1891

THE

# ONTARIO REPORTS,

VOLUME II,

CONTAINING

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

OF THE

## HIGH COURT OF JUSTICE FOR ONTARIO,

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

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FRO

EDITOR:

CHRISTOPHER ROBINSON, Q.C.,

REPORTERS:

QUEEN'S BENCH DIVISION..... S. J. VANKOUGHNET,
CHANCERY DIVISION..... A. H. F. LEFROY,
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# JUDGES

OF THE

# HIGH COURT OF JUSTICE,

DURING THE PERIOD OF THESE REPORTS.

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" JOHN DOUGLAS ARMOUR, J.
" MATTHEW CROOKS CAMERON, J.

CHANCERY DIVISION:

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

COMMON PLEAS DIVISION:

THE HON. ADAM WILSON, C. J.
" " THOMAS GALT, J.
" " FEATHERSTON OSLER, J.

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THE HON. OLIVER MOWAT.

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## QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

# HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

## MIDLAND RAILWAY COMPANY v. ONTARIO ROLLING MILLS COMPANY.

*Contract to deliver goods—Refusal to pay as agreed—Right to refuse further delivery — Abandonment of contract— Counter claim—Damages for non-delivery—Contract by letters.*

The plaintiffs agreed to deliver to the defendant from 1300 to 1500 tons of old iron rails—"cash on delivery of each 100 tons, or with privilege of drawing against them as may be agreed on between us as they are shipped." On 17th February, 1880, the plaintiffs having delivered 1150 tons sent an account of shipments drew for $1500, which the defendants on the 21st refused to accept, erroneously, as they afterwards admitted, asserting that two carloads, price $333, had not been received, and adding, "You should deliver the balance due on contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount that we think it not unreasonable to ask this." There was a silence for some time, though the parties were in correspondence about another contract, and on the 5th June, 1880, the plaintiffs wrote: "We shall now soon be able to complete the delivery of the old rails," and they went on to refer to the contemplated contract. In answer the defendants' agent referred to the other contract, but said nothing about the completion of the present one. On August 20th the plaintiffs again drew for the price of the amount delivered, and acceptance was refused for the same reasons as before. The plaintiffs sued for the price of the iron delivered, and the defendants counter-claimed for damages for the non-delivery of the difference between the iron delivered and 1300 tons.

*Held*, reversing the judgment of Osler, J., on this point, at the trial, HAGARTY, C. J., dissenting, that the plaintiffs were not justified in treating the defendants' letter of the 21st and their conduct as shewing that they considered the contract at an end, and refused further performance of it, for they could not after the letter of the 21st February have sued for breach thereof, in not accepting the remaining 150 tons; and that while the defendants were liable for the price of the amount delivered, they

were entitled to judgment on their counterclaim for damages caused by the failure of the plaintiffs to deliver the balance.

The plaintiffs claimed damages for non-acceptance of iron under another contract.

*Held, per* OSLER, J., upon the evidence and correspondence set out below, that no concluded contract was shewn, and if it had been the plaintiffs could not have recovered; for 1. They had transferred the contract, and 2. They made default in delivery at the time agreed upon.

APPEAL from a judgment of Osler, J., before whom the action was tried at Toronto, in May and July last.

The plaintiffs had two separate claims. The first was for the price of scrap iron sold and delivered to defendants. The second claim was for non-acceptance of other iron.

The plaintiffs had a verdict for $1,502.72 on the first claim, being for the amount due them on deliveries of iron.

The learned Judge found against the plaintiffs on the claim in the alleged second contract, and disallowed a counter-claim by the defendants for damages for the non-delivery of 150 tons of iron under the first contract.

The following was the learned Judge's judgment on the whole case:—

OSLER, J.—In this action the plaintiffs seek to recover, under the first three paragraphs of their statement of claim, $1,502.72, being the balance due for a quantity of scrap iron sold and delivered, and under the fourth and fifth paragraphs damages for non-acceptance of a quantity of old iron rails sold by the plaintiffs to the defendants, at the price of $33 per ton.

By their defence and counter-claim the defendants, as to the claim for goods sold, allege that these goods were delivered to them under the terms of a special contract to deliver from 1,300 to 1,500 tons of old iron rails, of which quantity the plaintiffs delivered only 1,150 tons; and by way of counter-claim they seek to recover damages for non-delivery of the remainder. As to the rest of the plaintiffs' claim they (1) deny the contract alleged, and (2) aver that the plaintiffs were not prepared to deliver the iron within the time specified for delivery thereof.

It was hardly disputed that the plaintiffs were entitled to recover under the first head of their demand the sum of $1,502.72 with interest, from the 28th February, 1880. The contest between the parties was (1) as to the plaintiffs' right to recover damages for the breach of the contract alleged in the fourth and fifth paragraphs of the statement of claim; and (2) on the defendants' counter-claim for damages for the non-completion of a former contract under which the goods, the price of which is now sued for, were delivered.

