsement of a bill of exchange, or what purported to be such, the drawer's name not having been placed to it. The Court held that as there was no drawer's name to it the prisoner could not be convicted of feloniously forging or feloniously uttering an endorsement on a bill of exchange under the statute, yet that he might have been convicted of a common law forgery. See, also, *Reg.* v. *Carson*, 14 C. P. 309; *Reg.* v. *Stewart*, 25 C. P. 440, *Reg.* v. *Milton*, 10 Cox, C. C. 364; *Reg.* v. *Smith*, L. & C. 168; *In re Hall*, 32 C. P. 498; *Reg.* v. *Wilson*, 1 Den. C. C. 284; *Flower* v. *Shaw*, 2 C. & K. 703; *Reg.* v. *Griffiths*, Dears. & B. C. C. 548.

The evidence is quite clear that two, at least, of the persons entitled to receive the warrants were defrauded: *Reg.* v. *Boult*, 2 C. & K. 604; *Reg.* v. *Closs*, Dears. & B. C. C. 460.

It was urged, upon the authority of the case *The Queen* v. *White*, 2 C. & K. 404, that as the prisoner had only obtained the warrants by falsely representing that he had the authority of the parties to sign their names to the receipts, it was not forgery: that it was no more than a person without authority purporting to sign the name of another by procuration. I entirely dissent from that view. In the first place, White's case has, in my judgment, no application here. There the facts are quite different to what they appear here. The case can be best understood by extracting the main part of the evidence. The witness, Alfred Thomas Fallows, said: "I am a partner with Mr. Francis Hart in a bank at Nottingham. On the 1st of September 1846, the prisoner came to our bank with this bill, which he asked me to discount. He said he had brought it to be discounted; that he came from Mr. Tomlinson. I called in a clerk named Newton,

who said he knew him; that he sometimes came from Mr. Tomlinson, who was very good; so I discounted the bill. I told the prisoner that Mr. Tomlinson had not endorsed it; he said that Mr. Tomlinson was from home, but that he could endorse it for him. I asked him if he could, and he said yes. I asked Mr. Tomlinson's Christian name; he said 'Thomas,' and I wrote on the bill 'per procuration Thomas Tomlinson'. He said he would sign his name; he did sign his name, and I gave him the money." There the prisoner signed nothing but his own name. It was the banker who had signed Thomas Tomlinson's name, and the Court unanimously held that it was not forgery of Tomlinson's name by the prisoner. But that is not this case. Here the prisoner not only did not sign his own name as acting by procuration, but did sign the names of these parties and them alone to the receipts.

It was also contended that having imposed upon Williamson by the false representation of authority to sign the receipts no fraud was committed, that Williamson not having been defrauded the offence was not complete. That argument cannot prevail. Williamson was the mere servant of the Board of Guardians and they were the trustees of the public, and the prisoner must have known the warrants would be the means of his fraudulently acquiring public moneys which the evidence shews he did so acquire. It matters not, in my judgment, whether Williamson was defrauded or not, and if it be true, as represented by prisoner's counsel, that Williamson was *non compos mentis*, then so much the worse were the acts of the prisoner in obtaining the warrants from such a person.

Many instances might be given of the unsoundness of this argument. Take the ordinary case of a person obtaining possession of an ordinary post-office money-order, payable to another, and suppose that he represents to the post-office clerk that he has authority to sign the right person's name to the receipt, that the clerk believes him, that he signs the other person's name without authority to the receipt, and gets the public money,—would that not be forgery? He signed without authority the name of another, and he obtained from the P. O. Department money which belonged to the public. That is in principle this case. Can the prisoner be allowed to set up in such a case that the clerk or servant should have misbelieved him and discovered the attempted fraud, but that not having done so there was no fraud committed on those whose servant he was? Take another case. A man counterfeits a bank bill; he manages to pass it off on some one who knew its spurious character; he does not deceive him, but it passes into the hands of those who are deceived and defrauded;—would it be any answer for him to say, in answer to the charge of counterfeiting, that the person to whom he gave it knew that it was not genuine? Certainly not. The test in all such cases must be whether from the nature of the transaction the mind of any reasonable man could come to any other conclusion than that some person, corporation, or government would be defrauded by his act.

But the law has gone much further than that. In *The Queen* v. *Nash*, 2 Den. C. C. 493, it was held that a man may be convicted of forgery and

uttering an instrument *with intent to defraud*, though there is no person in a situation to be defrauded by his act. See the remaaks of Maule, J., at pages 500 and 502. It was decided in *Rex* v. *Sheppard*, R. & R. 169, that it was forgery, though the party to whom the forged instrument was uttered believed that the defendant did not intend to defraud him. In that case Heath, J., charged the jury that although it was sworn that the witnesses did not believe the forgery was committed with an intent to defraud, yet as it was the necessary effect and consequence of the forgery, if the prisoner could not repay the money, it was sufficient evidence of the intent for them to convict the prisoner. On a case reserved, all the Judges were of opinion that the conviction was right. I also refer to the remarks of Bayley, J., *Rex* v. *Harvey*, 2 B. & C. at page 261, and *Rex* v. *Holden*, R. & R. 154; *Regina* v. *Marcus*, 2 C. & K. 356; *Regina* v. *Hoatson*, 2 C. & K. 777.

The counsel for the prisoner asked to be allowed to give evidence on the following points:

1. That the prisoner is not guilty of the crime he is charged with.

2. That the crime charged is not the crime of forgery according to the laws of the State of Pennsylvania. This the learned counsel wished to shew with expert evidence shewing that it is not forgery, but a mere statutory misdemeanour.

3. That the deposition of Williamson is by a person who was *non compos mentis*.

During the taking of the testimony I was quite clear that I had neither power to virtually try the case on the question of the prisoner's guilt or innocence, as was proposed on the first point, nor that I could enquire into the mental capacity of the deponent Williamson on the last point. Further consideration has only strengthened the view I then took; and if authority were necessary to shew the correctness of it, I might refer to, *In re Burley*, 1 Can. L. J. N. S. 34, and per Draper, C. J., at page 44; *In re Caldwell*, 5 P. R. 217; *Regina* v. *Reno et al.*, 4 P. R. 281; *Regina* v. *Hovey*, 8 P. R. 345.

As to the second point, I still think I could not properly receive evidence to shew if possible that the State of Pennsylvania had within her boundaries altered or abrogated the Ashburton Treaty in cases of forgery. On that point I have already given my views, and I need say no more than this, that if I had received such testimony I could not, in the face of Mr. Graham's evidence, on the question of what is forgery in Pennsylvania, and the statute which Mr. Osler has asked me to refer to, do anything else but refuse a discharge of the prisoner.

In the case of *In re The Queen* v. *Gould*, 20 C. P. 154, it was held that in cases arising under this Extradition Treaty, if the evidence present several views, on any one of which there may be a conviction if adopted by the jury, the Court will not discharge the prisoner, but will direct extradition.

In support of the view that I should hear any evidence offered by the prisoner to satisfy my own mind, I was referred to a decision of the late Chief Justice Wood, of Manitoba. Since then the question has under-

gone discussion in England, and I think the force of that learned Judge's opinion must be weakened, if not destroyed, by the case of *The Queen* v. *Sir Robert Carden*, L. R. 5 Q. B. D. 1. I have also consulted the following cases, having, more or less, a bearing on the many questions which the case presents: *Ex parte Terraz*, L. R. 4 Ex. D. 63; *Re Burley*, 1 C. L. J. N. S. 20; *Ex parte Martin*, 4 C. L. J. N. S. 198; *United States* v. *Farrington*, 2 Crim. Law Magazine 525.

I conclude this opinion by repeating the language of that learned and distinguished Judge, Chief Justice Hagarty, who, in speaking of this treaty, says: "I think I am bound to construe a treaty so made between my Sovereign and her ally in a liberal and just spirit, not labouring with eager astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect. We are to regard its avowed object, the allowing of each country to bring to trial all prisoners charged with the expressed offences. Neither of the parties can properly have any desire to prevent such trial or to shield a possible offender. I have neither the desire, nor the right to assume that he will not be fairly tried in the United States. The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction." In *re Burley*, I. C. L. J. N. S. p. 49-50.

For these reasons I am of opinion that Ellis P. Phipps must be detained for extradition on the charges which have been perferred against him.

Upon *habeas corpus* to bring up the prisoner, and *certiorari* to return the proceedings, counsel for the prisoner, on 27th November, 1882, moved for his discharge from custody.

McCarthy, Q.C., for the prisoner. The first set of evidence (A) is irregular, for the Clerk of the Court of Oyer and Terminer at Philadelphia had no right to take evidence of witnesses before they were sworn before the grand jury, no information having been laid nor any cause in Court until the indictment was found. The law always required the grand jury's investigation to be secret, and this was a violation of the rule. No warrant was issued upon these depositions, but one was issued upon the indictment, which was not within the statute. The second set of evidence (B,) was inadmissible because our statute, 31 Vic. ch. 94 sec. 2, contemplates that only depositions upon which the original warrant of arrest issued shall be admitted in evidence. The original warrant was issued upon the indictment a week before these depositions were

taken, and they cannot be used. And the third set being mere copies of the second, is obviously open to the same objections. The offence itself, however, is not forgery within the Extradition Treaty, because from the evidence of Williamson, who issued the money warrants to the prisoner, it appeared that the prisoner had declared at the time that he had the contractors' authority to sign their names and receive the warrants. Williamson, the person who issued the money warrants, was not deceived by the signatures to the receipts, he knew they were not signed by the contractors, but were signed by the prisoner. Hence the offence, if any, was not forgery, but at most false pretences in the prisoner misrepresenting that he had authority to sign the contractors' names. See *Regina* v. *Emmanuel White*, 2 C. & K. 404, 2 Cox C. C. 210; *Rex* v. *Arscott*, 6 C. & P. 408.; *Regina* v. *Ritson*, L. R. 1 C. C. 200; *Regina* v. *Martin*, L. R. 5 Q. B. D. 34; *Brittain* v. *Bank of London*, 3 F. & F. 465.

B. B. Osler, Q.C., and *Carscallen*, also for prisoner. The evidence upon which extradition proceeds must be such as is admissible by the law of Canada, and none of the series of depositions put in evidence complies with our law. The permission given by statute to use depositions is in derogation of the common law right of every man accused of crime to have the witnesses examined in his presence where he can have the opportunity to cross-examine. *Re Lewis*, 6 P. R. 326, shews that all these depositions should be excluded, not being in strict conformity with our law. Williamson's evidence shews that these receipts were not signed by the prisoner with intent to defraud, because he knew they were signed by him and not by the contractors. Our Forgery Act, 32-33 Vict. ch. 19 sec. 27, D. provides for such a case and makes it a felony but not a forgery. Besides, section 27 is a new provision enacted in 1869, and not within the treaty, and only such offences as were recognized as forgeries by the general laws of both nations at the date of the treaty are within its provisions: *Re Windsor*, 6 B. &

S. 522, 10 Cox C. C. 118. The Imperial Extradition Act, 1870, sec. 9, requires the Judge to receive any evidence tendered to shew that the crime is not an extradition crime, but the County Judge refused in the present case to allow the prisoner to call expert evidence to shew that the offence charged was not forgery by the law of Pennsylvania. See Criminal Code, 169; *Wharton's* Crim. Pl. and Ev. (8th ed.) 53. The case must be governed by the law as it stood at the date of the treaty, and it was nothing more than misrepresentation of right to sign, and not forgery, and the prisoner ought to be discharged.

Edward Martin, Q. C., for the Commonwealth of Pennsylvania. In *Regina* v. *White*, 2 C. & K. 404, the prisoner White signed per procuration over his own name, and the document could deceive no one; but in the present case the prisoner Phipps signed the contractors' names only, and the signature was calculated to and did deceive and defraud the corporation of Philadelphia, who owed the money, as well as the contractors who were entitled to receive it. Williamson was a mere clerk who had no interest in the matter, since it avails the prisoner nothing to say that he was not deceived by the signature to the receipts, because a jury ought to infer an intent to defraud the person who has to pay: *Rex* v. *Mazagora*, R. & R. 291; *Regina* v. *Trenfield*, 1 F. & F. 143. It is only necessary to make out such a *primâ facie* case for forgery as would justify the accused being committed for trial: *In re Lewis*, 6 P. R. 236; *Regina* v. *Morton*, 19 C. P. 9; *Regina* v. *Browne*, 31 C. P. 484, 6 A. R. 386; *Regina* v. *Burley*, 1 U. C. L. J. N. S. 34; *Regina* v. *Reno*, 4 P. R. 281 And if upon any aspect of the case, a grand jury might be justified in finding a true bill for forgery, the prisoner should be extradicted: *In re Caldwell*, 5 P. R. 217; *Regina* v. *Gould*, 20 C. P. 154. The facts proved show that the prisoner's offence is forgery: *Regina* v. *Stewart*, 25 C. P. 440; *Regina* v. *Ritson*, L. R. 1 C. C. 203; *Russell*, C. & M. 4th ed., vol. ii. 709, 780, 786, *note*: *Fisher's* Digest, 2501;

Re Hovey, 8 P. R. 348. The depositions in evidence in the present case are clearly sufficient. The first set (A) are admissible under the Imperial Extradition Act, 1870, sec. 15; *Re Counhaye*, L. R. 8 Q. B. 410; *Re Ganz*, L. R. 9 Q. B. D. 93. Evidence may be given of depositions made before a grand jury: *Regina* v. *Hughes*, 1 C. & K. 519. Evidence for the defence ought not to be received on the preliminary examination before commitment for trial: *Regina* v. *Reno*, 4 P. R. 282; *Regina* v. *Carden*, L. R. 5 Q. B. D. 1. The second and third series of depositions are clearly admissible under our own Act, 31 Vict. ch. 94, sec. 2, D. and the Imperial Extradition Act, 1870, secs. 14 & 15; and it is no objection that they were taken and a warrant issued upon them in the United States after the prisoner had been arrested in Canada: *Re Lewis*, 6 P. R. 236.

F. Fenton, also for the Commonwealth of Pennsylvania. The County Judge did not refuse to receive evidence to shew that the offence was not an extradition crime, as required by the Imperial Extradition Act, 1870, sec. 9. The fallacy in the argument of prisoner's counsel is the assumption that unless Williamson, the clerk who issued the money warrants, was deceived or defrauded, no one was deceived or defrauded. It is clear that the corporation and the contractors, the real parties intended, were both deceived and defrauded. And in *White's Case*, 2 C. & K. 404, the banker who advanced the money was the only one who suffered, and he was not deceived by the signature, but by the misrepresentation of authority as agent. The contention that the law of forgery as it stood at the date of the treaty must govern is erroneous. The treaty itself provides that the extradition is to proceed upon such evidence of criminality as, according to law of place where the fugitive is found, would justify his arrest, if the crime had been committed there. This speaks *in futuro*, and it is evident that the framers of the treaty did not intend that it should apply only to the diverse descriptions of extradition crimes which then existed under the conflicting laws of the numerous States on the one hand,

or of Great Britain and their colonies on the other. They provided the simple and sufficient rule, that whenever, thereafter, any offences committed should, by local law, happen to constitute a crime of the description specified in the treaty in the place where it was committed, and in the country where the offender should be found, there the treaty should apply, and extradition should follow. This always gave the asylum State control over the offence, and no violence could be done to its right of asylum, since it would always lie with its Legislature to declare what acts would or would not constitute crimes of the nature specified in the treaty, and upon which it might operate. This principle is in fact expressly declared to govern and apply in Canada by the Imperial Extradition Act, 1870. The "first schedule" is as follows: "The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act," and a similar provision is contained in the Amendment Act of 1873. In this schedule are specified all the crimes mentioned in the treaty with the United States. And in the interpretation clause the term "extradition crime" means any "*one*" of the crimes in the schedule. *Regina* v. *Browne*, 31 C.P. 484, and 6 A. R. 386, shows that the Imperial Act applies in Canada so far as not inconsistent with the treaty with the United States, and this provision is not only not inconsistent, but in harmony with the treaty: *Traugott Muller's Case*, 5 Phil. Rep. 289. The prisoner's offences are clear forgeries under the wide terms of the 26th and 45th sections of 32-33 Vic. cap. 19, D. and Mr. Graham swears they are also forgeries by the law of Pennsylvania; and this satisfies the conditions of the treaty, and the prisoner ought to be surrendered.

December 30, 1882. HAGARTY, C. J.—I have perused with much attention the very full, careful, and able judgment delivered by his Honour Judge Sinclair.

It sets forth the facts of the case so fully that I need not here repeat them, agreeing as I do in the conclusion at which he has arrived, and in nearly all of the reasons which he gives for his decision.

I think he shews conclusively that we have before us all necessary materials taken in substantial accordance with the law.

I see no difficulty as to whether one or more warrants have been issued. I think that either here or in the U. S. a second, third or fourth warrant may be issued, and that we can treat either one as the original under the Treaty Statute, and that duly proved depositions taken under it will suffice.

I think the learned Judge was right in taking any question of the foreign law from the expert evidence offered to him, and that it was not his province to discuss the effect of any Pennsylvania statute produced before him. See *In re* v. *Windsor*, 6 B. & S. 528, per Cockburn, C. J. Nor do I feel at all pressed by the very technical objections urged for the prisoner as to the manner in which any depositions produced may have been taken, or as to the manner in which the case went to the grand jury, or how the witnesses were sworn, so long as it was proved so clearly by the oral testimony that they were duly sworn under proper authority.

Considering, as I do, that the proceedings are regularly before us, it only remains to see whether the evidence would, if the matters had occurred in this country, have sustained the charge according to our laws, or, in the words of the treaty, recited in chapter 89 Consolidated Statutes of Canada, would justify his apprehension and commitment for trial if the crime had been committed here.

The main contention of the prisoner is that, when he wrote "Seeds & Ferguson" on the stub receipt, he did not pretend it was their signature, but merely that he had their authority to sign for them, and so obtained the warrant: that this may have been a false pretence, but was not forgery.

The case of *Regina* v. *White* was mainly relied on. The fullest report is in 2 Cox C. C. 210.

The judgment below has dealt with the facts of the case. It differs very materially from this. There the prisoner wrote nothing but his own name after the banker who discounted the bill had, on his representation of his authority, written "per proc Thomas Tomlinson," the name charged as being forged.

I do not think that this case can be pushed beyond its own facts to cover a case like the present. There is no formal judgment: we can only gather the Judge's opinions from remarks made on the argument.

I think its legitimate authority may be stated thus: that it is not forgery to sign the name of another person with the written addition that you do so as his agent and as with his authority.

I have examined the cases relied on. In *Rex* v. *Arscott*, 6 C. & P. 408, the prisoner wrote, "Received, for R. Atkinson: G. Arscott." Littledale, J., says: "I take it that to forge a receipt for money is writing the name of the person for whom it is received. But in this case the acts done by the prisoner were receiving for another person and signing his own name."

This seems to contain the important distinction.

During the argument of *White's Case*, Parke, B., asked: "Suppose the prisoner had written merely 'Thos. Tomlinson,' saying at the time he had authority to do so?" Counsel answered: "It would, in effect, be the same thing." Parke, B.: "Then it makes no difference whether he writes his own name or that of another?"

Wilde, C. J.: "The party relies on the veracity of the writer, not on the signature."

Coltman, J.: "If the bill passed into other hands it would be a forged instrument to all subsequent holders."

Parke, B.: "I meant to confine my question to the case of an instrument not negotiable."

We must carefully examine how the fraud here was committed. I am quite willing to adopt the description

given of it by the learned Judge below. And my own view is merely in further illustration. The prisoner and the secretary Williamson were fellow servants of this almshouse. The latter has the custody of these warrants, counter-signed by the city comptroller. They are payable to bearer, and once in the prisoner's hands could be passed off as money.

He writes the necessary receipt on the stub, asserting to Williamson that he has authority so to do. He writes "Seeds & Ferguson," as if written by those parties. He does not apparently try to imitate their signature, but uses or writes the name without any addition or written assertion that it is written by another. It is professedly their signature, and in my opinion was *primâ facie* a forgery.

He knew perfectly well what the consequences would be. It was not his fellow servant Williamson that was to be defrauded; it would be the almshouse that would fail to be able to produce a valid voucher for the transferrable warrant on the city treasury, and the city treasurer who would pay the money on a warrant obtained without value, to say nothing of Seeds & Ferguson, who, having given no authority, would of course still have their claim on the almshouse: the latter would be the ultimate sufferers. He also knew that this book, in which these stubs were, is., as stated in the evidence, "a voucher for the Board of Guardians of the poor, when they return this book to the City Comptroller's office, as shewing what has become of the warrants issued by the board;" and it is then one of the public books of the city of Philadelphia.

It thus appears that until Seeds & Ferguson discover the fraud and repudiate this signature, the almshouse and the city are alike defrauded.

I cannot understand how the mere fact of his telling Williamson that he had the authority can prevent this from being forgery.

If the prisoner and Williamson were jointly devising a fraud on their employers, the mere proof that the prisoner went through the form of asserting his authority to use Seeds & Ferguson's name would not excuse him.

If (as was urged and asked to be allowed to be proved in evidence for the prisoner) Williamson was out of his mind, and did not know what he was doing, this would simply (as the learned Judge says) make the case worse for the prisoner, as it could not then be asserted that the secretary's mind was influenced by the prisoner's declaration of his authority to use the names, or be capable of intelligent action. So that, if either Williamson were an accomplice, or were so insane that his evidence should not be received, the whole attempt to shew it was not forgery would fail. The evidence would remain that the writing on the stub was that of the prisoner and a forgery. Now, if in *any* view of the case the charge of forgery can be supported on the evidence the prisoner should be given up, as laid down in *Regina* v. *Gould*, 20 C. P. 51. Strike out Williamson's evidence, as the prisoner seems to desire, and his case would be much worse. Had Williamson died before the charge was made there would have been still the false receipt on the stub in the prisoner's handwriting, and that, coupled with the disappearance and subsequent presentment of the warrant to the city treasury, would be a very formidable case as against the prisoner, an officer of the almshouse, with full access to the books.

I am of opinion that the evidence discloses a *primâ facie* case of forgery sufficient to warrant the commitment for trial of the prisoner if the crime had been committed here.

If committed for trial for forgery by a magistrate on a Canadian charge, I hardly think that any Judge would discharge him from custody on *habeas corpus* with all this evidence before him. I think we should hold that this was sufficient to send him for trial on the charge.

If we look on the prisoner's act as *primâ facie* a forgery, it would be for him on his trial to make out his defence, if possible, on what he communicated to Williamson.

The case suggests so many different aspects, that it appears to me one eminently fit to be sent for trial on the forgery charge, if it had occurred in Canada.

I cannot bring myself to admit that our Extradition Treaty with the United States, confessedly defective as it is, can be so hopelessly useless as to protect this prisoner from being sent to answer this charge before the Courts of his own country.

I have often marvelled at the astuteness that has been displayed in endeavouring to defeat the plain design and scope of this Extradition Treaty, as if we placed the very highest value on our right to the presence of fugitives from the laws of other countries.

It has, and always will be, the honest pride of our country to offer an inviolate asylum to mere political fugitives. But we best fulfil our treaty obligations by adherence to plain intelligible principles in the reception and construing of evidence fairly bringing the fugitive within the meaning of some one of the crimes for which his extradition is provided.

We are of course bound to see that in such a case as this the reasonable presumption of guilt is raised on the evidence, sufficient at least to warrant his being held for trial for forgery.

According to the view I have always held on this subject, we should always lean in favour of sending him for trial in his own country unless it be plain that under no view of the evidence can a charge of forgery be fairly made.

I may concisely state my conclusions thus:—This prisoner's employers had a right to a valid receipt from each creditor. The city of Philadelphia was also entitled to it. This prisoner, with intent to defraud, wrote a false receipt, purporting to be in the creditor's name. Whether this was done with the assent, or the connivance of, or by a deceit practised on his fellow servant or clerk, is, I consider, immaterial.

I think the prisoner should be remanded.

ARMOUR, J.—The principal contention urged by the prisoner's counsel as to the sufficiency of the proofs was that the Act, 31 Vic. ch. 94, sec. 2, D., and the Imperial Act,

33 & 34 Vic. ch. 52 sec. 14, were to be read together: that reading them together they only allowed the depositions and statements on oath, or copies of such depositions and statements on oath, *upon which the original warrant was granted* in the United States, to be used in evidence, and that if a second warrant were granted in the United States the depositions and statements on oath, or copies of such depositions and statements on oath, upon which such second warrant was granted could not be received as evidence in this country: that the statutes permitting the use of depositions and statements on oath, and copies of such, are an infringement upon the common law, and are to be construed in their narrowest and most restricted sense: that the depositions and statements on oath in this case upon which the *original* warrant was granted could not be used, because, as was argued, they were sworn before a person or tribunal having no jurisdiction to take them: that their infirmity could not be supplied by the depositions and statements on oath, or copies of such, upon which a *second* warrant was granted, but could only be supplied by the personal attendance and oral testimony of witnesses brought to this country to testify; and what was said by Gwynne, J., in *Re Lewis*, 6 P. R. 236, was cited in support of this contention, that "when a prosecutor who seeks to have a person arrested in this country for committal under the Extradition Treaty finds it more convenient to use *ex parte* affidavit evidence taken abroad in preference to bringing the living witnesses for examination face to face with the accused at the hearing of the complaint, it is the right of the accused, which impartial justice and the letter and spirit of the law award to him, that the minutest forms and technicalities with which the legislature hath surrounded the production of this species of *ex parte* testimony shall be strictly complied with. We have no right to deprive him of the protection which the noncompliance with any of these forms may afford to him: however heinous may be the offence with which he stands charged, he has a right to insist that only legal evidence shall be received against him."

With the greatest respect for the learned Judge who delivered the judgment in *Re Lewis*, I have to say that I cannot agree with what he there said, as above cited. I do not think that the proofs adduced against a person here charged with a crime in a foreign country, should be subjected to special demurrer; nor do I think that either the Ashburton treaty, or the statutes passed to carry it out should be construed otherwise than in a fair and liberal spirit, and so as to advance as much as possible the remedy they were entered into and passed to advance.

I think the word "original" in 31 Vic. ch. 94, sec. 2, was not there used in the sense of "first," but was merely used to distinguish the warrant granted in the United States from the warrant granted in this country, and that each of any number of warrants granted in the United States may be properly called the original warrant in the sense in which that word is used in the Act, and that the depositions and statements on oath, or copies of such, upon which each of such warrants was granted, may be properly used in evidence in this country. See *Re Counhaye*, L. R. 8 Q. B. 410; *Regina* v. *Ganz*, L. R. 9 Q. B. D. 93; *Regina* v. *Weil*, L. R. 9 Q. B. D. 701.

The Ashburton treaty, so far as it relates to extradition, must be read as a treaty made not only by the United States with Great Britain, but by each individual State of the Union through the medium of the Executive Government of the United States with Great Britain, and it must be so read, not only with reference to those States which were in existence at the date of the treaty, but also with reference to all the States which have been created since, each State created since being treated as having come into and being bound by the treaty from the date of its creation. This is the only way in which proper effect can be given to the treaty, having regard to the constitution of the United States, and to the fact that under that constitution the jurisdiction to legislate, and deal with the crimes mentioned in the treaty, resides in the individual States, if such crimes have been committed within their boundaries, and not in the Federal Government or Legislature.

With regard to the forgery of private writings in the State of Pennsylvania, such as the charge under discussion in this case, there is no common law of the Federation; nor is there any statute law of the Federation against it; and it is only by the common law of Pennsylvania, or by the statute law of that State, that such a forgery, committed within its boundaries, is made a crime at all, no other jurisdictions but that of the State of Pennsylvania having any power whatever over it.

The common law of England exists in the State of Pennsylvania and in all the other States which were in existence at the time of the Revolution, but in no other States.

In framing the treaty the parties to it were not providing for the past and present, but for the future; and I do not think that the treaty should be construed as referring only to what was understood to be forgery at the date of the treaty, but that under the generic term forgery everything was included which was in the nature of forgery, and which thereafter might be held to be forgery at common law by the decisions of the Courts, or might be declared to be forgery by the statute law.

For example, the photographic art has arisen since the date of the treaty. Assume it to be brought to such a degree of perfection that by it a person possessed of a genuine promissory note of another could make as many imitations of it as he chose; assume this not to be forgery at the common law, nor forgery by any statute in force at the date of the treaty,—was it intended that no statute could be passed making this forgery, and that such forgery should not be within the treaty? I think not.

Nor did the framers of the treaty intend, nor should it be construed, in my opinion, to include the crime of forgery only where that crime is common to both countries. There is nothing in the treaty to shew any such intention, but the contrary, in my opinion; and to hold so would be narrowing and restricting that which ought to receive a wide and liberal interpretation. The framers of the treaty

must be taken to have had in their minds the fact that there might be a divergence of opinion in the Courts of the respective countries as to what might or might not be forgery at the common law. Did they intend that such divergence was to abrogate the treaty *pro tanto*? I cannot conceive it possible that they did.

They must also be taken to have had in their minds the fact that there might be a divergence in the statute law passed by the respective countries with regard to forgery. Did they intend that such divergence should abrogate the treaty *pro tanto*? I think not.

Suppose one of the countries repealed all its laws against forgery and declared it to be no longer a crime, would the effect of that be to abrogate the treaty as to forgery altogether? I say not.

To come nearer the point, suppose that at the same time that *Regina* v. *White* was decided in England, a precisely similar case had come before the Courts of Pennsylvania, and that they had decided that what White did was forgery at the common law, and a citizen of the State of Pennsylvania had thereafter done exactly what White did, and had fled to Canada, should we not surrender him? I think we should. He would have committed forgery within the State of Pennsylvania, whose laws he was subject to and bound to obey, and I do not think we would have any right under the treaty to say to the State of Pennsylvania, what the fugitive did in your State is no doubt forgery by your laws, but it is not forgery by ours, and we will therefore not surrender him.

According to my view of the treaty, therefore, the first question for me to determine is, is the offence with which the prisoner stands charged in the nature of forgery? I think it is, and that therefore it comes under the generic term forgery used in the treaty.

The next question is, is it forgery by the law of the State of Pennsylvania? It was proved to be so by the District Attorney of the county of Philadelphia, in that State, a gentleman learned in the law, who swore that, assuming

the facts to be true as stated in the depositions, the crime of forgery was made out under the law in Pennsylvania, both as that law existed at the time of making this treaty in 1842, and as the law stands at present; and that they also made out the offence of forgery at common law, as it is received and interpreted in that State.

The evidence given by this gentleman is the proper legal evidence by which the law of the State of Pennsylvania is provable, and I think we must take his evidence, in the absence of contradiction, to be true.

I think the prisoner was entitled under the Act, 33 & 34 Vic. ch. 52, sec. 9, to have tendered evidence, which the Judge of the County Court would have been bound to receive, that the offence charged was not forgery according to the law of the State of Pennsylvania; and if I thought that he had in good faith tendered such evidence to the County Judge, and that the Judge had refused to receive it, I would say that the matter should be remitted to the County Judge, with instructions to him to receive such evidence if tendered by the prisoner.

I do not think, after reading what took place on this point in the short hand notes and giving it my best consideration, that such evidence was so tendered as to enable me to say that the County Judge refused to receive it.

The evidence disclosed in the depositions is sufficient to raise a strong presumption of guilt against the prisoner of the offence with which he is charged, and this satisfies the treaty, which requires that he shall be delivered up "only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed."

I think, therefore, that the prisoner should be surrendered, and should be remanded into custody for that purpose.

It may be that what I have said may be in conflict with some decisions on the same subject, and to some extent with *Re Windsor*, 6 B. & S. 522; but an attentive reading

of that case must assure every one that the learned Judges who decided it had not their attention called to the fact that under the constitution of the United States there could be no federal law against the crime in that case charged.

I refer to *Re Smith*, 4 P. R. 215; *Re Dubois*, alias *Coppin*, 12 Jur. N. S. 867; *Traugott Muller's Case*, 5 Phil. Rep. 289.

CAMERON, J.—I concur in the opinion of the Chief Justice and my brother Armour, that the technical objections to the warrants to commit and depositions are not entitled to prevail. The warrants are established to be warrants for the apprehension of the accused before trial, and signed by official persons. It is not competent for the authorities in this Province, charged with the duty of investigating against persons seeking an asylum here for offences committed in the United States, to enquire whether such proceedings have been regularly taken in that country. It must be assumed, when the official character of the person granting a warrant or taking a deposition is established, that he was acting lawfully within the scope of his authority, and the only question here on this head is, are they so presented, assuming them to have been granted or taken by a person having authority, as to make them evidence under the Acts respecting extradition. Without dissenting from the view taken by Mr. Justice Gwynne, in *Re Lewis*, 6 P. R. 237, I think the warrant and depositions are free from imperfection. The objection to them is not that that they are not sufficient in form to render them admissible, but that the person or tribunal before which they were granted or taken was not properly competent to grant such warrant, or take such depositions, and the depositions do not in fact constitute depositions, but are merely a part of the information, and the contention was that it is only the depositions taken in the presence of the accused that are admissible in evidence. I have already given the answer which, in my opinion, meets the first ground of

objection, and as to the last, I think it is an error to say that an information is not a deposition.

Deposition in such a case as the present means that which has been deposed to on oath, and in this sense an information is clearly a deposition. If an information is not a deposition, it would be impossible ever to receive depositions in evidence except where the person against whom the proceedings in extradition are taken has escaped and is a fugitive from justice, after the preliminary enquiry has wholly or partially taken place, which could never have been the intention of the Act, as the warrant referred to is not a warrant of commitment for trial, but a warrant authorizing the apprehension of the accused to answer to the charge.

The remaining question involved in the application for the discharge of the prisoner is, was the evidence of his criminality, according to the law of this province, sufficient to justify his apprehension and commital for trial if the crime of which he is accused had been committed here? This question divides itself in two questions; first, is the offence charged an offence under the treaty at all? and second, is the evidence *primâ facie* sufficient to justify his being committed for trial upon such charge? The charge is forgery, and is therefore one of the crimes embraced within the treaty. The document alleged to have been forged is a receipt, and therefore is a document in relation to which the statutory felony of forgery may be committed, and in my view that is the only kind of forgery that is within the treaty.

In construing a treaty between nations, while it must be conceded the most liberal interpretation should be given to it in order that the intentions of the high contracting parties may be carried into effect, there is no rule of law that enables a Court to depart from the ordinary rules of construction. A contract made in reference to an existing state of things will, unless a contrary intention is expressed in the contract itself, always speak in reference to that state, and must be interpreted by it. I assume, therefore,

as there was the crime of felonious forgery known to the law of both countries, and the treaty only deals with offences of the degree of felony, the graver kind of offence was that which the high contracting parties had in view in providing for the reciprocal surrender of fugitives from justice charged with the crime of forgery; and that when they were excluding from the operation of the treaty numerous felonies and all other misdemeanours, they did not intend to make it cover the one misdemeanour of a forgery at common law; nor was it intended to embrace any act or offence made forgery by any statutory law of either nation passed after the execution of the treaty.

It is said one reason for the limited number of crimes contained in the treaty, was the fact that slavery existed in the United States at the time it was adopted, and Great Britain did not desire to extend its operation, lest its provisions might be resorted to for the purpose of securing the extradition of one who sought freedom from slavery and an asylum in Great Britain, or any of its colonies or dependencies. It could not in reason be contended if a law, after the execution of the treaty, had been enacted in the United States, that any one who made or used a false key for the purpose of escaping from prison or his master's house, should be guilty of forgery, that a fugitive slave escaping through such means would be liable to be surrendered under the treaty. The contract is, that each nation will surrender to the other all fugitives from justice charged with certain specified offences then known to the laws of both, not that they will surrender persons charged with offences either not then existing or not then known by the specified names, but which either party might afterwards create or designate.

In *Re Windsor*, 6 B. & S., Cockburn, C. J., says, at page 529: "We ought to interpret the statute according to the intention of both parties, and it would be going far to assume that before passing it the legislature of this country went into an elaborate enquiry as to what by the law of every State of the American Union amounted

to forgery, and made this statute with the intention to include each of them within its operation. I believe that in point of fact that was not done, and we ought not to assume that it was. We must assume that the terms used by the parties to this treaty, especially as they were parties speaking the same language and with laws so like, used them in the sense which they bear in our own law and in the law of the United States, and not in that which they have in any particular State of the Union." The charge against the applicant in that case was, that of making a false entry in a book kept by a money corporation of New York, in which it was the duty of the prisoner to keep an account of the moneys received by him as officer of the corporation, and how they were disposed of; and the learned Chief Justice further said: "No doubt this was a false entry and made for fraudulent purposes; but it is clear, for the reasons given by the members of the Court during the argument, that the offence in question did not amount to forgery. * * * The true construction of this statute is, that its terms, specifying the offences for which persons may be given up, must be understood to apply to offences which have some common element in the *legislation* of both countries." Blackburn, J., in the same case, said: "We have only power to surrender under statute 6 & 7 Vic. ch. 76, which does not say that all criminals are to be given up, but that for some specified crimes they may. The crimes thus specified are those defined in a treaty previously entered into by the two high contracting parties. The charge against the applicant is, that being a clerk in a bank he did embezzle or steal a large sum of its money: that he made an entry in a book stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to forgery. Forgery is the falsely making or altering a document to the prejudice of another by making it appear as the document of that person. Telling a lie does not become forgery because it is reduced to writing." And he adds: "Forgery is one of the crimes specified, and

that must be understood to mean any crimes recognized throughout the United States and in England as being in the nature of forgery. 'Piracy' is another, which means offences committed on the high seas, and is so understood by both. But I do not think, if either country were to say that some crime committed on land should be piracy, this would come within the meaning of the treaty."