It will be convenient to deal in the first instance with the counter-claim, as the contract out of which it arises is first in order of time; and

the first question is, whether, as the defendants contend, this contract is one for the delivery of at least 1,300 tons of old iron, or whether (which is the plaintiffs' contention) it means that they were bound only to supply it up to that quantity if they removed so much from their track in laying down their new steel rails, and for which they had themselves no other use, as for sidings, &c. If the defendants' contention is right there was a short delivery by 150 tons, for which they claim damages.

Negotiations, which admittedly ended in a binding contract, were begun by a letter from one Gartshore, the defendants' agent, (13th August,) to Cox, the plaintiffs' manager, desiring to make an offer for the old iron rails which the plaintiffs may have to dispose of. Soon afterwards there was an interview between them on the subject, which was followed by a letter (19th August) from Gartshore to Cox, in which, referring to their former correspondence and interview of that date in reference to old scrap rails, he offers $14.10 per gross ton for "say 1,500 tons." In another letter of the same date he offers a higher price "for the same quantity and terms as those mentioned in my former letter." The plaintiffs wanted $16 per ton, and on the 20th August Gartshore again writes to Cox that he had pressed upon his principals their acceptance of his (Cox's) proposal of $16 per ton for "the 1,500 tons." There is no further correspondence in evidence until the 26th August, when the defendants' manager writes to Mr. Cox on the subject of loading the iron on cars or vessels, and says, "please forward formal acceptance of the proposition made for us by Gartshore." To this letter Cox replied on the 27th August, "I now formally accept your offer of $16 per ton for from 1,300 to 1,500 tons of old iron rails f. o. b. cars at Port Hope: cash on delivery of each 100 tons, *or with privilege of drawing against them as may be agreed on between us as they are shipped.*

There was some subsequent correspondence on the subject from which it may be inferred that the defendants assented to the statement in this letter as to quantity, although the only quantity which had up to that time been mentioned in their note was 1,500 tons: *Bruce* v. *Tolton*, 4 App. R. 144. Cox and Gartshore do not entirely agree as to what passed between them in conversation as to quantity, the former saying that it was understood that the quantity to be sold was estimated by the quantity to be replaced by steel rails, and that he never offered to deliver more than the rails the defendants would have for sale owing to the laying of new rails, while the latter say that the quantity Mr. Cox spoke of as for sale was about 1,500 tons, but not in connection with the purchase of that quantity of steel rails. He understood, he says, that Cox was going to sell all the old iron he had, and did not know he had none but what he was replacing with steel. The discrepancy, if there is one, is not very material. I think it was clearly the intention of the parties to assign definite limits to the quantity of iron to be sold, so that it should not exceed a maximum of 1,500 tons, nor fall short of a minimum of 1,300 tons. The defendants wanted and expected to get 1,500 tons; but the plaintiffs were doubtful of their ability to supply that amount without inconvenience, and therefore framed their agreement so as to meet such a contingency.

In my opinion the meaning of the contract plainly is, that the defendants shall deliver at least 1,300 tons, and there is nothing in the evidence, if I could look at it for the purpose, to shew that it means or was intended to mean that under any circumstances they had a right to deliver less than that quantity in fulfilment of their contract. See *Tamvaco* v. *Lucas*, 1 E. & E. 592; *McLay* v. *Perry*, 44 L. T. 152.

I find, moreover, as a fact, that they had that quantity and could have delivered it under this contract.

The next question is, whether there was a breach of the contract by the defendants, or any excuse for its non-fulfilment by them.

No time was specified for the delivery of the iron, so that it was to be delivered within a reasonable time, according to circumstances. Deliveries were made from time to time by car or vessel up to the 14th February, 1880, not only without complaint, but, if I may judge from the correspondence, almost with a tacit concession on the defendants' part that the plaintiffs were delivering with reasonable promptitude.

On the 19th January, 1880, the defendants had written: "We do not hear of any scrap being shipped to us on old contract. How is it?" and the plaintiffs replied on the 21st January: "Are picking up scrap for to-day for shipment to you."

On the 17th February, 1880, a statement of the shipments to date was sent forward, and the plaintiffs drew on defendants for the amount due for deliveries as shewn by that statement, viz.: $1,500, the amount now claimed. The defendants on the 21st refused to accept because: (1) Their books shewed only $1,000 due: (2) That two cars, shipped 23rd January, 1880, had not been received (this turned out to be an error, as they had been received on 31st January;) and lastly, because, as they say, "*You should deliver balance due* on the contract before asking us to pay any more; *the time has so far gone by the date when we expected the whole amount to be delivered* we think it not unreasonable to ask this." It does not appear that any reply was sent to this letter.

On the 11th March, 1880, a correspondence was opened, which continued at intervals till the 8th June, between Cox and Fuller, on the subject of another contract; but no allusion was made to the contract now in question until the 5th June, when Cox wrote: "We shall now soon be able to complete the delivery of the old rails under the first contract and commence delivery of the 2,500 tons." (The latter expression refers to the other contract, which Cox assumes to have been concluded.) "Will you kindly let me know whether you require them shipped by water or by rail?" Fuller, who was still general manager of the defendants, replied to this letter from Cleveland on the 8th June, merely to say that there was no contract for the 2,500 tons, taking no notice whatever of the rest of it.