It was proved by an expert that by the law of Pennsylvania the alleged offence committed by the prisoner is forgery, and if nothing appeared but that he had signed the names of Seeds & Ferguson, or the other persons who had claims against the almshouse, to the receipts given in evidence, it would be forgery, both by the common law and statute law in force in this Province. But it further appears by the evidence of Williamson, who swears to the signing of the names of Seeds & Ferguson by the prisoner, that the signing took place in his presence, and the prisoner did not pretend that the receipt was signed by Seeds & Ferguson, or put it off as their signature; but he falsely represented that he had their authority to sign it. Credit was not given to the signature, but to the representation. The signature was not used to defraud—the representation was. If, instead of saying he had the authority of Seeds & Ferguson, he had written, after the name Seeds & Ferguson, per proc., and signed his own name, it is clear the offence, before the passing of our Act, 32-33 Vic. ch. 19, sec. 27, D., would not have been forgery, as it was so held in *The Queen* v. *White*, 1 Den. 208, 2 C & K. 404.

I am unable to see any distinction between signing the name by proc., and signing accompanied by a statement that it is signed by authority. The moment it appears that the name was not offered as a genuine signature, but as a signature written by the person offering it, it is made manifest there is no forgery. The offence is one of making a false representation, which may or may not be a crime according to circumstances.

In the present case it was the obtaining of a cheque, the property of the city of Philadelphia, by false pretences,

which is not a crime within the Ashburton Treaty. The offence of signing the name of another by procuration to certain documents, not including a receipt *eo nomine*, without authority, is now, by 32-33 Vic. ch. 19, sec. 27, declared to be a felony, and appears in a statute relating to forgery, but the offence is not in terms made forgery, and the Act was passed since the treaty.

I am, therefore, of opinion there was not such evidence of criminality as would warrant the committal of the prisoner for trial in this country for the crime of forgery, and he is entitled to be discharged from custody. I am aware that in the opinion I have expressed, the offence of forgery, to be within the treaty, must be a felony, is at variance to some extent with the opinion of the present Chief Justice of the Common Pleas, in *Re Caldwell*, 5 P. R. 217, wherein he said, at p. 221: "It was thirdly alleged that the facts did not shew that the offence of forgery had been committed. It appears to me the offence has been sufficiently charged and proved to constitute the crime of forgery. If it be under the Act of 1823, (see laws of the United States, *Dunlop*, page 678, ch. 38,) the offence is felony. If it be under the Act of 1863, (see United States statutes at large, 37th Congress, ch. 67,) the offence will, I presume, be a misdemeanor; and if it be under the Act of 1866, 39th Congress, ch. 24, it is a felony. But whether a felony or misdemeanor can be of no consequence; it is nevertheless the offence of forgery, and it is with that alone that the treaty and the statute deal." The nature of the alleged forgery is not stated in the case, and it may clearly have constituted a forgery in this country.

As to the rejection of evidence by the learned Judge of the County Court, it appears to me that evidence of the fact that the offence charged was not an offence within the treaty was admissible, and ought to have been received. But I have great difficulty in determining what effect that should have on the present application. Our duty is here merely to determine whether, upon the material before the

Court, there is such a case made out as would warrant the committal of the applicant if the offence had been committed in this province. It is in evidence that it is an offence within the treaty in the United States. The imperial statute does not say that in a case of a conflict of evidence upon such a question what the Court should do, and I apprehend it is not our province to determine on which side of such conflict of evidence the truth lies. If the offence charged is one within the treaty, according to our law, I do not see how the Court can say a case for committal had not been made out. I do not see my way to holding that the case could be remitted to the County Court Judge to take further evidence. By his warrant of committal he is *functus officio*, and has ceased to have jurisdiction over the case, and this Court has no power except to say whether, on the material before it, the applicant should be discharged or remanded for extradition. I refer to the opinion of Chief Justice Wilson in the case of *Caldwell*, 5 P. R. 217, already cited.

Prisoner remanded.

[QUEEN'S BENCH DIVISION.]

MURPHY V. THE GRAND TRUNK RAILWAY COMPANY.

Railway—Fences—Gates—Non-repair—Accident.

The defendants' line of railway ran through the plaintiff's farm, and the plaintiff's mare escaped from a field adjoining the railway through a gate opposite a farm crossing which the defendants had erected, and which was out of repair, and was killed on the railway.

Held, that it was the duty of the defendants to keep the gate in repair, and that they were liable, whether they were bound to erect such farm crossing or not.

THE plaintiff's statement of claim alleged that the Wellington, Grey, and Bruce Railway was constructed across the plaintiff's farm, bisecting it: that the said railway was united with and became a part of the Great Western Railway, which latter railway was afterwards united with and became a part of the Grand Trunk Railway, under the provisions of the Act of the Parliament of Canada, 16 Vic. ch. 39. The 7th paragraph of the said statement was as follows:

"By a statutory provision of the said Parliament, the said the Wellington, Grey, and Bruce Railway Company, the defendants, and all other railway companies, are required in all cases of their railway intersecting the land of any person, to provide and erect gates at all farm crossings connecting the portions of the land so divided by their railway, and the same, when so erected, to maintain and keep in repair."

The statement then alleged the erection of gates at the farm crossings in connection with the plaintiff's farm: that one of the said gates upon the plaintiff's said land leading to one of the said farm crossings across the said railway was wrongfully suffered to be and continue defective and out of repair; by reason whereof a mare of the plaintiff, lawfully being in a field of the plaintiff adjoining the said railway, in which field was one of the aforesaid gates, escaped through the said gate out of the said field of the plaintiff upon the track of the said railway, and whilst thereupon was killed by being run over or struck by an engine of the said railway.

Statement of defence: Not guilty, by statute.

The cause was tried at the last Assizes at Orangeville, by Osler, J., and a jury, who found that the gate in the statement of claim mentioned was wrongfully out of repair, as alleged: that by reason thereof the plaintiff's mare escaped out of the plaintiff's field into and upon the defendants' railway, where she was run down and killed by a passing train of the defendants, and they assessed the plaintiff's damages on occasion of the premises at $160.

At the close of the plaintiff's case defendants' counsel objected that there was no evidence that the mare was killed by the railway; and that there was no duty such as was alleged in the statement of complaint No. 7. The learned Judge ruled, as to the first objection, that there was evidence from which it could be inferred that the mare was killed by the railway, and overruled the second objection, and gave the defendants' counsel leave to move. These objections were not renewed at the close of the case, nor was there any objection made by the defendants' counsel to the charge of the learned Judge.

November 24, 1882. *Barker*, for the defendants, obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict for the plaintiff should not be set aside and a nonsuit entered, on the grounds that no statutory or other duty or obligation, of the Great Western Railway Company, or of the defendants, to provide and maintain, or repair the gates, in the statement of claim referred to, was shewn, and that no such duty or obligation existed: that it was not shewn that any farm crossing connecting the divided portions of the plaintiff's land existed, in regard to which there was any duty or obligation of the Great Western Railway, or of the defendants, to provide and maintain, or repair, gates thereat: that there was no evidence that the plaintiff's mare was killed by being run over or struck by any engine of the Great Western Railway Company, as alleged, or owing to any act or default of the said company, or of the defendants.

December 5, 1882. *Barker* supported the order *nisi*.

There was no evidence that there was a farm crossing, and it cannot be assumed it was a statutory crossing. *Brown* v. *Toronto and Nipissing R. W. Co.*, 26 C. P. 206, shews there was no duty on defendants to make a crossing. The statute on which the plaintiff relies is sec. 13 of 22 Vic. c. 66, R. S. O. ch. 165. Unless the plaintiff proves a statutory crossing his case fails. The mere fact that the railway ran through his farm did not entitle him to a crossing: this *Brown* v. *Toronto and Nipissing R. W. Co.*, establishes.

Dunbar, contra. The case cited has no application. It is plain the Legislature intended there should be farm crossings. These were there, and therefore the defendants should have provided gates, and kept them in order.

December 30, 1882. ARMOUR, J.—The first objection taken on the argument in support of the order *nisi* by the defendants' counsel was, that there was no evidence to shew how or by whom the farm crossing between the dissevered portions of the plaintiff's farm was constructed.

The only evidence on this point was that of the plaintiff, and was as follows:—

"You own a farm in the township of Ilkington; what is the number of the lot? Lot 17; I have owned it about twelve years; that was before the railway was built there; the railway runs through the farm. Have you any provision for crossing from one side of the road to the other? Yes; a crossing and two gates. What kind of a crossing, a level crossing? No; it is graded up a little; a grade of about four feet. What kind of gates are they? They are just ordinary barred gates on hinges."

Although I do not think the question by whom this farm crossing was constructed at all affects this case, it is, in my opinion, fairly presumable, from this evidence, that it was built by the railway company; and as no objection was raised at the trial as to the deficiency of proof on this point when it might have been supplied, and as no point was raised at the trial as to this part, I do not think that we ought to entertain the objection now.

The main point taken at the trial and urged before us in argument was that, inasmuch as the Court of Common Pleas had determined, in *Brown* v. *Toronto and Nipissing*

R. W. Co., 26 C. P. 206, that the railway company was not bound to erect and maintain farm crossings of the road for the use of the proprietor of the lands adjoining the railway, the railway company were relieved from the duty of erecting and maintaining gates at such farm crossings, and the defendants were consequently not liable for the damage occasioned by the non-repair of the gate in question.

But the duty imposed by law upon the railway company to erect and maintain fences on each side of the railway of the height snd strength of an ordinary division fence, with openings or gates or bars therein at farm crossings of the road, is not at all dependent upon whether or not a duty is imposed upon them by law to erect and maintain such crossings, but is wholly independent of it.

There was a farm crossing on the plaintiff's farm, and the railway company was bound by law to erect and maintain fences on each side of their railway through the plaintiff's farm of the height and strength of an ordinary division fence, with openings or gates or bars at such farm crossing, irrespective altogether of the question who constructed or whose duty it was to construct such farm crossing.

It was proved that the railway company had erected gates at this farm crossing, and that they had assumed to maintain them and keep them in repair, and it was also proved by the defendants' servants that it was part of the duty of their section men to see that these gates were kept in repair.

There was ample evidence to go to the jury that the plaintiff's mare escaped from his field on to the railway through the want of repair of one of these gates, and that she was killed by a passing train of the defendants.

The order *nisi* should therefore be discharged, with costs.

HAGARTY, C. J., and CAMERON, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

TURNER V. LUCAS ET AL.

Preferential judgment—R. S. O., ch. 118.

The defendant, a creditor of O, who was in insolvent circumstances, commenced an action on the 25th May, 1882. By arrangement with O, who appeared, pleaded to the plaintiff's statement of claim, and consented to an order striking out his defence, a judgment was obtained the next day. The plaintiff commenced proceedings immediately after the defendant, and in due course obtained judgment against O, and the validity of the defendant's judgment came in question on interpleader.

Held, following the decisions under R. S. O., ch. 118, that the defendant's judgment was valid.

Per ARMOUR, J. If the matter were *res integra*, O., by actively interfering to enable the defendant to recover a judgment against him sooner than by due course of law he otherwise could have done, was giving a confession of judgment within the words of the Act, and certainly within its spirit.

THIS was an interpleader issue, directed to try whether a judgment obtained by the defendant against one O'Connor in this Court, on the 26th day of May, 1882, and the writ of execution issued on said judgment to the sheriff of the county of Oxford, against the goods and lands of the said O'Connor, ought to be deemed and taken to be null and void as against the plaintiffs, acting as well on their own behalf as on behalf of all other creditors of the said O'Connor, either by the common law or by virtue of the statute chap. 118 of the Revised Statutes of Ontario, being an Act respecting the fraudulent preference of creditors by persons in insolvent circumstances.

The issue was tried at the last Assizes at Woodstock, by and before Burton, J. A., who gave judgment for the defendant, stating, however, that his inclination would have been in favour of the plaintiff, had he not felt bound by authority to find the other way.

The facts proved and admitted at the trial were as follow: "O'Connor was, at the time of the transactions hereinafter detailed, a merchant doing business in Ingersoll, and was in insolvent circumstances and unable to pay his debts in full, and was indebted to the plaintiffs, defendants, and divers other persons, the amount of his indebtedness to the defendants being $560.96, of which $275 was then payable, and the balance had not then become payable;

and on the 25th day of May, 1882, the defendants being aware of O'Connor's being in insolvent circumstances and unable to pay his debts in full, placed their claim against him in their solicitor's hands for collection, who on that day issued a writ of summons against him specially endorsed for $560.96, for goods bargained, sold, and delivered by the defendants to him; and he having, at the request of the defendants or their solicitors, come to London where the said solicitors resided, was on the said day served with the said writ; and the said solicitors thereupon procured O'Connor to appoint a solicitor, one Blake, to appear for him, and consent to an order for immediate judgment and execution. Accordingly on the 26th day of May, 1882, the said Blake entered an appearance for the said O'Connor, and on the same day the defendants delivered their statement of claim, to which O'Connor's solicitor on the same day pleaded payment; and on the same day consented to an order that the defendants should be at liberty to sign final judgment against O'Connor for the sum of $560.96, and costs of suit, and that O'Connor's statement of defence should be struck out, and on the same day an order was accordingly made by the local Judge at London; and on the same day judgment was entered by the defendants against O'Connor for the said sum of $560.96 and $36.43 costs of suit. The plaintiffs subsequently recovered judgment against O'Connor, having commenced their action against O'Connor after the defendants commenced theirs. The object of O'Connor's action in the premises was to give a preference to the defendants over his other creditors.

November 21, 1882. *MacKelcan*, Q. C., obtained an order *nisi* calling upon the defendants to shew cause why the verdict or judgment entered in this cause should not be set aside, and a verdict or judgment entered for the plaintiffs, upon the law and evidence, and upon the ground that, under the facts admitted, and the evidence put in at the trial, the judgment in the issue mentioned, and the

writs of execution issued thereon, ought to be deemed and taken to be null and void as against the plaintiff.

December 1, 1882. *Gibbons* shewed cause, citing *Heaman* v. *Seale*, 29 Grant 278; *Davis* v. *Wickson*, 1 O. R. 369; *Brayley* v. *Ellis*, 1 O. R. 119: *Martin* v. *McAlpine*, 2 C. L. T. 352.

MacKelcan, Q. C., contra, cited R. S. O. ch. 118, sec. 1; *Arch.* Pr., 12th ed., 943; *Sharpe* v. *Thomas*, 6 Bing. 416; *Maxwell* on Statutes, 56; *Doe* v. *Carter*, 8 T. R. 300.

December 30, 1882. ARMOUR, J.—Neither by the common law nor by 13 Eliz. ch. 5, was it illegal or fraudulent for a debtor to prefer one creditor to another (see *Holbird* v. *Anderson*, 5 T. R. 235), so that if the defendants' judgment is to be deemed and taken to be null and void, as against the other creditors of O'Connor, it must be so deemed and taken by force of the statute R. S. O., ch. 118.

This statute first became law in 1858, and was enacted at the instance of the mercantile community to remedy, to some extent, the want of a bankrupt law, by preventing insolvent debtors from prefering one creditor to another, and by compelling, so far as possible, by its provisions, an equal distribution of their estates among all their creditors.

Section 1 of that Act, the only one with which we are concerned in determining the question now before us, provides that, "In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors, gives a confession of judgment, *cognovit actionem* or warrant of attorney to confess judgment, with intent, in giving such confession, *cognovit actionem* or warrant of attorney to confess judgment, to defeat or delay his creditors, in whole or in part, or with intent thereby to give one or more of the creditors of any such person a preference over his other creditors, or over any one or more of such creditors, every such confession, *cognovit actionem* or warrant of attorney to confess judgment, shall be deemed and taken to be null

and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution."

In *Young* v. *Christie*, 7 Grant 312, the debtor, Christie, having been sued by Young, his creditor, and having been also sued by McMullen, another creditor, defended Young's suit, and allowed McMullen to take judgment by default, and it was held that such conduct of the debtor was not within the words or the equity of this section, the Chancellor remarking that he had "great difficulty in holding any judgment recovered in the ordinary course of law to be within the equity of the statute."

In *McKenna* v. *Smith*, 10 Grant 40, the debtor, Smith, having been sued by his creditor, McKenna, and by another creditor, Hutty, defended McKenna's suit, in order to enable Hutty to get the first judgment, and allowed Hutty to take judgment by default. The Court followed *Young* v. *Christie*. The Chancellor said: "The statute meant to prevent fraudulent preferences and transfers of property, but it certainly has not furnished any machinery, nor indeed given any power, by which its apparent objects can be thoroughly effected. * * * While the Act endeavours to prevent the debtor himself, when in insolvent circumstances, from helping a particular creditor, by any act of his own, to a portion of his property, it leaves it open to any such creditor by active proceedings on his part, the debtor being passive, to sweep away the whole estate from all the other creditors, however large and honest and old their claims may be."

In *Labatt* v. *Bixel*, 28 Grant 593, the debtor, Bixel, having been sued by Labatt, his creditor, and also by his son, another creditor, defended Labatt's suit, and merely put in an appearance to his son's suit, and by so doing enabled his son to obtain judgment against him sooner than he could otherwise have done, and before Labatt. The Court said: "The statute avoids a judgment the recovery of which is facilitated by the debtor, in order to its gaining priority, but not all such judgments. There are

several ways in which the recovery of judgment may be facilitated—by confession, *cognovit actionem*, or warrant of attorney; that is a class; by abstaining from making any defence in the one suit;—by entering appearance and making no further defence. Only the first class *in terms* is prohibited by the statute. It might have been reasonable to prohibit the others also, or to have made a general provision against a debtor prefering a creditor where two suits are pending against him. * * * The statute did remedy an evil. It might have gone further in the same direction, but did not. If the Courts go further in the same direction where the Legislature has stopped, what would it be but legislation?"