No other correspondence or communication which is in evidence took place until the 20th August, 1880, about which time the plaintiffs appear to have again sent forward a draft for $1,500, and the defendants write on that day advising that they have again declined it for the reasons given in their letter of the 21st February, adding that the two cars had never been received nor the quantity of iron contracted for.

Although it was, as I think, in contemplation of the parties that the contract should be carried out during the year 1879 I am not prepared to say that a reasonable time had elapsed for doing so on the 14th February, 1880, when the last delivery took place. The defendants might have insisted upon more prompt performance had they chosen to do so, but in considering what is a reasonable time, the conduct of the parties entitled to the performance of a contract is not to be overlooked, as shewing their own view of their rights while the contract is open. The defendants knew that the greater part, if not the whole, of the iron would consist of old rails taken up for the purpose of being replaced with steel, and that this change could not be effected at once, and they accepted the February consignment without objection. It must have been evident, however, to the plaintiffs from the defendants' letters of the 31st October, 1879, and 19th January, 1880, that the latter were pressing for an early delivery of the whole, and on the 21st February they had distinct notice, by the defendants' letter of that date, that they had expected it to be delivered long before then, and that they still wished the residue to be delivered. It appears to me that a reasonable time for the delivery of this residue would be during the rest of that month, say until the 1st March, 1880, which would be quite long enough to enable the plaintiffs either to forward their own old rails if they had them, as I think they had, or to go into the market to procure the requisite quantity if they had not. I have no doubt they cannot excuse themselves by saying as they do, that they required the rest of their iron for their own purposes, or that they had not removed enough to supply the defendants with the agreed quantity.

The only other question is, whether the plaintiffs were exonerated or discharged from their liability to deliver it, by the refusal to pay anything more, until the whole of the defendants' residue was delivered.

The terms of payment provided for by the contract were "cash on delivery of each 100 tons, or with the privilege of drawing against them as may be agreed upon between us as they are shipped."

When the defendants' letter of February 21st, 1880, was written at least 100 tons of iron had been delivered which had not been paid for, the draft being for a balance remaining due after giving credit for certain goods which the defendants had furnished to the plaintiffs, and there still remained 150 tons more to be delivered. I read that letter as an intimation by the defendants that they intend no longer to be bound by the terms of the contract as to payment—as a refusal, in short, to perform it in that respect. It is not a mere refusal to pay for what had been already delivered, which alone might not have been very important, but it is a refusal to pay in the manner agreed on for that which was yet to be delivered.

"In cases of this sort," says Lord Coleridge, in *Freeth* v. *Burr*, L.R. 9 C. P., at p. 213, "where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the con-

tract. I say this in order to explain the ground on which I think the decisions in these cases must rest. There has been some conflict among them. But I think it may be said that the fair result of them is as I have stated, viz., that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. That is the true principle on which *Hoare* v. *Rennie*, 5 H. & N. 19, was decided. Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces, on his part, all the obligations of the contract. * * The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the contract, or a refusal to perform it on the part of the person so making default."

I cannot distinguish the present case in principle from that of *Withers* v. *Reynolds*, 2 B. & Ad. 882. The agreement there was, to supply the plaintiff with straw until the 24th June, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight. The plaintiff agreed to pay this sum for each load of straw so delivered. At the end of January, 1830, the plaintiff was in arrear for some loads and tendered defendant the price of all except the last load, saying that he should always keep one load on hand. The defendant told the plaintiff he would send no more unless it was paid for on delivery. It was held that the true construction of the agreement being that each load was to be paid for on delivery, the plaintiff was not bound to send any more, the defendant having expressly refused to pay for the loads as delivered.

On the authority of this case, as explained in *Freeth* v. *Burr*, I hold that the defendants are not entitled to recover under their counter-claim. I refer also to *Bloomer* v. *Bernstein*, L. R. 9 C. P. 588; *Bradford* v. *Williams*, L. R. 7 Ex. 259; *Bankart* v. *Bowers*, L. R. 1 C. P. 484; *Buchanan* v. *Anderson*, 16 U. C. R. 331.

I do not rely upon the case of *Hoare* v. *Rennie*, 5 H. & N., which has been dissented from by some Judges, and by others has been said to belong to an entirely different class of cases from the present; and I think the cases of *Simpson* v. *Crippin*, L. R. 8 Q. B. 14; *Brandt* v. *Lawrence*, L. R. 1 Q. B. D. 344; *Reuter* v. *Sala*, L. R. 4 C. P. D. 239, and *Honck* v. *Muller*, L. R. 7 Q. B. D. 92, do not apply, or are distinguishable, for the reasons which appear in the judgment of Bramwell, L. J., in the latter case, or on the principles laid down by Lord Coleridge in *Freeth* v. *Burr*.