In *King* v. *Duncan*, 29 Grant 113, Proudfoot, V. C., held that "Under the decisions there would seem to be no violation of the statute in a debtor not taking advantage of a credit not having expired, or in his not insisting upon a merger of the debt, if there were any such merger, for the statute only avoids a confession of judgment, a *cognovit actionem*, or a warrant of attorney to confess judgment."

In *Heaman* v. *Seale*, 29 Grant 278, the plaintiff commenced an action in the Queen's Bench against one Cooper on the 21st January, 1881. Cooper entered an appearance, and afterwards filed pleas, so that the plaintiffs were unable to recover judgment until the 28th March. Meantime Seale & Childs commenced an action against Cooper in the County Court on the 16th February; on the 19th Cooper entered an appearance in person; on the same day the declaration was filed; on the 21st Cooper pleaded to the action, and on the same day signed a *relictâ verificatione*, and judgment was signed and execution issued thereon. Proudfoot, V. C., said: "After perusing the judgments in *Young* v. *Christie*, *Labatt* v. *Bixell*, and *Mackedie* v. *Watt*, I must hold that the judgment attacked does not offend against the provisions of the statute. * * A *relictâ verificatione* is neither a confession, nor a *cognovit*, nor warrant of attorney, and is therefore not prohibited by the statute."

In *Davis* v. *Wickson*, 1 O. R. 369, on November 4, 1881, Wickson commenced an action in the Common Pleas against Foster; on the same day appearance was entered, a statement of claim delivered, and a statement of defence delivered, and an order made in Chambers, by consent, striking out the defence, and allowing judgement to be entered, which was done, and writs placed in the sheriff's hands. On November 9, 1881, Davis commenced an action in the County Court against Foster, and on November 22nd following entered judgment by default of appearance, and on the 29th placed writs in the sheriff's hands. Boyd, C., said: "It becomes unnecessary to express any opinion upon the validity of the judgment recovered by Wickson against Foster. * * * For the purpose of costs I have somewhat considered the question, and after reading the cases of *Holbird* v. *Anderson*, 5 T. R. 235 (which would now be a case unquestionably of improper preference); *Feehan* v. *Lee*, 10 C. P. 385, and *Labatt* v. *Bixel*, 28 Grant 593, I do not think that the plaintiff could at any time have successfully attacked this prior judgment. See, also, *Heaman* v. *Seale*, 2 C. L. T. 44, to which my brother Proudfoot referred me after I had arrived at the same result."

Judicial decisions have thus, as has been seen, limited the words of the Act, "confession of judgment," "*cognovit actionem*," and "warrant of attorney to confess judgment," strictly to the instruments technically known as such at the time of the passing of the Act; and, according to them, what O'Connor did, consenting to an order that his defence should be struck out and judgment forthwith signed against him, was not within the Act, because, by so doing, he was not giving a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, technically so called. See, also, *McKenzie* v. *Major*, 23 C. P. 261.

The order *nisi* must therefore be discharged, with costs.

Speaking for myself alone, had the matter been *res integra*, I would have held that, where a defendant, being a debtor in the circumstances and with the intent in the

Act mentioned, had actively interfered to enable a plaintiff, his creditor, to recover a judgment against him sooner than he could have recovered it by due course of law and without such interference, such defendant was giving a confession of judgment within the very words of the Act, and certainly within its spirit, and was doing the very mischief aimed at by the Act; and I would not have thought that, in so construing the Act, I was legislating, but only making "such construction as should suppress the mischief and advance the remedy, and should suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and should add force and life to the cure and remedy according to the true intent of the makers of the Act, *pro bono publico*."

I refer to *Heydon's Case*, 3 Rep. 7*b*; *Doe Mitchinson* v. *Carter*, 8 T. R. 300; *Sharpe* v. *Thomas*, 6 Bing. 416; *Wilson* v. *Wilson*, 2 P. R. 374.

HAGARTY, C. J., and CAMERON, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

WALTON v. THE WOODSTOCK GAS COMPANY ET AL.

Statute of Limitations—Discontinuance—Vacant Land.

On 8th April, 1854, the plaintiff acquired by conveyance the fee simple of a vacant piece of land, but did not enter. Shortly after a railway company surveyed and staked out a portion of it, with other land required for their railway, and the sum to be paid by them to the plaintiff was settled by arbitration under the statute, but the company never paid or took possession. On 31st December, 1857, the plaintiff recovered judgment against the railway company, and under proceedings in Chancery sold their interest in the land to the defendant P., who did not take actual possession, though he went upon the land prior to 1860, and examined the clay to see whether it was fit for brick-making. He did not fence or cultivate it, though it was fenced on two sides by the adjoining proprietors. He also put up a board on it with an advertisement that the lot was for sale, signed by him, but when was not shewn, and it was knocked down and not replaced. In 1876 P. sold the land to the defendant company, who immediately went into possession and made valuable improvements. The railway company and the defendants paid the taxes from 1853.

Held, CAMERON, J., dissenting, that neither the railway company nor P. had such a possession of the land as extinguished the title of the plaintiff, who was therefore entitled to recover the land.

Per CAMERON. J. There had been a discontinuance by the plaintiff, and sufficient evidence of an adverse claim to defeat the plaintiff's title.

THE statement of claim alleged that on the 8th day of April, 1854, one Archibald Burtch was seised in fee of town lot No. six on the east side of Yonge street, in the town of Woodstock, according to a certain plan: that on that day he conveyed the said land to the plaintiff in fee: that on the first day of August, 1876, the defendant company unlawfully entered into possession of it, and had ever since unlawfully excluded the plaintiff from the possession of the same. And the plaintiff claimed: (1) A declartion establishing his right to the said land; (2) Possession of the same; (3) $300 for mesne profits; (4) Further and other relief.

By their statement of defence the defendant company claimed to be lawfully in possession of the said land, and to be in possession thereof as landlords by their tenants, Morgan, McIntosh & Griffiths; and by an amended statement of defence, the defendant company said, that at a sale of the Woodstock and Lake Erie Railway and Har-

bour Company, at the suit of one McBain, the said land was put up for sale and purchased by the defendant Parker, who sold the same to the defendant company: that the plaintiff sold and conveyed the said land to the said railroad, and gave up possession thereof to the said railroad company, in and about 1854, and had not since been in possession thereof; and that after Parker purchased said land, he entered into possession thereof under such title, and continued in possession until he sold to the defendant company: that the defendant company erected valuable lasting improvements on the said land under the belief that the land claimed by the plaintiff was their own land, and they pleaded the 4th section of R. S. O., ch. 95, and submitted that they were entitled, in the event of the plaintiff establishing his title to said land, to be paid the amount by which the value of said land was enhanced by such improvement: that the plaintiff had been out of possession of the said land for more than ten years, and that the cause of action, if any, did not accrue within ten years: that the plaintiff had not brought this action to recover the said land within ten years next after the time at which the right to bring such action first accrued to him; and they pleaded "The Real Property Limitation Act."

By his statement of defence the defendant Parker set up the same defence as the defendant company set up by their amended statement of defence. By a supplemental statement of defence the defendant company alleged that by indenture bearing date the 28th day of July, 1876, made between defendant Parker, of the first part, his wife, for the purpose of barring her dower, of the second part, and the defendant company of the third part, the defendant Parker conveyed the said land to the defendant company in fee simple, and by the said indenture covenanted with the defendant company, their successors and assigns, that he was lawfully seised in his own right of an absolute and indefeasible estate of inheritance in fee simple of and in all and singular the said land, and that he had good right, full power and lawful authority to convey the same,

and that the defendant company should and might at all times thereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the said land and every part thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the defendant Parker, or of any other person or persons lawfully claiming or to claim the same, and that the said land was free and clear, discharged, and unencumbered, of and from all former and other grants, with charges, estates, judgments, taxes, assignments, and encumbrances, of what nature or kind soever, and that defendant Parker the said land, and every part and parcel thereof, unto the defendant company, their successors and assigns, against the defendant Parker and his heirs, and against all and every person or persons whomsoever lawfully claiming or to claim the same, should and would warrant and forever defend; and the defendant company claimed that the defendant Parker should be ordered and adjudged to perform and make good his said covenants, and to pay to the defendant company all loss, costs, and damages to which they might be put or sustain by reason of this action, including all damages and costs which the defendant company might be ordered to pay to the plaintiff in this action.

Issue.

The cause was tried at the last Woodstock Assizes by and before Osler, J., when the following facts appeared: The patent from the Crown for the land in question issued on the 22d of May, 1805, to Hammon Lawrence, who conveyed the same, on the 10th of March, 1809, to Archibald Burtch, who conveyed the same on the 8th of April, 1854, to the plaintiff. It was vacant and unenclosed when the plaintiff got it, and he did not enclose it or go into the actual possession of it. Shortly after he got it the Woodstock and Lake Erie Railway and Harbour Company surveyed certain lands for a station for their said railway, including the said land, and planted stakes indicating such survey, some of which stakes were on the said land, but how many or where did not appear. They then applied

to the plaintiff to buy the said land, but he asked £100 for it, which they refused to give, and served him with a notice to arbitrate. The arbitration was held, and an award made in favour of the plaintiff, but the company never paid the sum awarded, and the plaintiff never gave them a deed, nor did he ever give them possession of the land. It was not proved that the company had ever deposited their map or plan and book of reference as required by law. The company never took possession of the said land, or did any act upon it save as above stated. The plaintiff, in June, 1854, moved from Woodstock to the county of Bruce, where he has since resided. He never paid any taxes on the land in question, nor did it appear that any were paid by any one till after the sale to the defendant Parker hereinafter mentioned.

On the 31st of December, 1857, one McBain, a judgment creditor of the railway company, filed his bill in Chancery against the said company for a sale of their lands, and such proceedings were thereupon had that the land in question was sold, under the directions of the said Court, on the 16th of February, 1864, and the defendant Parker became purchaser thereof, one of the conditions of the said sale being that the vendor was not to be bound to produce or prove title anterior to that of the company. Parker never obtained a reference as to the title, nor did he ever investigate the title to the said land, and on the 2nd day of June, 1864, he obtained a vesting order from the said Court vesting the said land in him in fee for all the estate, right and interest therein of, as well the plaintiff, as of the defendant in the said suit. The plaintiff was no party to the said suit, and was in no way bound thereby, and never heard of the sale until after it had taken place.

On the 29th April, 1865, Parker paid some arrears of taxes in respect of the said land, and thereafter till he sold the same to the defendant company continued to pay the taxes thereon. The defendant Parker never cultivated nor enclosed the said land, but agreed to pay one half of the expense incurred by the adjoining proprietors of the

lots on the north and east sides of it in fencing their lots, if he ever enclosed it. Nor did he ever go into the actual possession of it, but on one occasion, about the year 1866, he dug some holes upon it for the purpose of testing the clay to see if it would make bricks; and on another occasion, but when did not appear, he put up a board upon it with this inscription: "These lots for sale, apply to H. Parker," but this board got knocked down, and he never put it up again. Save these acts the defendant Parker did no acts upon the said land, but occasionally went upon it to see it. Some time in 1875 he sold this lot and its adjoining one to the defendant company for $400; and on the 16th of November, 1875, they paid him $200 on account of the purchase money; and the balance on August 5th, 1876, after the deed was executed. Before the deed was executed the solicitor of the defendant company investigated the title, and finding it defective required Parker to execute a deed with absolute convenants—the deed mentioned in the supplemental statement of defence of the defendant company. The defendant company after they purchased from the defendant Parker, and before they got the deed, commenced to make and did make valuable improvements on the said land.

The learned Judge found as follows: (1) That the plaintiff had proved a paper title to the land in dispute; (2) That for upwards of 27 years next before the commencement of the action the plaintiff had not been in the possession or occupation of the said land, or in receipt of the rents and profits thereof; (3) That at the time of the commencement of the action, and for six years previous thereto, the defendant, the Woodstock Gas Light Company were in the actual possession and occupation thereof under a contract of sale and subsequent conveyance to them from the defendant Parker; (4) The Woodstock and Lake Erie Railway, (afterwards the Niagara and Detroit River Railway Company), whose right and title to the said land the defendant Parker purchased under proceedings in the Court of Chancery, in a suit of *McBain* v. *That*

Company, never were in possession of the said land other than by staking out the line of their railway thereon; and never in fact had any title to the same by length of possession or otherwise, and never paid the purchase money therefor; (5) That the defendant Henry Parker, (from whom the defendants the Woodstock Gas Light Company purchased the said land in the year 1876) on two occasions at least after he so purchased it, and prior to the year 1860, made an entry thereon as and believing himself to be the owner thereof, but never remained in the actual and continuous possession or occupation thereof; such land was always, until the last named defendants took possession thereof, lying open, vacant, and unenclosed by fences, except on two sides thereof, when it was fenced off by fences of adjoining proprietors: (6) The taxes on the said land had been paid since the year 1853 by the said the Woodstock and Lake Erie Railway Company and the defendants, and not by the plaintiff, who had not been assessed therefor since the year 1855: (7) The improvements on the said land had been made by the defendants the Woodstock Gas Light Company under the *bonâ fide* belief that the said land was their own. And he directed judgment to be entered for the defendants, with costs.

In Michaelmas Sittings last, Osler, Q. C., moved to set aside the judgment for the defendants, and to enter it for the plaintiff, and on 30th November, 1882, he supported his order, contending that there must be continuous adverse possession for twenty years, referring to *McConaghy* v. *Denmark*, 4 S. C. 609; *Kipp* v. *Synod of Toronto*, 33 U. C. R. 220; *Lloyd* v. *Henderson*, 25 C. P. 253; *Heyland* v. *Scott*, 19 C. P. 170; *Steers* v. *Shaw*, 1 O. R. 26; *Davis* v. *Henderson*, 29 U. C. R. 355; *Shepherdson* v. *McCullough*, 46 U. C. R. 573.

Fletcher, contra. In 1854 the Railway Company took possession of these lands by staking them out, surveying

them and registering their map, and under the appropriation clause of the Railway Consolidation Act then in force, that gave the Railway Company a title, leaving a lien for the purchase money; at all events, under the arbitration which was had between the parties, the title in equity passed to the Railway Company, and the owner has only a lien for the purchase money. The solicitor's return of moneys paid for rights of way shewed £100 paid Walton for a lot. This payment could not refer to the other lot, because the other lot was not conveyed to the Railway Company, but to Wm. Lynn Smart; and it did refer to this lot, because there was an entry that the payment was made for a lot for which no deed had geen given; yet it was admitted on all hands that a deed had been given for the other lot, and the evidence of payment was as conclusive as could be expected after a lapse of twenty-eight years. At all events there was a title in defendant Parker, who bought at a Chancery sale in 1866, by various acts of possession. Parker paid taxes, fenced both sides of the lot, not in front, no front fences being required in Woodstock, dug for clay and left the holes open, and had a board up for a long time, "This lot for sale, apply to Henry Parker, proprietor." These acts shewed that Parker made an entry as owner. The moment Parker erected his board announcing his proprietorship in 1864, the plaintiff's right of action accrued, and he is now barred by statute, it being more than ten years since. Complete fencing is not necessary, and if Parker empleyed an agent to do the very acts which he himself did, then under the authority of *Heyland* v. *Scott*, 19 C. P. 170, he had possession of the lot; *a fortiori*, had he the possession if he did the acts himself. At all events, the plaintiff in the most open and flagrant manner discontinued possession, and the plaintiff did not bring his action soon enough, and if the alternative, "discontinued such possession," has any application or meaning the expression is applicable to this case, where the plaintiff discontinued possession for twenty-eight years.

The cases cited are referred to in the judgment.

December 30, 1882. ARMOUR, J.—In *McDonnell* v. *McKinty*, 10 Ir. L. R. 514, Blackburne, C. J., at p. 526, said: "The word 'discontinuance,' I understand to mean an abandonment of possession by one person followed by the actual possession of another person. This, I think, must be its meaning, for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance, there must be both dereliction by the person who has the right and actual possession, whether adverse or not, to be protected."

In *Smith* v. *Lloyd*, 9 Ex. 562, Parke, B., in delivering the judgment of the Court, said, p. 572: "We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under 3 Wm. IV., ch. 27, secs. 2 and 3, for we are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C. J., in *McDonnell* v. *McKinty*, 10 Ir. Law Rep. 514, and the principle upon which it is founded."

In *Ketchum* v. *Mighton*, 14 U. C. R. 99, and in *Lloyd* v. *Henderson*, 25 C. P. 253, *Smith* v. *Lloyd*, was quoted and followed.

In *Kipp* v. *The Incorporated Synod of the Diocese of Toronto*, 33 U. C. R. 220, the plaintiff's evidence shewed that one Scott had been let into possession by Vansittart, adversely to the plaintiff, about nineteen years before the action was commenced, and other persons were proved to have been in possession adversely to the plaintiff before Scott for several years. The learned Judge told the jury that to entitle the defendants to a verdict, they and those under whom they claimed should have had twenty years' *continuous* possession. This was objected to as a misdi-

rection, and the Court so held; but there is nothing in the case, when rightly understood, against the principle laid down in *Smith* v. *Lloyd*.

In *McConaghy* v. *Denmark*, 4 S. C. 609, Gwynne, J., said, p. 632: "Now, by a long unbroken chain of decisions, extending over a period of upwards of forty years, it has been held by the Courts in Upper Canada that the possession which will be necessary to bar the title of the true owner must be an actual constant, visible occupation by some person or persons (it matters not whether in privity with each other in succession or not), to the exclusion of the true owner for the full period of twenty years; and that to transfer the title to, the person in possession at the expiration of the twenty years such person must claim privity with the persons preceding him in the possession during the period of twenty years, unless he himself was continuously in such possession during that period; the difference being that, while any person in possession, after the title of the true owner is barred by a possession to his exclusion for twenty years, may defend successfully an action of ejectment brought by the original owner, however short may have been the possession of such defendant, and notwithstanding his want of privity with the persons in possession during the twenty years, yet no one can recover as plaintiff in ejectment in virtue of a title acquired by possession against the true owner for twenty years under the provisions of the statute, unless he himself alone or in privity with others in possession before him, had that continuous possession which was required to bar the true owner; and payment of taxes, or the committing of acts of trespass by cutting timber from time to time by a person not in actual visible psssession, will avail nothing towards establishing the possession which the statute requires."

These authorities shew clearly that neither the railway company nor Parker ever had such a possession of the land in question as extinguished the title of the plaiutiff.

I refer to *Coverdale* v. *Charlton*, L. R. 4 Q. B. D. 104.

The judgment will therefore be entered for the plaintiff, with costs.

HAGARTY, C. J., concurred.