In case the construction I have adopted should hereafter be held not to be the proper construction of the defendants' letter, I find as a fact that the defendants were not insolvent, and that the plaintiffs had no reasonable ground for believing that they would be unable to pay for the iron when delivered: *Morgan* v. *Bain*, L. R. 10 C. P. 15; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Re Phœnix Bessemer Steel Co.*, L. R. 4 Ch. D. 108; *Bingham* v. *Mulholland*, 25 C. P. 210; *Bloomer* v. *Bernstein*, *supra*.

The second head of the plaintiffs' claim remains to be considered—that, viz., for damages for refusing to accept delivery of iron under another contract.

If there was a contract at all, sufficient to satisfy the Statute of Frauds, it must be made out from the correspondence already referred to, which passed between Mr. Cox and Mr. Fuller.

There is the further question of fact, whether the latter was on this occasion acting as agent of the defendants or of some other principals. It was not contended that these persons had not authority to bind the respective corporations for whom they were said to be acting.

The correspondence begins with a telegram, dated 11th March, 1880, from Fuller to Cox: "Have you any old iron rails that you would sell, delivered in Cleveland, *May and June?* If so, name price."

Cox replied on the same day. "Just considering purchase of a further quantity of steel rails, which will give us 2,500 tons of old rails to sell. If you can offer $35 on cars or vessels at Port Hope, we will close out purchase and sale (? sell) to you at once. *Delivery might partially extend into July.*"

Fuller answered that he would like time to consult with "Cleveland parties," but would offer $ 33, "if you cannot wait."

There was no further communication till the 16th March, when Cox wrote to Fuller as follows: "Referring to our recent correspondence by wire, as to the 2,500 tons of old iron rails, fearing that a difficulty might occur in being able to make delivery of the 3,500 tons sold to Messrs Bertram & Co., and the 2,500 to you both within the time specified, we have arranged with B. & Co. to assume our contract with you. * * I will repeat the contract as I understand it, and as we have transferred it to Messrs B. & Co. They are to deliver on the cars or vessel at Port Hope 2,500 tons of old iron rails, during the months of May, June, *July*, and *August*, 1880, at $33 per gross ton of 2,246 pounds; cash against documents as the delivery progresses; and I have said that you would provide a bank credit the same as we have done in our purchase. Upon hearing from you that this is satisfactory, a contract can be prepared and executed."

Owing, as it appeared, to Fuller's illness, this letter remained unanswered until the 1st April, when he wrote Cox: "I am just getting about again. Will be glad to know if you will be here soon; that we may arrange definitely about the old rails. They are to go to parties in Cleveland."

On the 2nd April Cox replied, referring to his letter of 16th March, and asking for a reply.

To this Fuller replied on the 3rd April: "In your letter of 16th ult. you name May, June, July, and August as the time for delivery of old rails. In my message I asked for *May* and *June* deliveries, and I do not think the Cleveland people will accept July and August. Can you arrange for earlier shipments, and a cargo of say 400 to 500 tons ready to load by 1st May. * * As I want to go to Cleveland Thursday or Friday, it is quite important that we should have an interview, &c."

This letter was answered by Cox on 6th April: "In your first telegram you mentioned May and June deliveries. I stated that deliveries would have to extend into July. It would be a convenience to us if it could extend into August, though we should try very hard to complete in July, and would be very likely to do so. I am not sure that we could ship 400 or 500 by 1st May, but it is possible we could do so, and at any rate early in the month of May. Can you meet me in Toronto Thursday?"

Fuller replied by telegram on 7th April: "Cannot well go to Toronto to-morrow; am going to Cleveland Friday and will see what parties say."

Cox replied by letter on the same day: "Shall expect to hear from you on your return from Cleveland," &c.

There was nothing further until the 5th June, when Cox wrote to Fuller: "We shall now soon be able to commence delivery of the 2,500 tons," &c. [The letter already set out.]

On the 8th June, Fuller replied from Cleveland by letter, which closes the correspondence: "The parties here for whom I was acting in the negotiation with you for the rails claim that there is no contract, as you did not accept their terms for delivery, and made conditions which they did not and would not accept under any circumstances."

Now the whole of the foregoing correspondence must be read together. We cannot stop at Fuller's telegram of the 13th March, or at any other particular stage of it, and say here the contract is complete, if it appear from subsequent letters or negotiations that the minds of the parties were not *ad idem*, and that there were terms not finally agreed upon: *Hussey* v. *Horne-Payne*, L. R. 4 App. Ca. 311; and see *Willing* v. *Currie*, 36 U. C. R. 46; *English and Foreign Credit Co.* v. *Arduin*, L. R. 5 H. L. 64.