CAMERON, J.—I am of opinion that the verdict for the defendant is right and should not be disturbed, on the ground that upon the facts proved it must be taken that the plaintiff discontinued possession of the land in 1854, when the Woodstock and Lake Erie Railway Company gave notice that they required the land for the purpose of their railway, and required the plaintiff to appoint an arbitrator to determine the price to be paid therefor, though the company made no positive use of the land so as to be visibly in occupation of it. They entered and staked off the lot, arbitrated as to the price to be paid, and after the sale under the decree of the Court of Chancery the defendant Parker entered, and by a post planted on the lot containing an advertisement for sale by him, gave notice of his ownership or claim of dominion over it. These things were, I think, sufficient evidence of an adverse claim to the land and of a discontinuance by the plaintiff clearly sufficient to prevent him from making a lawful entry or bringing an action after the lapse of twenty years. If an actual visible occupation in some one for the full period of ten years before action, as was held in the Court of of Appeal in the case of *Harris* v. *Mudie*, 7 A. R. 414, is essential in a case like the present, then there has not been such an occupation in this case, as there certainly has not been a fence about the lot for the period of ten years.

The right of the plaintiff to make an entry under the statute arose immediately on his discontinuance, which, if I am right, took place when the arbitration was had under the circumstances in evidence; though, as matter of law, had the taking possession by the railway company been resisted, the company might not, without paying the amount awarded, or giving security under the Railway Act, have been able successfully to invoke the power con-

tained in it for obtaining from the County Judge a warrant to put them in possession. As the law then was the plaintiff would have been barred by the lapse of twenty years: that would be in 1874 or 1875. If the leaving the town of Woodstock, and absenting himself for the period of twenty-eight years, under the circumstances of the company claiming the right to take the land, does not amount to a discontinuance of possession, it is difficult to see under what circumstances a discontinuance of possession can take place, so as to come within the statute, or to make such discontinuance prevent a recovery, unless there has been an occupation of the land by some one else for a sufficient time to work a bar quite irrespective of the question of discontinuance.

Doe Taylor v. *Proudfoot*, 9 U. C. R. 503, favours this view, while *Doe Cuthbertson* v. *McGillis*, 2 C. P. 124, is against it. But in the latter case there were not any of the circumstances, such as the claim of the right of expropriation by the railway, or anything except absence, to indicate a discontinuance or abandonment of possession.

Judgment for plaintiff, with costs.

A DIGEST

OF

REPORTED CASES

DECIDED IN

THE QUEEN'S BENCH AND CHANCERY DIVISIONS,

HIGH COURT OF JUSTICE FOR ONTARIO

1882.

ACQUIESCENCE.

Absence of proof of.]—See SALE OF LAND, 3.

ADMINISTRATION.

Deficiency of assets—Liability to refund—R. S. O. ch. 107, *sec.* 30—*Secured creditors.*]—The R. S. O. ch. 107, sec. 30, which enacts that on the administration of the estate of a deceased person, in case of a deficiency of assets, all debts shall be paid *pari passu*, not only abolishes privilege among creditors, but places them in the same position with respect to each other as legatees; and a creditor receiving payment in full, either in an action against the executor or by the voluntary act of the latter, must refund the excess above his proportionate share at the instance of other creditors.

A secured creditor need not bring his security into hotchpot as a condition precedent to ranking on the estate, his lien being expressly preserved by the Act. *Chamberlain* v. *Clark et al.*, 135.

AMENDMENT.

Of sentence in conviction by Sessions, effect of.]—See CONVICTION.

Of information at close of case.]—See TEMPERANCE ACT, 1878.

See PRINCIPAL AND SURETY, 1.

APPEAL.

From master's report.]—See EXECUTORS.

ARBITRATION.

See MUNICIPAL CORPORATIONS, 4 —WAYS, 2.

ASSIGNMENT.

Of replevin bond.]—*See* REPLEVIN.

AUCTIONEERS.

See MUNICIPAL CORPORATIONS, 7.

AWARD.

See MUNICIPAL CORPORATIONS, 2.

BANKRUPTCY AND INSOLVENCY.

1. *Chattel mortgage—Agreement to execute—Prior advances—Pressure —R. S. O. ch.* 118.]—Where there is a promise to execute a chattel mortgage, upon the faith of which money is advanced, or where there is a pre-existing duty to give such a mortgage, which is in consequence of pressure subsequently executed, the mortgage is not void under R. S. O. ch. 118.

Held, also, that the doctrine of pressure which obtained before the Insolvency laws, now occupies the same position since their repeal. *Brayley* v. *Ellis et al.*, 119.

2. *Insolvent Act of* 1864—*Personal wrong—Discharge— Seduction —Ca. sa.—Return.*]—*Held*, affirming the judgment of Cameron, J., that under the Insolvent Act of 1864, sec. 9, sub-sec. 5, a discharge n Insolvency would form no answer to proceedings upon a judgment against the defendant for seduction.

Held, also, that where a *ca. sa.* had been issued upon the judgment within the year, it was not necessary to return and file the same within the year. *Beninger* v. *Thrasher*, 313.

See LIMITATIONS OF ACTIONS AND SUITS, 3.—FRAUDULENT ASSIGNMENT. —FRAUDULENT JUDGMENT.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Sale under after expiration by non-renewal—Creditor, meaning of— Interpleader—Setting up new title.*]—A chattel mortgage which has expired by effluxion of time under R. S. O. ch. 119. sec. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgagor then existing; and a sale on default in good faith, made by the mortgagee, with the consent of the mortgagor, though good as between the parties to the mortgage, only passes to the purchaser a title subject to the rights of any creditors who take steps to follow the goods.

Remarks upon the policy of the Chattel Mortgage Act.

In an interpleader issue the claimant claimed under his purchase from the chattel mortgage, and the issue was found against him:

Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the Court. *Barker* v. *Leeson*, 114.

2. *R. S. O. ch.* 119.]—The omission of the word "him," at the conclusion of the affidavit of *bona fides* registered with a chattel mortgage, has the effect of destroying the security as against an execution creditor who has seized while the goods re-

mained in *statu quo*, but does not impair the instrument as between the parties. *Davis* v. *Wickson et al.*, 369.

BILLS AND NOTES.

See LIMITATIONS OF ACTIONS AND SUITS, 4.

BOUNDARIES.

See WAYS, 1.

BRIDGE.

Duty of maintaining.] — *See* WAYS, 1.

BUILDINGS.

1. *Excavation of building—Right to lateral support—Damages by removal of—Future damages—Costs.*] —The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged.

Held, that in substituting artificial support for the natural support of the soil which had been removed, the defendants might construct it of any material, provided it was a sufficient support for the purpose, and that they continued to maintain the plaintiff's land in its proper position.

Held, also, that in estimating the plaintiff's damages, no sum should be allowed for damages to arise in future.

The damages were assessed at $40, but judgment was given for the restoration of the plaintiff's land. *Held*, that the plaintiff was entitled to full costs. *Snarr* v. *The Granite Curling and Skating Co.*, 102.

2. *Party wall — Adjoining proprietors.*] — Where the defendant raised the height of a party wall beyond that of the building of the plaintiff, the adjoining owner, with the latter's consent, and subsequently opened a window through the said wall, so raised, so as to overlook the the plaintiff's premises:

Held, that by piercing the window defendant had distinctly given notice that he ceased to regard the wall as a party wall; that it was an unauthorized user of the party wall; and the plaintiff was entitled to an injunction to restrain the further continuance of such window. *Sproule* v. *Stratford*, 335.

BY-LAW.

For taking gravel to repair streets.] —*See* WAYS, 2.

CABS.

See MUNICIPAL CORPORATIONS, 5.

CA. SA.

See BANKRUPTCY AND INSOLVENCY, 2.

CARRIERS.

See DAMAGES.

CERTIORARI.

See CONVICTION.

CHALLENGE.

See JURORS.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES—BANKRUPTCY AND INSOLVENCY, 1.

CHOSE IN ACTION.

Assignment of replevin bond.]—*See* RELEVIN.

CLERGY RESERVES.

Clergy Reserve money not within township treasurer's bond.]—*See* MUNICIPAL CORPORATIONS, 3.

CONSTITUTIONAL LAW.

Held, that the Legistature of the Province of Ontario had power under No. 14, of sec. 92, B. N. Act to pass R. S. O. ch. 71, providing for the qualification of Justices of the Peace. *Regina* v. *Bennett*, 445.

See PARLIAMENT, 1, 2.—JURORS.

CONTESTED ELECTIONS.

See PARLIAMENT, 1, 2.

CONTRACT.

For purchase of land.]—*See* SALE OF LAND, 2.

CONVICTION.

Hard labour — Amendment of sentence by Sessions — Quashing conviction — Trespass.]—Where an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the Sessions amended the record by striking out "hard labour."

Held, (CAMERON, J., diss.,) that their assuming so to amend the conviction was not a quashing of the conviction, and therefore trespass would not lie against the Justice.

Per ARMOUR, J. — The General Sessions of the Peace have no power under 32-33 Vic. ch. 31, to amend the sentence in a conviction, as by striking out the part imposing hard labour, but can hear and determine an appeal on the adjudication of guilt only.—HAGARTY, C. J., inclined to agree, but gave no express decision on this point.

Per ARMOUR, J.—This Court has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect of such adjudication; and sec. 71 of 32-33 Vic. ch. 31, D., does not take away the *certiorari* in such a case.

The conviction awarded imprisonment with hard labour in default of payment of the fine. The Sessions amended the conviction by striking out hard labour, and awarding imprisonment only in default of distress. The commitment under which plaintiff was confined directed imprisonment at hard labour.

Per CAMERON, J.—The conviction as amended, which was the only one put in evidence, superseded the original conviction, and in effect quashed it so far as regarded the hard labour; defendant was bound to shew an

existing conviction authorizing the commitment, and as he failed to do this, the excess of jurisdiction in awarding hard labour made him liable in trespass; and, *Semble*, that the award of imprisonment in the first instance, under the circumstances in evidence, would also make him so liable.

The conviction was under a village by-law, for writing and posting up an indecent placard, and the placard was criminal libel. *Quære*, *Per* CAMERON, J., whether the municipality could thus make a new offence, and award a new or additional punishment for what was already a criminal offence.

The by-law directed imprisonment only in default of distress. *Quære*, *Per* CAMERON, J., whether the 32-33 Vic, ch. 31, sec. 59, would apply so as to enable the Justice to commit under it in the first instance upon proper evidence.

Per CAMERON, J.—*Quære*, whether upon the evidence the finding that the plaintiff was not put to hard labour was justified.

See MUNICIPAL CORPORATIONS, 1—SUNDAY.

COSTS.

See BUILDINGS, 1.—PARTNERSHIP.

COURTS.

Jurisdiction.]—*See* PARLIAMENT, 2.

COVENANT.

See SALE OF LAND, 3.

CRIMINAL LAW.

Admissibility of deposition of witness.]—*See* EVIDENCE, 2.

Inadmissibility of wife against husband.] — *See* EVIDENCE, 3 — JURORS—SUNDAY.

Forgery.]—*See* EXTRADITION.

CROPS.

Purchaser of land under a decree in mortgage suit, entitled to growing crops.]—*See* MORTGAGE, 1.

CUSTODY OF INFANTS.

See INFANTS.

DAMAGES.

Carriers—Delivery at wrong destination—Measure of damages—Fall in market.] — The defendants contracted with the plaintiff to carry a car-load of clover seed to Liverpool, and gave him a bill of lading therefor. While it was on the way, by a new contract, its destination was changed to London, for delivery to a supposed customer of the plaintiff's, and a new bill of lading was given to the plaintiff; but, by a mistake of the defendants, the seed went by a line of steamships to Liverpool, and as soon as the mistake was discovered the defendants notified plaintiff. After great delay, which the learned Judge at the trial found to have been caused by the defendants, the seeds reached London, and the plaintiff's supposed customer having refused it, it was sold at the reduced price, the market having fallen between the day when the seed should have been

delivered in London and the day of sale. The learned Judge found a verdict for the plaintiff, and assessed as damages, in addition to freight from Liverpool to London, the difference in market price between the date at which the seed should have arrived in London, if it had been shipped by the right line, and the day it arrived there.

Held (CAMERON, J., dissenting), that the damages were properly assessed, the finding of fact being that the delay was caused by the defendants.

Per CAMERON, J.—The damages, which were the material result of the breach of contract to carry to London, were what it cost the plaintiff to have the goods taken to London, and a reasonable sum to compensate him for the expense, trouble, and correspondence occasioned by the seed having been sent to a wrong destination; and damages resulting from a fall in the market were not incident to the breach of the contract.—*Monteith* v. *The Merchants' Despatch and Transportation Co.*, 47.

For removal of lateral support.]—*See* BUILDINGS, 1.

See MORTGAGE, 2 — MALICIOUS PROSECUTION—RAILWAYS AND RAILWAY COMPANIES, 2—DOWER—SHIPS.

DEATH.

Presumption of.]—*See* DOWER.

See RAILWAYS AND RAILWAY COMPANIES, 2.

DEED.

See SEAL.—ESTATE.

DEFAMATION.

1. *Slander—Repetition—Privileged communication.*]—The plaintiff was assistant in the shop of C., a druggist, over which the defendant and her husband, a physician, lived, the latter being C.'s landlord and customer. The defendant having in the presence of a witness accused the plaintiff of having taken $4 from her trunk upstairs, her husband told C. that the plaintiff must be discharged, or he would send him no more prescriptions. A meeting was, however, arranged between the parties in the presence of the witness, for the purpose, as they said, of an investigation. On this occasion the slanderous words were repeated, and the plaintiff was discharged from C.'s employment.

Held, that what was said at this meeting was privileged, and the case having been left to the jury generally a verdict for the plaintiff was set aside. *Hargreaves* v. *Sinclair*, 260.

2. *Slander—Imputation of Insolvency—Actionable words—Nonsuit.*]—The defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers (meaning the plaintiff) had run away owing money to him and others: that he, the defendant, had come in to catch the plaintiff, but that he had gone or cleared out. At the trial a nonsuit was entered, on the objection that the words were not shewn to have been used with reference to the plaintiff's business, and no special damage was proved.

Held, that the nonsuit was wrong, for the words used cast an imputation upon the solvency and financial standing of the plaintiff, and it was for the jury to say whether they were spoken in reference to his business, and calculated to injure him therein. *Lott* v. *Drury*, 577.

DEPOSITIONS.

Admissibility of.]—*See* EVIDENCE, 2.

DESCENT.

Distributions, Statute of.]—The proviso in the Statute of Distributions that "There be no representations admitted amongst collaterals after brothers' and sisters' children," excludes the children of a deceased nephew of the intestate. *Crowther et al.* v. *Cawthra et al.*, 128.

DISCONTINUANCE.

See LIMITATIONS OF ACTIONS AND SUITS, 5.

DISTRIBUTION, STATUTE OF.

See DESCENT.

DOWER.

Husband's absence—Presumption of death—Damages for detention of dower.]—*Held*, that the presumption of death arising from continued absence of the defendant's husband, unheard of for seven years, is sufficient to sustain an action of dower as against the objection that he is still living.

Quære, whether damages for detention of dower, or for arrears of dower, can be recovered under the Dower Act. *Giles* v. *Morrow*, 527.

ELECTIONS.

See PARLIAMENT, 1, 2.

DRAINAGE.

Validity of by-law.]—*See* MUNICIPAL CORPORATIONS, 6.

EMINENT DOMAIN.

See RAILWAYS AND RAILWAY COMPANIES, 1.

ESTATE.

Conveyance—Mortgage—R. S. O. ch. 108, ss. 15, 19—Statute of Limitations.]—Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular," the mortgaged land, *habendum* "as and for all the estate and interest" of the grantors "in and to the same."

Held, sufficient to pass the fee to the grantees.

Held, also, the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, passed by the above deed to the grantees, and coupled with their own subsequent possession for the necessary period conferred on them an absolute title to the land by virtue of R. S. O. ch. 108, ss. 15, 19.

EVIDENCE.

1. *Held*, that a magistrate cannot take judicial notice of Orders in Council, or their publication, without

proof thereof by production of the Official Gazette, and therefore that a conviction was bad which was made without such evidence, that the Canada Temperance Act of 1878 was in force in the county pursuant to the terms of section 96 thereof. *Regina* v. *Bennett*, 445.

2. *Case reserved — Deposition of witness—Admissibility of—Proof of absence.*]—Upon a prosecution for uttering forged notes, the deposition of one S. taken before the police magistrate on the preliminary investigation was read, upon the following proof that S. was absent from Canada: R. swore that S. had a few months before left his, (R.'s) house where she (S.) had for a time lodged, that she had since twice heard from her in the U. S. A., but not for six months. The chief constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S. by means of personal enquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife.

Held, upon a case reserved, CAMERON, J., dis., that the admissibility of the deposition was in the discretion of the Judge at the trial, and that it could not be said that he had wrongly admitted it. *Regina* v. *Nelson*, 500.

3. *Neglect to support wife—Conviction—Wife's evidence—Admissibility of—Reservation of case.*]—*Held*, ARMOUR, J., diss., that the evidence of a wife is inadmissible, on the prosecution of her husband for refusal to support her, under 32-33 Vic. ch. 20, sec. 25.

Under C. S. U. C. ch. 112, any question of law which may have arisen on the criminal trial, may be reserved for the consideration of the Justices of either of Her Majesty's Superior Courts of common law.

Quære, per ARMOUR, J., having regard to the provisions of the Judicature Act, whether a reservation to the Justices of the Queen's Bench Division of the High Court of Justice was authorised. *Regina* v. *Bissell*, 514.

Of verbal warranty—Admissibility.]—*See* SHIPS.

Of waiver of excessive consignment.]—*See* SALE OF GOODS.

Of death of husband.]—*See* DOWER.

See ACQUIESCENCE — HUSBAND AND WIFE.

EXECUTORS.

Executors—Compensation—R. S. O. ch. 107, *sec.* 41—*Rests—Master's report—Practice.*]—The fact that, an account being taken in the Master's office pursuant to a decree in an administration suit, a balance has been found against an executor, some of the items of which are the result of a surcharge, is not alone sufficient to disentitle him to compensation under R. S. O. ch. 107, sec. 41.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the Court to determine on the propriety of his decision.

Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out

on the report, rather than to appeal in such a case. *Sieveright et al.* v. *Leys*, 375.

Consent to sale of land.]—*See* WILL, 1.

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION—INFANTS.

EXPROPRIATION.

See RAILWAYS AND RAILWAY COMPANIES, 1.

EXTRADITION.