It was urged that the telegram of the 13th March concluded the contract. If there had been nothing after that, perhaps it might have been successfully argued that although Fuller had in the first instance asked for May and June deliveries, he had, by continuing negotiations upon the other terms of the proposal alone, conceded Cox's suggestion to extend deliveries into July. But when Cox three days afterwards by letter formally re-states the contract, as he understands it, with no less than three variations from any possible contract to be gathered from the telegrams which had passed between them up to that time, viz., (1) extending deliveries over May, June, July, and August; (2) cash against documents *as delivery progresses*, and (3) that defendants should provide a bank credit, we find that this was by no means Fuller's understanding of the contract. Without adverting to the other variations of the contract, he insists upon May and June deliveries, and I think his letter shews that he had never intended to waive that point. Cox replied insisting upon July and urging concession of August, upon which Fuller says he will consult his principals, and so the matter remained between them until Cox writes in June, a month after the time specified by Fuller for the first delivery, that he would soon be able to commence delivering, when Fuller at once replied that there was no contract because his terms for delivery had not been accepted, and conditions had been sought to be imposed which his principals had

never acceded to. Looking at the whole of what passed between the parties, I am clearly of opinion that there never was at any time a concluded contract between them, and I therefore find against the plaintiffs on this part of the case.

If a contract could have been "spelt out" from the correspondence, I am at a loss to see how the plaintiffs could have maintained an action upon it, for they had transferred it, according to Cox's letter of the 16th March, 1880, to Messrs. Bertram & Co., with whom they already had a contract dating from the previous December, for the delivery of 3,500 tons of the same material at a price of $24 per ton. Cox was a partner of this firm in that transaction, and the arrangement, assuming that the plaintiffs knew of it, as he says they did, is one of a most singular character, the effect of it being to enable Bertram & Co., that is to say Cox, the plaintiffs' own manager, instead of the plaintiffs, to make a profit of $9 per ton. It is the more remarkable, inasmuch as the contract with Bertram & Co. has never been enforced against them, nor a pound of iron delivered under it, although the price of old iron fell considerably soon after the contract alleged to have been made with the defendants.

On the question of fact, whether these defendants were Fuller's real principals, I see no sufficient reason to disbelieve his statement that he was not acting for them, but for another company or association of persons in Cleveland. There is much in the correspondence to support this statement, and nothing inconsistent with it, except the fact, that in sending the first telegram of the 11th March he described himself, or was described, as manager Ont. Rolling Mills Company. The rest of the correspondence is in his own name, without addition. On several occasions he speaks of people or parties in Cleveland with whom he must consult, and to whom the iron is to be sent, and I should infer that they were his principals. It is sworn that the defendants' books contain no entry of the transaction or correspondence.

It is urged that as some of the iron bought under the contract negotiated by Gartshore was sent to Cleveland, it may be assumed that the defendants were again contracting with a similar intention. I think, however, that no inference can be drawn from this fact sufficiently strong to meet the direct testimony, in itself not improbable, that the defendants were not the purchasers. I find as a fact, therefore, that Fuller was not acting as the defendants' agent.

There is yet another obstacle to the plaintiffs' recovery under this supposed contract, viz., that they delivered none of the iron under it during the month of May, a default on their part before any part of the contract had been performed which gave the defendants a right to refuse performance of any part to be performed by them. The cases of *Hoare* v. *Rennie*, *Reuter* v. *Sala*, and *Honck* v. *Muller*, already referred to on the other branch of the case, seem to be clearly opposed on this ground to the plaintiffs' right to recover.

The result is, that the plaintiffs succeed on the first branch of their statement of claim and fail on the other; and the defendants fail on their counter-claim.

The only matters really in contest were the defendants' counter-claim, and the plaintiffs' claim for damages for breach of the second contract. Both parties have failed, and each would therefore be entitled to costs against the other. These costs, looking at the proceedings, evidence, and argument, would be nearly equal.

The plaintiffs, however, necessarily incurred other costs in obtaining judgment for the amount due to them on the first head of their claim, which, as I have said, was practically admitted. It seems to me, therefore, that a reasonable method of disposing of the costs would be to give the plaintiffs the costs, as of a strictly *undefended* action entered for trial for the claim in question. Under this order they will not be entitled to any costs of *interlocutory* proceedings, such *e. g.* as orders to produce, affidavits on production, nor to witness fees. In addition to these costs the plaintiffs are also to have the costs lost by the postponement of the trial at the defendants' instance, from Peterborough to Toronto in May last. Neither party is to pay or receive any other costs.

The defendants appealed against this judgment as to the counter claim.

The plaintiffs did not appeal.

December 4, 1882.—*Osler*, Q. C., for the appeal. The contract was for the sale and delivery of from 1,300 to 1,500 tons of iron, at $16 a ton, payable on the delivery of each 100 tons, and the learned Judge at the trial found that the plaintiffs were bound to deliver at least 1,300 tons. The plaintiffs only delivered 1,150 tons, and the defendants should have been allowed damages on their counter-claim for failure to deliver the residue. The claim was disallowed on account of a letter from the defendants' manager to the plaintiffs' manager, indicating unwillingness to pay balance due on the quantity delivered until the plaintiffs would deliver the residue. The right of the defendants for counter claim depends upon whether the learned Judge at the trial put a proper legal construction on this letter. It was not a direct refusal to pay, but rather pointed to a claim to set off damages against the balance due for former deliveries, and it would not justify refusal to deliver the residue. The price of iron rose during the period of delivery from $16 to $28 a ton.