Ashburton Treaty — Forgery.]—The prisoner was the superintendent of an almshouse in the city of Philadelphia, U. S., which was supported by the city. Certain persons furnished goods to the almshouse, and were entitled to receive warrants for the price thereof. These warrants, duly prepared and signed in favour of the parties entitled, were in the hands of W., the secretary of the almshouse, to be delivered to the proper parties on their signing the counterfoils of the warrants. The prisoner obtained possession of the warrants by falsely representing to W. that he had authority to sign the names of the respective parties entitled, and by signing such names on counterfoils. The warrants were then cashed at the city treasury.

The district attorney of Philadelphia, who was examined before the County Judge, swore that according to the criminal code of Pennsylvania, established by statute there, which was produced, and at common law, as there interpreted, the facts shewn made out the crime of forgery.

Held, CAMERON, J., dissenting, that the offence amounted to forgery within the meaning of the Ashburton Treaty, and that the prisoner should be remanded for extradition.

Per HAGARTY, C. J.—The evidence disclosed a *primâ facie* case of forgery sufficient to warrant the commitment for trial of the prisoner if the crime had been committed in Canada.

Per ARMOUR, J.—The treaty was not intended to include the crime of forgery only where that crime is common to both countries. In framing the treaty the high contracting parties were dealing both with the present and future, and the general term forgery should include everything in the nature of forgery, and which thereafter might be held to be forgery at common law by the decision of the Courts, or might be declared to be forgery by the statute law.

Per CAMERON, J.—The statutory crime of forgery is the only kind of forgery within the treaty, but it was not intended to embrace any act or offence made forgery by any statutory law of either nation passed after the execution of the treaty. The offence in this case was the obtaining a cheque by falsely pretending that the prisoner had authority to sign the counterfoil, and was not within the treaty.

Held, also, that the original warrant, within the meaning of 31 Vic. ch. 94, sec. 2 (D.), is not the first of two or more consecutive warrants, but is any warrant issued in the United States of America. *Re Ellis P. Phippe*, 586.

FORFEITURE.

Waiver of.]—*See* LANDLORD AND TENANT.

FORGERY.

See EXTRADITION.

FRAUD.

See INSURANCE, 2.

FRAUDULENT ASSIGNMENT.

Semble, where one creditor, having obtained property from his debtor in fraud of other creditors, has realized the property, and received the proceeds in a shape that cannot be earmarked, another creditor who has thereby been defrauded, cannot make the preferred creditor account for the said proceeds, but has no other remedy than that prescribed by 13 Eliz. ch. 5, sec. 2. *Davies* v. *Wickson*, 369.

FRAUDULENT DEEDS.

Voluntary conveyance—Undue influence—Incapacity.]—The defendant, a grandnephew of the plaintiff, who was of advanced age and feeble mind, obtained from the latter a conveyance of certain land, her only property and means of maintenance, for a nominal consideration. He verbally promised to support her as a consideration for the grant. He brought a witness, who was a stranger, from a distance, to explain the deed and witness it, though other relatives in the neighbourhood were not consulted. It was explained to her that the defendant could not be legally bound to maintain her, as he was a minor. The deed contained no power of revocation:

Held, that the deed should be cancelled, on the ground that the plaintiff was not in a fit state of mind to understand its effect; but independently of this, that it had been made improvidently and under undue influence, and was wholly voluntary, and therefore could not stand. *Widdifield* v. *Simons*, 483.

FRAUDULENT JUDGMENT.

Preferential judgment—R. S. O., ch. 118.]—The defendant, a creditor of O., who was in insolvent circumstances, commenced an action on the 25th May, 1882. By arrangement with O, who appeared, pleaded to the plaintiff's statement of claim, and consented to an order striking out his defence, a judgment was obtained the next day. The plaintiff commenced proceedings immediately after the defendant, and in due course obtained judgment against O, and the validity of the defendant's judgment came in question on interpleader.

Held, following the decisions under R. S. O., ch. 118, that the defendant's judgment was valid.

Per ARMOUR, J.—If the matter was *res integra*, O., by actively interfering to enable the defendant to recover a judgment against him sooner than by due course of law he otherwise could have done, was giving a confession of judgment within the words of the Act, and certainly within its spirit. *Turner* v. *Lucas et al.*, 623.

FRAUDULENT PREFERENCE.

See FRAUDULENT ASSIGNMENT.—FRAUDULENT JUDGMENT.

FRAUD AND MISREPRESENTATION.

See PRINCIPAL AND SURETY, 2,

GROWING CROPS.

Purchaser of land under decree in mortgage suit entitled to.]—*See* MORTGAGE, 1.

HARD LABOUR.

See CONVICTION.

HUSBAND AND WIFE.

Separate property of married woman—Conveyance by wife to husband—R. S. O. ch. 109, *sec.* 2.]—Where by an agreement before marriage made in Montreal between the intending husband and wife, it was provided that each should enjoy all property, real and personal, which either might possess at the time of, or acquire during the marriage, in any way, as his or her separate and respective property, and should have the absolute controul and management thereof free from the debts and demands of the other, and after marriage the wife acquired certain land of which she and her husband executed a mortgage.

Held, that by the agreement the land was vested in the wife as her proper separate estate, and there was no incongruity in the husband being the grantee of the wife.

Ogden v. *McArthur*, 36 U. C. R. 246, distinguished.

Semble, that R. S. O. ch. 109, sec. 2, is retrospective, so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment.—*Sanders* v. *Malsburg*, 178.

Inadmissibility of wife's evidence on prosecution of husband for refusal to support her.]—*See* EVIDENCE, 3.

IMPRISONMENT.

See CONVICTION.

INFANTS.

Contract—Adoption of child—Parental control—Promise to make a will—Parties.]—Where a father enters into a contract whereby he parts with the custody and control of his child, with the *bonâ fide* intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy; and although, where such a contract is executory on both sides, the Court cannot decree specific performance, by reason of the want of mutuality, yet where the contract has been faithfully performed so far as the father and child are concerned, so that their *status* has become altered, the Court will, if possible, enforce in *specie* the performance of the contract by the other party to it.

Where, therefore, the parents of the plaintiff agreed with H. and his wife to give up to them their

daughter, the plaintiff, then six years old, to bring up as their own, and make her sole heiress to their property at their death, and where it appeared that the agreement was *bond fide* intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will.

Held, (reversing the judgment of FERGUSON, J.,)[1] that the agreement could be enforced against H.'s representative, and that it must be decreed accordingly.

Held, also, (affirming FERGUSON, J.,) that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Roberts* v. *Hall*, 386.

INJUNCTION.

To restrain opening of window in party wall.]—*See* BUILDINGS, 2.

To restrain building.]—*See* SALE OF LAND, 3.

INSURANCE.

1. *Insurance by vendor—Insurable interest—Misrepresentation—Assignee in bankruptcy—"Change of risk."*]—A vendor, who has agreed to sell for full value, has nevertheless, pending the contract of sale, a perfect right to insure the premises sold.

If such a vendor insures the premises, describing them as "his," this is no misrepresentation, for pending the contract he remains the legal owner.

The fact of the vendor insuring under such circumstances, being an assignee in bankruptcy, makes no difference from the case of an ordinary vendor.

Where the words in a condition in a policy are, "if the risk be increased or changed by any means whatever," the term "change" must be held to be used rather as a synonymn of "increase," than as a word of different signification. *Ottawa Co.* v. *Liverpool Ins. Co.*, 28 U. C. R. 522, approved of. *Gill* v. *The Canada Fire and Marine Ins. Co.*, 341.

2. *Fire insurance—Mortgagor and mortgagee—Subrogation—Mortgagee's fraud in obtaining money.*]—M., who had mortgaged his property to the plaintiffs, subsequently, on 2nd April, 1881, insured with the defendants, loss, if any, payable to plaintiffs. Attached to the policy on a printed slip, dated 29th May, 1881, was the following clause: "It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy." A loss having occurred, the defendants disputed their liability, and the matter was referred to an arbitrator, who awarded in favour of the plaintiffs, after refusing to admit evidence for the defendants that the policy had been obtained by fraud.

Held, that the above clause pro-

vided only against future acts; that the defendants did not thereby guarantee the policy to the plaintiffs as indisputable, and therefore that they were not debarred from setting up that the insurance had been effected by fraud; and the case was remitted to the arbitrator for the admission of such evidence.

Held, also, that the clause did not amount to a new insurance in favour of the mortgagee. *Omnium Securities Co.* v. *Canada Fire and Mutual Ins. Co.*, 494.

INTEREST.

Of Judge.]—*See* MUNICIPAL CORPORATIONS, 7.

INTERPLEADER.

See PRINCIPAL AND SURETY, 2—BILLS OF SALE AND CHATTEL MORTGAGES, 1.

JUDICATURE ACT.

Quære, as to power to reserve, in criminal cases, for the Queen's Bench Division since the Judicature Act.]—*See* EVIDENCE, 3.

JUDGMENT.

See FRAUDULENT JUDGMENT.

JURORS.

Criminal law—Selection of jurors 32-33 Vic. ch. 29, sec. 44 (D.)—Writ of error—Challenge to the array].—By 32-33 Vic. ch. 29, sec. 44 (D.), every person qualified and summoned to serve as a juror in criminal cases according to the law in any province, is declared to be qualified to serve in such province, whether such laws were passed before the B. N. A. Act or after it, subject to and in so far as such laws are not inconsistent with any Act of the Parliament of Canada.

By 42 Vic. ch. 14 (O.) and 44 Vic. ch. 6 (O.), the mode of selecting jurors in all cases, formerly regulated by 26 Vic. ch. 44, was changed. The jury was selected according to the Ontario Statutes, and the prisoner challenged the array, to which the Crown demurred, and judgment was given for the Crown. The prisoner was found guilty and sentenced, and he then brought error.

Held, *per* HAGARTY, C. J., that the Dominion Statute was not *ultra vires* by reason of its adopting and applying the laws of Ontario as to jurors to criminal procedure.

Semble, that under sec. 139, Consol. Stat. U. C. ch. 31, where no unindifference or fraudulent dealing of the sheriff is shewn, any irregularities are not assignable for error.

Per ARMOUR and CAMERON, J. J.—The objection raised by the prisoner was not a good ground of challenge to the array.

Quære, whether, when such a question has been reserved by a Judge at the trial, it can afterwards be made the subject of a writ of error. *Regina* v. *O'Rourke*, 464.

JURY.

See TRIAL.

JUSTICES OF THE PEACE.

Conviction by interested Justices.] *See* MUNICIPAL CORPORATIONS, 7.

Power of Ontario Legislature to appoint.]—*See* CONSTITUTIONAL LAW.

LANDLORD AND TENANT.

Lessor and lessee—Covenant to keep up fences—Removal of fence—Waiver.] —*Semble*, that in this country the removal of a fence on a farm from one place to another is not *per se*, as a matter of law, a breach of a covenant to repair and keep fences in repair; and whether it is so or not would be a question of fact under the circumstances ~~of each~~ case.

When the lessor accepted rent after such a removal with knowledge of it, *Held* a waiver of the forfeiture, if any, and that he could not afterwards claim to re-enter for the continuance of the fence in its altered position as a breach of the covenant. *Leighton* v. *Medley*, 207.

LATERAL SUPPORT.

See BUILDINGS, 1.

LEASE.

See SALE OF LAND, 1.

LEGACY.

1. *Will, construction of—Legacy reducible by testator's debt.*]—A testator bequeathed, "unto my sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make $6,000." At the time of the making of the will there was $3,258.47 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of $2,000 to M. J.'s credit, making the whole sum at her credit $5,258.42: of this sum, $3,000 was placed on a special account at interest, $2000 was agreed to be paid to her by the purchasers, and the balance, $258.42, was paid in cash, and her account balanced in the books, leaving nothing at her credit.

Held, that M. J.'s legacy was to be reduced by the amonnt of testator's debt to her at the time of his death: that what had taken place amounted to payment of the debt; and that she was entitled to the legacy of $6,000. *Wilkes* v. *Wilkes*, 131.

2. *Legacy.*]—A testator by his will directed that "$5,000 of the money which I may be entitled as my share of the partnership business now carried on at," &c., under the name of E. H. & Co., should be invested by his executors at interest, and that the income derived therefrom should by them be paid over, as received, to his daughter M., for her maintenance until she attained twenty-one, when she should be entitled to $5,000; and if the interest in any year from the investment should fall short of $400, the difference to make up that sum should be paid by his executors out of the interest or profits derived from the remainder of her estate. "Subject as aforesaid, he gave the residue of his estate, real and personal, to his executors in trust for his son," &c. Subsequently to the making of the will the partnership of E. H. & Co. was dissolved, and the testator until his death carried on the business alone, but under the name of E. H. & Co., his

interest in the partnership having been realized by him and carried into his new business.

Held, that the legacy of $5,000 was demonstrative and not specific, and that she was entitled to be paid the same out of the general estate. *Daly* v. *Harris*, 147.

LIBEL.

See DEFAMATION, 1, 2.

LICENSES.

See MUNICIPAL CORPORATIONS, 5.

LIMITATIONS OF ACTIONS AND SUITS.

1. *Boundary line—Wild land—Constructive possession—Statute of Limitations.*]—Thirty or forty years before action a blazed line had been run between the lots of plaintiff and defendant by S., a surveyor, along part of which a fence had been erected. The parties respectively cut timber and exercised acts of ownership on the lands on each side of and up to the blazed line. The plaintiff swore that although he and his father had been governed by this line and never claimed or went beyond it, it was always their intention to dispute it when they should be able to establish the true line. The learned Judge at the trial found that there was sufficient evidence of defendant's occupation of the land up to the blazed line to extinguish the plaintiff's title. *Held*, ARMOUR, J., dissenting, that the verdict was right.

Title by possession to wild land can be made out otherwise than by actual enclosure. *Steers* v. *Shaw et al.*, 26.

2. *Mortgage — Foreclosure — Recovery of land—Statute of Limitations.*]—The remedy by way of foreclosure or sale in mortgage suits is a proceeding to recover lands within the meaning of R. S. O. ch. 108, sec. 4. Therefore when a suit to foreclose a mortgage was commenced ten years and eight months after the date of the default in payment, and the plaintiff claimed payment of the mortgage debt, possession, and foreclosure.

Held, that the only relief to which the plaintiff was entitled, was judgment upon the covenant for payment. *Fletcher* v. *Rodden*, 155.

3. *Statute of Limitations—Mortgage—Insolvency.*]—When the right of action for entry or foreclosure is taken away by virtue of R. S. O. ch. 108, sec. 15, the title itself of the mortgagees is extinguished, and the right of action wholly disappears.

A mortgagee who has suffered the statute to run before he asserts his right of entry cannot, by afterwards getting possession of the property, revive his title to it, but he is in as a mere trespasser.

The insolvency of the mortgagor and the appointment of an assignee in insolvency, does not suspend the running of the Statute of Limitations, so as to preserve the lien and security of the mortgagee on the land mortgaged. *Court* v. *Walsh*, 167.

4. *Bill of exchange — Statute of Limitations.*]—The bill of exchange in this action fell due on 1st December, 1875, and the writ issued on the 1st December, 1881.

Held, (CAMERON, J., dissenting,) that the statute began to run on the 2nd December, 1875, and therefore that this action was commenced in time. *Sinclair* v. *Robson*, 16 U. C. R. 211, remarked upon.

Per ARMOUR, J. — Though the holder of a bill may put himself in a position to commence his action on the day the bill falls due by demanding and being refused payment, he is not bound to do so; and if he does not, the acceptor has the whole of the day of maturity in which to pay the bill, and the statute does not commence to run until the day after. *Quære*, whether even in case of such demand and refusal, the statute will begin to run on that day.

Per CAMERON, J.—Inasmuch as by C. S. U. C. ch. 42, sec. 15, the bill might have been protested at any time after three o'clock on the day it fell due it was then overdue, and the action was commenced too late.

Held, also, that the plaintiff, under the facts stated below, had established his right to sue upon the bill, *Edgar* v. *McGee*, 287.

5. *Statute of Limitations—Discontinuance—Vacant land.*] — On 8th April, 1854, the plaintiff acquired by conveyance the fee simple of a vacant piece of land, but did not enter. Shortly after a railway company surveyed and staked out a portion of it, with other land required for their railway, and the sum to be paid by them to the plaintiff was settled by arbitration under the statute, but the company never paid or took possession. On 31st December, 1857, the plaintiff recovered judgment against the railway company, and under proceedings in Chancery sold their interest in the land to P., who did not take actual possession, though he went upon the land prior to 1860, and examined the clay to see whether it was fit for brick making. He did not fence or cultivate it, though it was fenced on two sides by the adjoining proprietors. He also put up a board on it with an advertisement that the lot was for sale, signed by him, but when was not shewn, and it was knocked down and not replaced. In 1876 P. sold the land to the defendant company, who immediately went into possession and made valuable improvements. The railway company and the defendants paid the taxes from 1853.

Held, (CAMERON, J., dissenting), that neither the railway company nor P. had such a possession of the land as extinguished the title of the plaintiff, who was therefore entitled to recover the land.

Per CAMERON, J.—There had been a discontinuance by the plaintiff, and sufficient evidence of an adverse claim to defeat the plaintiff's title. *Walton* v. *The Woodstock Gas Co. et al.*, 630.

See ESTATE.

LORD'S DAY.

Conveying travellers on.] — *See* SUNDAY.

MALICIOUS PROSECUTION.

Reasonable and probable cause—Malice—Misdirection—New trial.]—In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action. Therefore where the jury were directed, in the course of the charge, that if a person makes a charge against another for the purpose of his being arraigned upon it without being justified in point of law, then he does it maliciously: that they need not trouble themselves with a question of malice except as it might be inferred from want of reasonable and

probable cause, and that if the information had been laid without proper cause the result would be that it was laid maliciously ; and the plaintiff obtained a verdict of $500.

Held, misdirection, for which a new trial should be granted.

Per HAGARTY, C. J., dissenting. Though the directions standing alone might be open to criticism, the charge must be read as a whole ; but as the jury were afterwards told repeatedly that they should find for defendant if they thought that he believed the matters sworn to in his information, there was no misdirection which would warrant interfering with the plaintiff's verdict

Where the damages are large, and to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection. *Winfield* v. *Kean*, 193.

MEMORANDA, 316.

MISDIRECTION.

See MALICIOUS PROSECUTION.

MORTGAGE.

1. *Mortgage sale—Growing crops—Purchaser's right to.*]—Upon default made in payment of a mortgage the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security. Therefore, when land was sold in July under a decree made in a mortgage suit, without any reservation of crops,

Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the unsecured growing crops, mature and immature. *McDowall* v. *Phippen*, 143.

2. *Mortgage — Payment—Assignment of mortgage—Trespass—Excessive damages.*]—H., being seised in fee of certain lands, mortgaged them to W., and subsequently sold the minerals thereon, with the right to mine, to the defendant. The mortgage being overdue, W. recovered judgment in ejectment and issued a writ of *hab. fac. poss.* Defendant hearing of this wrote to H. that the mortgage must be paid, and that he must give him an order to pay it and deduct the money so paid from the purchase money of the minerals. Thereupon a memorandum was drawn up that the defendant should either pay the mortgage in full discharge thereof, or take an assignment of it as a subsequent encumbrance, for the purpose of saving the interest of defendant, as also of said H. in the said lands, the amount so paid to be credited and allowed to defendant upon his purchase money of the minerals. Defendant paid the amount due on the mortgage, though his purchase money was not due to H. Afterwards H. put the plaintiff in possession of the land to farm at a rental, and the defendant having obtained an assignment of the W. mortgage and judgment, evicted the plaintiff.

Held, ARMOUR, J., dissenting, that the payment by defendant was in effect a payment by H., whereby the mortgage was satisfied, and as that payment was made for the purpose of saving H.'s interest as well as his own, the defendant would not have been justified in equity in enforcing the mortgage against H., or his

assignee, the plaintiff; and that the plaintiff was entitled to damages for the trespass.

Per ARMOUR, J.—The defendant was entitled either to pay the mortgage in discharge thereof, or to take an assignment of it as a subsequent incumbrancer; he did the latter; though he was to have been credited with this payment, his own payment to H. was not due, and the credit had not in fact been made; and he therefore had the right to enforce the mortgage.

The plaintiff claimed $500. The jury assessed the damages at $1,500, and the learned Judge at the trial amended the statement of claim accordingly.

Held, that the damages were excessive, and a new trial was granted. *Robinson* v *Hall*, 266.

3. *Mortgage—Acceleration clause—Foreclosure — Election.*]—In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of the clause, and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest, and costs, whenever tendered, although he does not pray for a personal order for immediate payment. *Drummond* v. *Guickard*, cited in *Green* v. *Adams*, 2 Chy. Ch. R. 124, overruled. *Cruso* v *Bond*, 384.

See LIMITATIONS OF ACTIONS AND SUITS, 2.—BILLS OF SALE AND CHATTEL MORTGAGES—INSURANCE, 2.

MUNICIPAL CORPORATIONS.

1. *By-law regulating width of tires—Unfair discrimination—Conviction.*]—A by-law of a town provided that no one should use any waggon, &c., upon any of the streets of the town for drawing brick, stones, &c., when the weight of the load should exceed 1,500 pounds, unless the tires of the wheels were of a specified width; but the by-law was not to apply to any waggon conveying lumber or goods from the mill or manufactory thereof into the town if distant more than two miles from the town limits, nor to any person passing through the town with vehicles loaded with the said articles.

Held, bad, as discriminating as against residents of the town in favour of others.

Held, also, that a conviction under such by-law was bad, for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour. *Regina* v. *Pipe*, 43.

2. *Municipal Act — Drainage — Award, validity of—Charging lands benefited.*]—The arbitrators appointed by the plaintiff and defendant municipalities, on an appeal by the defendants from the report of the surveyor, made an award pursuant to the Municipal Act, whereby they adjudged that the deepening of a creek, &c., benefited lands in the defendant municipality, and that the latter should pay therefor $350; but the award did not specify the lands which in their opinion were so benefited, nor charge such lands with a just proportion of the costs of the works.

Held, that for this reason the award was invalid. *The Corporation of the Township of Thurlow* v. *The Corporation of the Township of Sidney*, 249.

3. *Treasurer's bond—Construction—Clergy Reserve moneys—Provincial surplus—R. S. O. ch.* 180, *sec.* 213; *ch.* 204, *sec.* 221.]—Where a township treasurer was, by his bond, dated 6th October, 1874, bound duly to account for all moneys coming into his hands, and applicable to the general uses of the municipality, *Held*, that Clergy Reserve moneys, and money derived from the distribution of the Provincial surplus, which had, by by-law, been specifically appropriated to educational purposes, were not within the condition of the bond, and that the operation of this bond was not extended to school moneys by the R. S. O. ch. 180, sec. 213, and ch. 204, sec. 221. *The Corporation of the Township of Oakland* v. *Proper et al.* 380.

4. *Extending limits of town—Arbitration—Drainage assessment—Award against township invalid—R. S. O. ch.* 174, *sec.* 53, *ch.* 33.]—A portion of the township of Sarnia was added to the town of Sarnia by proclamation of the Lieutenant-Governor. The former municipality was indebted to the Province for certain drainage works under the provisions of R. S. O. ch. 33, in respect of roads benefited by the drains. The arbitrators, in settling the matters in dispute between the two corporations, refused to consider this indebtedness, and made their award without adjudicating thereon.

Held, that the award was invalid, for the liability in respect of the roads was an ordinary debt payable out of the general funds of the township, to which the town should contribute.

The award directed the township to pay a certain sum to the town.

Held, bad; for the Municipal Act, R. S. O. ch. 174, sec. 53, only provides for a payment by the town to the township.

In re the Village of Point Edward and the Township of Sarnia, 44 U. C. R. 461, distinguished. *Re the Corporation of the Township of Sarnia and The Corporation of the Town of Sarnia*, 411.

5. *Cab driver—License.*]—*Held*, that R. S. O. ch. 174, sec. 415, which provides that the board of commissioners of police shall, in cities, regulate and license the owners of cabs, &c., used for hire, does not authorize the imposition of a license fee upon the driver of such vehicle; nor does the 42 Vict. ch. 31, sec. 23, which empowers the board to license any trade, calling, business, or profession, or the person employed in such trade, &c., give power over persons not within its jurisdiction before, so as to authorize the imposition of such a license fee. *Regina* v. *Reeves*, 490.

6. *Drainage by-law—Assessment of land benefited not within the petition—Objection to by-law—Discretion of Court.*]—A petition for a drainage by-law was signed by a majority of the owners of the land designated in the petition, but the applicant was not one of the petitioners, nor was his land part, nor did he reside on any part of the land described in the petition, but the surveyor who made the examination and prepared the estimates reported that his land would be benefited by the works, and he was accordingly assessed, and the by-law was finally passed.

Held, that the by-law was valid.

Held, also, that the question whether the lands are in fact benefited is one for the Court of Revision,

or the Judge of the County Court on appeal therefrom.

It was objected that no copies of the by-law or notices attached were posted up as required, but the applicant knew of the by-law before it passed, and appealed from his assessment to the Court of Revision.

Held, that the objection should not be given effect to. *In re White and The Corporation of the Township of Sandwich East*, 530.

7. *Selling land by auction—Conviction — Interest of magistrate—Quashing conviction.*]— The defendant having sold land by auction under a decree of the Chancery Division, was convicted of a breach of the by-law of the county of Huron, passed pursuant to the Municipal Act, R. S. O. ch. 174, sec. 465, subsec. 2, providing that it should not be lawful for any person to sell by public auction any wares, goods, or merchandise of any kind without a license.

Held, that the conviction was clearly bad, for the by-law did not refer to lands; nor would the statute have authorized such a by-law.

Two of the four convicting Justices were licensed auctioneers for the county, and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one Justice.

Held, that they were disqualified, and in quashing the conviction on that ground, also, the Court ordered them to pay the costs. *Regina* v. *Chapman*, 582.

See CONVICTION—WAYS, 1, 2—RAILWAYS AND RAILWAY COMPANIES, 1.

NEW TRIAL.

See MORTGAGE, 2 — MALICIOUS PROSECUTION—DEFAMATION, 1.

NEXT OF KIN.

See DESCENT.

ORDERS IN COUNCIL.

Magistrate cannot take judicial notice of.]—*See* EVIDENCE, 1.

PARLIAMENT.

1. *Dominion controverted election —Preliminary objections—Allegation of agency—Sufficiency of—Allegation of undue influence by Provincial Government—Striking off votes when seat not claimed.*]—*Held*, following the North York election case, 32 C. P. 458, that the High Court of Justice has no jurisdiction in Dominion controverted election cases.

Allegation, that the Government of the Province of Ontario, in the interest and on behalf of the respondent, used undue influence to secure his return. Objection, that no agency was alleged, and because no such agency, if alleged, could in law exist.

Held, that this objection should be left to be disposed of by the Judge at the trial; and *Semble*, that evidence of agency could be given under the allegation.

Allegation – that forty persons whose names were not on the voters' list, who were not entitled by law to vote, did vote and voted for the respondent. Objection—that the matters alleged were not available, because the seat was claimed for the defeated candidate, and because it could be

shewn that the forty votes were cast for the respondent.

Held, though this objection came within the East Elgin Case, 4 App. 412, there appeared to be too much doubt about the question to strike out the allegation; for, *Semble*, that a person who has voted without a right to do so is not entitled to the protection of the statute as to secret voting, and that an elector should not be prevented from showing that the elected member obtained his majority through bad votes. *In re West Huron Election*, 433.

2. *Dominion election case—Jurisdiction of High Court of Justice—Entitling of petition—Delivery to officer of Court of Queen's Bench—Security — Mode of depositing.*] — The Court of Queen's Bench is an existing Court for the presentation and trial of Dominion controverted election cases, notwithstanding the Ontario Judicature Act, 1881.

The petition in this case was intituled, "In the Queen's Bench, High Court of Justice, Queen's Bench Division," and was delivered, without any special instructions to him, to an officer of and in the office of the Queen's Bench Division, with whom and in which the business of the Court of Queen's Bench had formerly been transacted, and the officer entered it in the procedure book of the Queen's Bench Division.

Held, that the words "High Court of Justice, Queen's Bench Division," added in entituling the petition, might be rejected as surplusage, and that the petition had been properly presented in the Queen's Bench.

Held, also, that the act of the officer in entering it in a wrong book should not prejudicially affect the petition.

The deposit of $1,000 was given to the clerk at the same time, but it was afterwards paid into a bank under the direction of the accountant of the Supreme Court. *Held*, that having been properly paid to the clerk, the subsequent disposition of it could not affect the petitioner.

An election petition need not shew the time at which the return of the respondent was published in the *Gazette*. *In re Russell Election Petition*, 489.

PARTIES.

Necessary parties to petition under Vendors and Purchasers Act.]—*See* WILL, 1.—INFANTS.

See PRINCIPAL AND SURETY, 2.

PARTNERSHIP.

Partnership action — Costs.] — Where, on the dissolution of a partnership between the plaintiff and defendant, it was agreed that the defendant should wind up the concern, and the plaintiff having demanded a statement of account, the defendant rendered an untrue and imperfect one, whereupon the plaintiff brought this action for a winding-up, claiming that the defendant was indebted to him on account of partnership assets received, which the defendant denied, and the plaintiff succeeded.

Held, that defendant must pay the costs of the suit. *Carmichael* v. *Sharp*, 381.

PARTY WALL.

Opening of window in, restrained.] —*See* BUILDINGS, 2.

PAYMENT.

See MORTGAGE, 2—LEGACY, 2.

PRACTICE.

In Election Cases.]—*See* PARLIAMENT, 1, 2—EXECUTORS.

PRACTICE IN EQUITY.

Executors—Compensation—Rests.]—*See* EXECUTORS.

PRESUMPTION.

Of death of husband.]—*See* DOWER.

PRESSURE.

See BANKRUPTCY AND INSOLVENCY, 1.

PRINCIPAL AND SURETY.

1. *Principal and surety—Innocent misrepresentation—Discharge of surety.*]—S. had been treasurer of a municipal corporation, and a bond which he had given having been mislaid, the council being under the impression that he had given no security, required him to furnish it.

The council having examined his books concluded that they were in his debt, as the books shewed, and the reeve, believing this was the case, represented to defendant that S., defendant's son, "was all right on the books." Defendant, on this, signed a bond, as surety for the due performance by S. of his duties, which he said he would not have done but for the reeve's statement. The reeve also said that if defendant did not go his surety S. would lose his position. Afterwards, as S. had been drinking, defendant wrote to the council desiring to have his bond annulled, but he withdrew this letter at the request of S. After S. had been dismissed, and the deficiency in his accounts discovered, defendant said he would pay whatever had occurred since he signed the bond.

Upon the first trial no plea of fraud was put in, and a new trial was granted on affidavits not raising this defence; but defendant gave notice that he would at the trial move to add such a plea. The learned Judge at the trial refused the application, holding that the plea could not be supported on this evidence; but he found that the bond was given upon the assumption and statement that the treasurer was not then in arrear.

Held, HAGARTY, C. J., dissenting, that the plea should have been added, and that defendant was entitled to a verdict upon it.

Per HAGARTY, C. J.—There was no false statement and no fraud, and therefore the plea was not sustained. *The Corporation of the Village of Gananoque* v. *Stunden*, 1.

2. *Co-sureties—Right to securities—Interpleader—Shares in a ship—Seizure of.*]—The plaintiff sold 24 shares in a vessel to B. & Co., who not being able to pay cash, procured O. to make a note in the plaintiff's favour, which was endorsed by him and B. In order to secure himself, O. took a bill of sale to himself of the shares. The plaintiff discounted a note at the bank, and after several renewals was obliged to pay it. In an interpleader issue between the plaintiff and the execution creditor of O., to try the right to the shares,

Held, ARMOUR, J., dissenting, that the effect of this arrangement was properly held at the trial to be to make B. the principal debtor to the bank for the amount of the note, and the plaintiff and O. his co-sureties therefor; and upon payment thereof, that the plaintiff was equitably entitled to the twenty-four shares held by O., his co-surety, as security against his liability on the note.

Quære, whether interpleader is a proper remedy in such a case, and whether the shares could be seized and sold by the sheriff. *Per* HAGARTY, C. J.—Some proceeding to which O. & B. were parties, in which the title to the shares could be cleared up, would be a better remedy.

Per ARMOUR, J.—The question raised could not be properly adjudicated upon without O. & B. being parties; the plaintiff and O. were not sureties, but the plaintiff was the creditor, B. the principal debtor, and O. the surety; and on default the plaintiff was entitled to compel O. to realize the security which he held, and apply it towards payment of the debt. *Trerice* v. *Burkett*, 80.

See SHIPS.

PUBLIC SCHOOLS.

Public school moneys not protected by township treasurer's bond.]—*See* MUNICIPAL CORPORATIONS, 3.

PURCHASER FOR VALUE WITHOUT NOTICE.

See SALE OF LAND, 3.

RAILWAYS AND RAILWAY COMPANIES.

1. *Point of commencement—"From," meaning of—Eminent domain—Expropriation of lands already devoted to public uses.*]—The charter of the Canada Atlantic Railway Company, reciting in the preamble that the line of railway which it was proposed to construct, would afford the shortest and most convenient connection between the cities of Ottawa and Montreal, authorized the company to construct a their track *from* the city of Ottawa to, &c. The head office was to be in Ottawa.

Held, that they had the right to enter the city and construct from a point within its limits.

The city passed resolutions providing for a lease of right of way to the company over lands expropriated by the city for water-works purposes, under 35 Vic. ch. 80 (O.)

Held, that though *primâ facie* the only right intended to be conferred on a company is that of expropriating the private property of individuals or corporations, and not property already devoted to public uses, or already expropriated under other Acts, yet under some circumstances the right to make such expropriation might exist, and if so, then the city would have the corresponding power to convey; and as the applicant had not shewn to the Court that circumstances did not exist under which the railway company could take the land, the Court would not assume that the city had committed a breach of trust in passing the resolutions.

Held, also, that there was nothing in the resolutions authorizing the railway to cross the streets at a grade different from that prescribed by the Railway Act of 1879. *In re Bronson*

et al. and the Corporation of the City of Ottawa, 415.

2. *Lord Campbell's Act—Death of wife—Husband's right of action—Pecuniary damages — Collision at crossing—Proof of negligence.*]—The plaintiff sued under Lord Campbell's Act, on behalf of himself and his children, for the death of his wife, occasioned by the defendants. The wife had some separate estate from which she derived an income, but the jury allowed no damages in respect thereof. It was not shewn that the wife afforded any pecuniary assistance either to the husband or her children. The jury found for the plaintiff and apportioned the damages amongst the plaintiff and some of his children.

Held, ARMOUR, J., dissenting, that the verdict was wrong; for the plaintiff was not entitled either for himself or the children to recover compensation for anything but pecuniary loss, or the loss of a reasonable probability of pecuniary benefit.

Per ARMOUR, J. The loss to be compensated is the loss of some benefit or advantage capable of being estimated in money, as distinguished from a *solatium* for wounded feelings and loss of companionship; and the loss to the husband of the wife's performance of her household duties, and to the children of a mother's education, are both losses which can be estimated by a jury.

Per ARMOUR, J., the jury were rightly directed, under the facts, that the defendants had laid down the track, on which the accident happened, in the city of Ottawa, without authority, it being a third track or switch for use in connection with their station, for purposes of shunting, &c., and if illegally laid down no acquiescence, except by by-law, would make it rightful as against the father.

Per HAGARTY, C. J. Having been there for many years with the knowledge and acquiescence of the corporation, its existence could not alone make defendants liable, but it was properly left as a circumstance to be considered by the jury.

The train was backing at the time. *Per* ARMOUR, J. The jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing; and having regard to the fact that they had without authority increased the number of tracks there, it was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precautions. *Lett, Administrator of Lett* v. *The St. Lawrence and Ottawa Railway Co. and Hinton* v. *St. Lawrence and Ottawa Railway Co.* 545.

3. *Fences—Gates — Non-repair—Accident.*]—The defendants' line of railway ran through the plaintiff's farm, and the plaintiff's mare escaped from a field adjoining the railway through a gate opposite a farm-crossing which the defendants had erected, and which was out of repair, and was killed on the railway.

Held, that it was the duty of the defendants to keep the gates in repair, and that they were liable, whether they were bound to erect such farm-crossing or not. *Murphy* v. *The Grand Trunk Railway Co.* 619.

REFORMATION.

See SALE OF LAND, 2.

REPLEVIN.

Replevin bond—Action on—Staying proceedings on equitable grounds.] — The defendants' timber limits adjoined those of B. & C., but from uncertainty of description in their respective licenses the division line was not defined. The defendant replevied 216 pieces of timber cut within a line run under instructions of the Crown timber agent as the boundary of the defendants' limits, but on account of the infirmity in his license he failed in the action as to 175 pieces, for a return of which B. & C. were entitled to judgment. The latter procured an assignment of the replevin bond to themselves, and assigned it to the plaintiffs, who brought this action thereon. The Court was of opinion that the timber in question was cut upon lands intended by the Crown to be within the limits of the defendant's license, though B. & C. had some grounds for asserting title thereto.