The cases cited are referred to in the judgment of Osler, J.

*J. K. Kerr*, Q.C., contra. The bargain was for delivery of all iron to be taken from the line of railway to be replaced with steel—not for a fixed quantity, and the plaintiffs delivered all they were bound to deliver. The finding of the learned Judge on this point is not sustained by the evidence, but if the Court should agree with the finding the letter referred to was a sufficient justification for refusal to deliver more iron.

December 30, 1882. HAGARTY, C. J.—We have only to consider the counter-claim. I think the view of the law taken by my brother Osler is correct, as the fair result of the cases. It remains to see whether the facts warrant its application.

The terms of the bargain were "cash on delivery of each 100 tons, or with privilege of drawing against them as may be agreed on between us as they are shipped." These terms are accepted by the defendants.

On February 17th, 1880, the plaintiffs send account of shipments shewing a balance due them of about $1,500, and they claim for this.

On February the 21st the defendants refuse the draft, and erroneously assert that two car loads had not arrived, and therefore the draft was much too large, and they add: "We think you should now deliver the balance due on the contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount, that we think it not unreasonable to ask this."

The defendants were clearly wrong as to the two car-loads, and the amount of the draft was right.

After this letter of the defendants of February 21st, there is an unexplained silence on both sides.

I cannot find any notice taken or answer sent by plaintiffs.

The parties appear to have been bargaining about a second contract for a further large quantity of iron, and many communications passed between them; but it is not

alleged that any reference is made to the position of the first contract. No further deliveries were made by plaintiffs.

On the 5th June, 1880, plaintiffs wrote: "We shall soon be able to complete the delivery of old rails under the first contract, and commence delivery of the 2,500 tons. Will you kindly let me know whether you desire them shipped by water or by rail?"

The 2,500 tons would be on the new arrangement.

To this defendants answer, June 8th: "The parties here for whom I was acting in the negotiations with you for old rails claim that there is no contract, as you did not accept their terms for delivery, and made conditions which they did not and would not accept under any circumstances."

It appears that the plaintiffs drew on defendants for $1,502.72, the amount claimed for actual deliveries, the same nearly as the former draft of $1,500.

On August 20th, defendants write: "Your draft for $1,502.72 has just been presented and acceptance declined for the same reasons stated in our letter of February 21st, a copy of which we enclose herewith. We have only now to add that the two cars have never been received, nor the quantity of iron contracted for. We also enclose statement as our books shew it."

Then we find defendants' letter of January 24th, 1881, admitting receipt of the two missing cars on January 31st, 1880, and that they credit plaintiffs with the value—viz., $333.

We can find no evidence of any further communication. Plaintiffs issued their writ on the 5th February, 1881.

I think the defendants, in February 1881, very distinctly intimated their refusal to pay for the iron actually delivered. A large amount was then due to the plaintiffs under the bargain as to terms of payment; and I do not see any right on their part to refuse payment unless the residue of the iron be delivered, or making such delivery a condition precedent to their liability to pay as they had agreed. It was like the errror committed by plaintiffs in the case of *Freeth* v. *Burr*, L. R. 9 C. P. 210.

I think the plaintiffs might have fairly assumed that defendants either repudiated further liability on the contract, or at all events that they refused to abide by the bargain as to paying for each 100 tons as delivered.

It seems very like the case of *Withers* v. *Reynolds*, 2 B. & Ad. 882. Had plaintiffs replied to this refusal to pay, as in the latter case, that they would not make further delivery except on payment as had been agreed, then it would have been difficult to distinguish the cases.

The plaintiffs did not do so—nor did the defendants in any way give them to understand that they required further deliveries or would hold plaintiffs responsible.

It is naturally argued that their letter of June 5th, stating that they could soon be able to complete the delivery under the first contract, shewed that they did not consider the contract wholly at an end. It is not easy to understand the sense in which we should regard that letter, written nearly four months after defendants refusal to pay their draft.

At all events the defendants' reply, taking no notice of the suggestion as to the old contract, seems to me to confirm the conclusion that they had abandoned or determined the right to further deliveries of rails. Reading this letter in the light of the subsequent letter, refusing the last draft, strengthens this impression. I think the proper conclusion is that drawn by the learned Judge, and the counter-claim was properly disallowed.

After their rejection of the advances so made in June, the plaintiffs make, as it were, a final effort to get paid for their actual deliveries by drawing again on the defendants, and in August the defendants refuse to accept, declaring their grounds to be those taken in their February letter.

There seems to be a curious difference of opinion amongst the Judges as to the right of one party to refuse performance merely because the other party has broken a term of the contract on his part; but I see no reason for doubting the correctness of the general rule asserted in *Freeth* v. *Burr*, viz., whether the acts or conduct of the party do or

do not amount to an intimation of an intention to abandon and altogether refuse the performance of the contract.