Held, that, there having been a breach of the condition of the bond, B. & C. became entitled to recover such damages as they had sustained by replevin proceedings; that the bond, after it was assigned by the sheriff to B. & C., was a debt and chose in action assignable pursuant to the statute; and that the plaintiff having the beneficial interest therein by assignment was entitled to recover; but, it being a case for the equitable interference of the Court, it was directed that, upon payment by the defendant of the cost incurred by B. & C., in cutting and transporting the timber up to the time it was replevied, less a set-off found for the defendants in this action, (the amount to be ascertained by a reference if the defendants should so elect) further proceedings should be stayed. *Bates et al.* v. *Mackey*, 34.

REPRESENTATION.

See DESCENT.

RESTRICTIVE COVENANT.

See SALE OF LAND, 3.

RULES OF COURT.

317.

SALE OF GOODS.

Acceptance—Waiver of excessive consignment.]—The defendants, with the knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground, though negotiations took place for a reduction in price, on account of delay, &c., but took into stock 15 out of 25 cases sent. The other 10 cases remained in bond till they were sold to pay duties.

Held, that there was evidence on which a waiver of any objection as to the excess was properly found. *Goodyear Rubber Co.* v. *Foster et al.*, 242.

SALE OF LAND.

1. *Agreement for lease – Statute of Frauds — Specific performance.*]— The plaintiff was the lessee of certain premises used as a factory, and having become insolvent the lease was forfeited by the lessor, the defendant, though at what particular time did not appear. The plaintiff con-

tinued in occupation, and an arrangement was entered into, whereby one F. agreed to purchase the machinery on the premises from the official assignee, giving the plaintiff the option to redeem it within two years.

The plaintiff further obtained from the defendant an agreement, as follows:

"Toronto, January, 27th, 1880.

"In the event of Thomas Carroll continuing the occupation of building on Hayter street, I promise and agree to give a new lease at a rental of $600 for five years; also agree to allow," &c., (specifying certain allowances.) (Signed)

"R. S. WILLIAMS."

The defendant refused to sign a lease of the premises to the plaintiff, and an action being brought for specific performance,

Held, dismissing the action, that the agreement was not sufficient to satisfy the Statute of Frauds, as it did not appear from it with certainty when the term was to begin, nor to whom the lease was to be given.

Semble, that the official assignee should have been made a party, and that in any event it would have been a case for damages, not for specific performance.—*Carroll* v. *Williams*, 150.

2. *Contract of purchase — Construction — Pleading.*] — An agreement for the purchase of certain land, after providing for the payment of a certain portion of the purchase money, continued as follows: "The remaining $1,900 (after deducting the amount due to the Crown), payable in instalments of $100 each, without interest, on April 1st in each year during nineteen years," and the purchaser to secure by mortgage "the residue or sum of $1,900 (less the amount due to the Crown), payable as aforesaid." It was not then known exactly how much was due to the Crown, but it was soon after ascertained to be $364.

Held, the true meaning of the above agreement was that the amount due to the Crown was to be subtracted from the $1900, and the balance paid in instalments of $100 each on April 1st in each year until the whole of such balance should be paid.

Semble: It does not follow because a plaintiff asks in his bill for reformation of a document, that therefore a defendant is entitled to claim the same relief, though he has not asked for it. *Wolfe* v. *Hughes*, 322.

3. *Sale of land—Restrictive covenant—"Assigns"—Evidence—Innocent purchaser — Acquiescence.*] — Where D., the owner of certain lands, on selling part to B., inserted this clause in the conveyance:—"Bellevue Square is private property, but is always to remain unbuilt upon except one residence with the necessary outbuildings, including Porter's Lodge," and the purchaser on his part covenanted not to allow any business of a certain kind to be carried on on the part conveyed.

Held, that the benefit of the restriction passed to the assignee of the purchaser, as one of the advantages and privileges appurtenant to the land, though the word "assigns" was not there, and though the benefit of it was not formally transferred to him.

The locality and extent of this square being in question—*Semble*, that this being a matter of a *quasi* public nature in which a class of the people in the neighbourhood would be concerned, evidence of reputation was admissible; and under the cir-

cumstances it was held that the square was sufficiently defined by such evidence.

Where it is clearly intended to give some tangible benefit to a grantee by such a covenant in the conveyance to him, and it formed a part of the consideration which induced his purchase, the Court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement.

Where the person who was building the house objected to, held under an agreement for a lease, but had made no outlay on the property till after notice was served on her, nor paid any rent,

Held, she was not in the same position as an innocent person holding for value under a completed instrument, and the erection of the house must be stopped.

Where the square had been built upon for years without objection by purchaser or his vendee, the plaintiff, but the building had been done by certain purchasers under a mortgage executed by D. before he conveyed to B.,

Held, no proof of acquiescence, as they could not have objected with effect. *VanKoughnet* v. *Denison*, 349.

Right to insure pending sale.]—*See* INSURANCE, 1.

See WILL, 1.

SCOTT ACT.

See TEMPERANCE ACT, 1878.

SEAL.

The *testimonium* clause in a power of attorney declared that the principal set his hand and seal to the instrument. The attestation clause declared that it was signed and sealed in the presence of a subscribing witness, and opposite the signature of the principal was a visible impression made by the pen in the form of a scroll, in which was inscribed the word "seal."

Held, a sufficient sealing of the document. *Re Bell and Black*, 125.

SESSIONS.

Amendment of conviction by, not a quashing.]—*See* CONVICTION.

SHIPS.

Sale of vessel—Written agreement—Admissibility of—Verbal warranty as to class — Breach—Measure of damages.]—The defendants bought a vessel from the plaintiff, who, as the jury found, warranted her to class B. 1, and promised to get her insured in a company, of which he was agent, for $1,400. She would not class as B. 1, and no insurance could be effected under that class, but defendants sailed her uninsured until she foundered and was totally lost. In an action for the purchase money

Held, that the measure of damages to which defendants were entitled for breach of the warranty was not the $1,400, for which she might have been insured, but the sum which it would have taken to make her class B. 1, which it was for defendants to shew.

A mortgage was executed to secure the purchase money, and registered with the Customs, and annexed

to it was an instrument of the same date under seal, executed by defendants, reciting the mortgage, and that the terms of payment were set forth therein for convenience of registry, and "this indenture is executed for the purpose of evidencing the true agreement between the parties, which is hereinafter stated." The terms of payment were then stated, differing from those in the registered mortgage; and defendants covenanted to insure the vessel for $1,400, and assign the policy to plaintiff. The alleged warranty was verbal, and was not made out at the time of executing the writings, but defendants swore that they would not have bought without the warranty, and would not otherwise have given over one-third of the price for a vessel which could not be insured.

Held, that evidence of the verbal warranty was admissible: that it did not vary or alter the writings; and that the declaration that the instrument was made to evidence the true agreement referred merely to the terms of payment. *LaRoche* v. *O'Hagan et al.*, 300.

See PRINCIPAL AND SURETY, 2.

SLANDER.

See DEFAMATION, 1, 2.

SPECIFIC PERFORMANCE.

See INFANTS.

STATUTES.

26 Geo. II. ch. 6, sec. 1.]—*See* WILL, 3.

12 Vic. ch. 81, sec. 201, Sched. B. 4.]—*See* WAYS, 1.

14 & 15 Vic. ch. 5, sec. 11.]—*See* WAYS, 1.

32-33 Vic. ch. 20, sec. 25, (D).]—*See* EVIDENCE, 3.

32-33 Vic. ch. 31, secs. 59, 71, (D).]—*See* CONVICTION.

32-33 Vic. ch. 31, sec. 25, (D).]—*See* TEMPERANCE ACT, 1878.

R. S. O. ch. 5, sec. 10.[—*See* WAYS, 1.

R. S. O. ch. 108, secs. 15, 19.]—*See* ESTATE.

R. S. O. ch. 109, sec. 2.]—*See* HUSBAND AND WIFE.

R. S. O. ch 174, sec. 53.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. ch. 174, sec. 415.]—*See* MUNICIPAL CORPORATIONS, 5.

R. S. O. ch. 180, sec. 213.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 204, sec. 221.]—*See* MUNICIPAL CORPORATIONS, 3.

42 Vic. ch. 31, sec. 23, (O).]—*See* MUNICIPAL CORPORATIONS, 5.

STATUTE OF FRAUDS.

See SALE OF LAND, 1.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS AND SUITS.

STAYING PROCEEDINGS.

See REPLEVIN.

SUBROGATION.

See INSURANCE, 2.

SUNDAY.

Lord's Day Act—Conveying travellers — Who are travellers.] — The defendants, owner and captain respectively of a steamboat, advertised that they would carry excursionists on Sundays. A number of passengers left Buffalo, in the State of New York, on a Sunday morning, and proceeded by rail to Niagara, whence they were carried by the defendants' steamboat to Toronto and back the same day. The defendants having been convicted therefor of an offence under R. S. O. ch. 189,

Held, that the passengers were "travellers" within the meaning of the exception in sec. 1 of the Act: that there is no distinction in such a case between travellers for pleasure and for business; and that the convictions were therefore bad. *Regina* v. *Daggett*, *Regina* v. *Fortier*, 537.

SURETY.

See PRINCIPAL AND SURETY, 1—

TEMPERANCE ACT 1878.

Information — Several offences — Amendment after close of case—Order in Council, proof of— Evidence— Constitutional law—Power to appoint Justices of the Peace.]—*Held*, that an information which includes the three distinct offences of keeping for sale, selling, and bartering, intoxicating liquors, which are prohibited by sec. 99 of the Canada Temperance Act, 1878, contravenes 32-33 Vic. ch. 31, sec. 25, which provides that every information shall be for one offence only; but

Held, that such information may be amended by striking out all the offences charged except one; and that such an amendment may be made after the case has been closed and reserved for decision.

The defendant swore that he did not sell any intoxicating liquor on the day charged. The recipient of some liquor sold on that day named it in his evidence for the defence, but there was no evidence that it was an intoxicating drink, the evidence for the Crown only shewing that it resembled intoxicating liquor.

Held, that there was no reasonable evidence on which to found a conviction for selling intoxicating liquor. *Regina* v. *Bennett*, 445.

TITLE.

See WILL, 1—ESTATE.

TRESPASS.

See MORTGAGE, 2—CONVICTION

TRIAL.

A Judge is not bound under the Judicature Act to submit questions in writing to the jury. *Lett* v. *St. Lawrence and Ottawa Railway Co.*, 545.

UNDUE INFLUENCE.

See FRAUDULENT DEEDS.

VENDORS AND PURCHASERS.

What can be tried on petition under Vendors and Purchasers Act.] —*See* WILL, 1.

See HUSBAND AND WIFE.

VOLUNTARY CONVEYANCE.

See FRAUDULENT DEEDS.

WAGONS.

See MUNICIPAL CORPORATIONS, 1.

WAIVER.

Of forfeiture.] — *See* LANDLORD AND TENANT.

See SALE OF GOODS.

WATERS AND WATER-COURSES.

Riparian proprietors.]—A riparian proprietor has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands, but his right is a qualified one, and subject to the lawful and reasonable user of the waters by a mill owner above him on the same stream, and this although the user above him may be at times for an extraordinary purpose. *Dickson* v. *Carnegie*, 110.

See MUNICPAL CORPORATIONS, 6. —WAYS, 1.

WAYS.

1. *River between municipalities—Boundary—Middle of main channel — Cumming's Island — County of Carleton—Bridge — Liability to repair.*]—The township of Gloucester and the city of Ottawa, which was part of the township of Nepean, are on the easterly and westerly sides respectively of the river Rideau, and both within the county of Carleton. In the river at this point is situate Cumming's Island, and a bridge extended from the Ottawa side to the Island, and from the opposite side of the Island to the Gloucester shore. A line drawn down the middle of the river, equidistant from the banks, without regard to any islands, would leave the greater part of Cummings' Island on the Gloucester side, but the channel between the Island and Gloucester is the most navigable, while the largest amount of water passes through the other channel.

Held, that a line so drawn properly ascertained the limit between the adjoining municipalities, for the words "middle of the main channel," used in 14 & 15 Vic. ch. 5, sec. 11, and R. S. O. ch. 5, sec. 10, have their common law signification of the middle of the stream, and therefore the Island formed part of the township of Gloucester, and that part of the bridge from the Island to the latter township was wholly within that township.

Per ARMOUR, J.—If this be not the true construction, then, as the Legislature were dealing with territorial and proprietary rights, and not with navigation, the words "main channel" mean the widest and not the deepest or most navigable channel, in which case also the Island would be wholly within Gloucester

The county was found guilty on an indictment for not keeping the bridge in repair, which had been removed into this Court, but the indictment described the bridge as being in the townships of Gloucester and Nepean.

Held, that by 12 Vic. ch. 81, sec. 201, schedule B 4, the easterly limit of Ottawa is the middle of the river,

and is coincident with the westerly limits of Gloucester, and that no part of the township of Nepean lies between Ottawa and the river; and the bridge was therefore wrongly described as being in the two townships.

Held, also, that though this could have been amended at the trial, it could not be amended on this motion, and a new trial was ordered.

Per CAMERON, J.—The situation of the island in the river should not affect the liability of the municipality, for the bridge was evidently a county work, being intended to span the whole river and form a way from one bank to the other, the island, which was out of the direct course that the bridge would otherwise have taken, being merely used for engineering purposes.

Held, also, that under R. S. O. ch. 174, sec. 495, the duty of maintaining the bridge was cast upon the city and county. *Regina* v. *The Corporation of the County of Carleton*, 277.

2. By-law for taking gravel to repair streets—Award—Uncertainty.]—Pursuant to a by-law of the town of Ingersoll, permitting that municipality to take gravel from C.'s land for repairing their streets, without mentioning the quantity, the award was made that the corporation should "pay C. thirty-two and a half cents for every load of gravel or stone they should take for the repairs of their roads, as and for compensation for the injury done, and that the right to take such gravel at this price should extend for five years."

Held, that the by-law should have defined the quantity of gravel required to be taken, and the award should have fixed the value of such quantity as well as the amount to be paid for the right of entry to take the same away, and therefore that the award was bad. *In re the Corporation of the Town of Ingersoll and Carroll*, 488.

WILL.

1. *Vendors and Purchasers Act—R. S. O. ch.* 109—*Will, construction of—Power of sale with executor's consent—Practice—Parties.*]—A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient.

Held, that in the conflicting state of the authorities upon the question, the title was not one which the Court could force upon a purchaser.

Held, also, that under such a power the land could be sold in parcels.

On a petition under the Vendors and Purchasers Act the question of the existence or validity of the contract for sale cannot be tried, but only those matters which would be entertained upon a reference as to title under a decree for specific performance.

The only parties necessary on such a petition are those who would be parties to a suit for specific performance, and therefore mortgagees who had been joined were dismissed with their costs. *Re Thomas MacNabb*, 94.

2. *Will, construction of—After-acquired property.*]—The testator owned eighty acres of land, and sold a part thereof; subsequently and on the 30th March, 1875, he made his

will, whereby he devised to his son N. the said eighty acres, "excepting so much thereof as I may have sold and conveyed." Thereafter, and shortly before his death, he again acquired the part which he had sold.

Held, that although the will spoke from his death, the after-acquired property did not pass, for the testator had specified the subject matter of his devise, within which the property in question was not included. *Vansickle et al.* v. *Vansickle et al.*, 107.

3. *Devise to attesting witness —Election by heir*—26 *Geo.* II., *ch.* 6, *sec.* 1.—Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of the 26 Geo. II. ch. 6, sec. 1, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the will. *Munsie* v. *Lindsay*, 164.

4. *Vesting—Gift over—Contingency —Parties—R. S. O. ch.* 49. *sec.* 9.] —A testator by his will gave his homestead and certain personality to his wife, while unmarried, for the maintenance and support of the family surviving him, until the members of his said family should respectively attain twenty-one, and afterwards for the maintenance of his wife for life. He then proceeded to give and bequeath all his other real and personal estate, not thereinbefore mentioned, to his executors in trust to dispose of and invest, and "upon my son Thomas attaining the age of twenty-one years, should he be my only child, in trust to pay to him and put him in possession of the said residue;" but if there were more children, he directed that it should be divided amongst all, in the proportion of one part to a daughter and two parts to a son, to be paid to them when they should respectively attain twenty-one. He then proceeded to devise to his son Thomas the homestead, together with the household goods, &c., on the decease or second marriage of his said wife, should he have attained his twenty-first year. And in case his son Thomas should not survive him, or attain the age of twenty-one, or in case he (the testator) should have no other surviving child who should attain the age of twenty-one, or in case he should have no grandchild, his real and personal estate was to be divided in certain proportions among his brothers and sisters.

Thomas, the only child surviving the testator, attained twenty-two, and died without issue, leaving him surviving his mother who had not married again.

Held, Thomas took a vested estate, for that it did not appear that the testator intended it to be contingent either on his attaining twenty-one, or surviving his mother.

Held, also, the testator's intention was, that the gift over should not take effect unless Thomas died under twenty-one, without leaving a child. *Gairdner* v. *Gairdner*, 184.

5. *Vesting* — "*Worldly Estate.*"] — A testator, by his will, "as touching his worldly estate," gave to his wife the use of all his personal property and of his farm and buildings for her support and the bringing up of his children,—"and at her decease the whole of the personal and real property to be equally divided between my six children:"

Held, that the shares of the children vested on the death of the testator.

Baird v. *Baird*, 26 Gr. 367, explained and reconciled.

Held, also, "worldly estate" includes not only the corpus of the testator's property, but the whole of his interest therein. *Town* v. *Borden*, 327.

6. *Vesting — Executory interests.*] — A. testator, by his will, directed his trustees to accumulate certain trust moneys arising from the sale of his real and personal estate, and to hold them after the death or second marriage of his wife, and his youngest child attaining majority, in trust for his sons and daughters in equal shares as tenants in common; and in the event of any of his said children dying leaving issue, he directed that the share of the one, so dying, should be divided among such issue, so soon as such issue should have attained majority; and in default of any such issue of his said children attaining majority, he devised the whole estate, real and personal, to his trustees, to be converted into money, and applied to founding a charitable institution.

Held, on a view of the whole scope of the will, the period of absolute vesting was postponed until the grand-children attained majority, failing which the devise to the charity took effect.

Rule in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, *Ib.* 408, applied. *Re Charles*, *Fulton* v. *Whatmough*, 362.

Promise to make.] — *See* INFANTS — LEGACY, 1, 2.

WORDS.

"*Worldly Estate.*"] — *See* WILL, 5 — ESTATE.

"*Change of risk.*"] — *See* INSURANCE, 1.

"*From.*"] — *See* RAILWAYS AND RAILWAY COMPANYS, 1.

"*Travellers.*"] — *See* SUNDAY.