The very late case of *Mersey Steel and Iron Co.* v. *Naylor et al.* in the Court of Appeal, L. R. 9 Q. B. D. 648, very fully reviews the cases, and holds the rule laid down in *Freeth* v. *Burr* to be correct.

After a reasonable time had elapsed, as my brother Osler points out, for their completing delivery after the defendants' letter of February 21, and no deliveries made, and for months thereafter no request for iron, or asking of reason for delay, I think the plaintiffs might reasonably have assumed that defendants did not require any more, especially as in March a new negotiation commences for delivery of large quantities of the same article of old rails, and much corespondence takes place between them without any reference to the undelivered iron on the old contract.

But for the plaintiffs' letter of 5th June, I should have thought it clear. I am, however, unable to think that defendants' reply falling back on the reasons assigned in the letter of February 21st, is to be read as if they again said: "Deliver all the undelivered balance of iron and then we will pay you, and not till then."

Ought we not rather to read it as amounting to this: "It is too late. We told you five months ago what we were willing to do. You did not accede thereto. The matter is therefore at an end."

Lastly, defendants write a letter on the 31st January, acknowledging the receipt of the two cars long before, and that they credit the value to the plaintiffs, without further remark or asking for any more iron.

Nothing further passes, and the suit is commenced.

I treat the matter as one of fact, and as a juror find that the plaintiffs might reasonably have concluded from defendants' conduct that the latter treated the contract for further delivery as at an end, and that they refused further performance of it. I should certainly so have found as a juror. I therefore agree with my brother Osler.

I adopt, as my brother Osler has done, the view of the

law laid down in *Freeth* v. *Burr*, and as he has quoted the language of the Judges as to what should be the rule of decision, I need not repeat them.

I think the appeal should be dismissed, with costs.

CAMERON, J.—The finding of my learned brother Osler in favour of the plaintiffs on this claim under the first paragraph of their statement of claim is not found fault with, nor is his finding upon the second branch or ground of the plaintiffs' claim against the defendants questioned. The sole question therefore on this motion is, was he right in holding that the defendants had failed to make out a valid counter-claim for damages for breach of the plaintiffs' contract, out of which their first claim arose, to deliver to the defendants 1,500 tons of old iron, the delivery made having fallen short of that quantity by 150 tons? Whether he was right in so holding depends upon the question, whether upon the facts proved the plaintiffs were relieved from their contract to deliver the balance of the iron by the conduct of the defendants. The only conduct of the defendants that could possibly have that effect is their having declined on the 21st February, 1880, to accept the plaintiffs' draft for $1,500 for iron then delivered, on the ground, which was contrary to the truth, that the draft was for a larger quantity of iron than had been delivered, the defendants stating in their letter of refusal: "Their books shewed only $1,000 due: that two cars shipped on 23rd January, 1880, had not been received," and they added: "We think you should now deliver the balance due on contract before asking us to pay any more money: the time has so far gone by the date when we expected the whole amount that we think it not unreasonable to ask this."

The learned Judge treats this letter as not only a refusal to pay for what iron had been delivered, but also as a refusal to pay in the manner agreed on for what was yet to be delivered.

I cannot adopt this view. The letter itself does not so

put it. In the first place, the objection to accept the draft is based on the ground, erroneous as the facts shew, but by the writer believed at the time to be correct, that the draft was for a larger amount than was due, and then the opinion is expressed that under the circumstances, as the time within which the whole quantity of iron should have been delivered had elapsed, it would only be reasonable on the plaintiffs' part not to require any further payment till the delivery was completed. This can scarcely, in giving reasonable effect to the language used, be treated as an intimation that the defendants would not pay for what had actually been delivered, nor for what should thereafter be delivered in accordance with the contract, if the plaintiffs required such payment to be made.

The case seems to me to be readily distinguishable in principle from that of *Withers* v. *Reynolds*, 2 B. & Ad. 882. The facts are widely different. In that case the plaintiff insisted that he should keep back, contrary to agreement, the price of one load of the straw delivered. The defendant objected and told the plaintiff the straw would not be delivered unless paid for on delivery. In this case the plaintiffs say or do nothing of the kind. They make no direct reply to the defendants' expression of opinion, that owing to the plaintiffs' delay in performing the contract the defendants should not reasonably be asked to pay till full delivery was made. The silence of the plaintiffs should rather be regarded as an acquiescence in the justice of the opinion expressed by the defendants, than as a repudiation of the contract on their part.

If the defendants were right in asserting that the plaintiffs had unreasonably delayed the performance of the contract, then at that time they had a cause of action against the plaintiffs for their breach of contract, which they have not lost by any thing that has since happened. If they were wrong, the plaintiffs ought in fairness to have replied to that effect and insisted upon the defendants performing their part of the contract, and informed them

that unless the iron was paid for according to the contract, no more would be delivered. That the plaintiffs did not consider the letter as determining the contract is manifest from their letter to the defendants of the 5th June, 1880, in which they say: "We shall now soon be able to complete the delivery of old rails under the first contract, and commence delivery of the 2,500 tons. Will you kindly let me know whether you desire them shipped by water or by rail."

Nothing can be more explicit than this both as to the fact that the plaintiffs considered the first contract as then existing, and as an admission that they were then only in a position to complete it by delivering the balance of the iron. The defendants simply replied to that part of the letter relating to the 2,500 tons, or the second contract, and assuming that the enquiry as to the way in which the iron was to be shipped related as well to the iron to be delivered under the old contract as the new, the plaintiffs being at liberty by the old contract to ship by car, the defendants' silence could not in any manner be deemed a refusal on their part to accept and pay for the iron to be delivered under the old contract.

Matters between the parties remained in this position up to the 20th August, when the defendants again refused to accept the plaintiffs' draft for the amount due on the iron previously delivered. Their letter of refusal was as follows: "Your draft for $1,502.72 has just been presented, and acceptance declined for the same reasons stated in our letter of February 21st, a copy of which we enclose herewith. We have only now to add that the two cars have never been received, nor the quantity of iron contracted for. We also enclose statement as our books shew it."

On the 24th January, 1881, the defendants, finding they were in error as to the receipt of the two car-loads of iron, wrote to the plaintiffs admitting the receipt of the two missing cars of January 31st, 1880, and giving credit to the plaintiffs for the amount of iron in those cars, $333.

The case, in my opinion, very nearly resembles the case

of *Freeth* v. *Burr*, L. R. 9 C. P. 208, in its facts, and the Court there held that the mere refusal to pay for one parcel of a number to be delivered, where payment is to be made of each parcel on delivery, will not warrant the other party to the contract treating it as abandoned, and justify the refusal to deliver the remainder. The intention of the party refusing to perform his part of the contract to repudiate and abandon it, must be made to appear.

The case was the defendant sold 250 tons of pig iron at 56 shillings per ton; half to be delivered in two weeks; remainder in four weeks; payment net cash fourteen days after delivery of each parcel. The defendant failed to deliver within the time stipulated, and the market rising, the plaintiffs in February wrote to defendant remonstrating with him for not having delivered any of the iron. About the 15th of February the defendant delivered ten and a half tons. The plaintiffs then wrote: "We are surprised that you should have sent such a paltry lot as ten tons on a contract for 250 tons, which should have been delivered last December. We must request you will give us a definite time for delivery of at least fifty tons, which must be delivered at once, or we shall have again to buy against you."

On the 17th May, 1872, the defendants wrote to the the plaintiffs as follows:—

"We are informed that the lighter which we sent with thirty tons Kentledge pig iron to your wharf on the 10th inst., is still lying there unloaded, and that this has arisen through an undue preference being allowed by you to other barges in discharging, or from some other cause for which you are to blame. We have therefore to intimate that we shall hold you liable for damages from and after the 13th inst."

On the following day the plaintiffs wrote to defendant:

"Your barge has been discharged some days. Do you intend to deliver the remainder, or shall we buy against you?"

On the 21st, defendant replied:

"It is our intention to deliver remainder of the pig iron, and do not wish you to buy against us."

On the 29th May, 126 tons had been delivered, and the defendants wrote to the plaintiffs:

"Would you kindly forward us cheque in payment of the ballast iron we have delivered to you, and we shall proceed at once to send on the remainder."

The plaintiffs, under an impression that they were entitled to set off against the defendants' claim any loss which they might incur, in case the defendant failed to deliver the remainder of the iron, refused to pay for the 125 or 126 tons delivered; and their attorney, in reply to a letter from the defendant's attorney demanding payment, put forward a claim for £250, being £2 per ton on the 125 tons undelivered. The defendant refused to deliver any more iron and sued the plaintiffs for the quantity delivered, which the plaintiffs then paid, and brought their action for the defendant's breach of the contract to deliver the iron.

At the trial before Brett, J., it was objected, against the plaintiffs' right to recover, that the plaintiffs' refusal to pay for the quantity delivered was an abandonment of the contract, and absolved the defendant from his obligation further to perform it; and *Hoare* v. *Rennie*, 5 H. & N. 19, was relied on in support of the contention. The learned Judge overruled the objection, holding that the mere refusal by the plaintiffs to pay for the first 125 tons did not exonerate the defendant from his obligation under the contract, and leave was reserved to the defendants to move to enter a nonsuit. Afterwards, on motion to enter such nonsuit, the Court held the ruling of the learned Judge at *Nisi Prius* was right, and Lord Coleridge, C. J., stated the principles that apply to such cases in the way in which my learned brother Osler in his judgment has set them out, which may be summed up briefly, in the language of the learned Chief Justice, as follows: "There has been some conflict amongst them (the decisions). But I think it may be taken that the fair result of them is as I have stated, viz: that the true question is, whether the

acts and conduct of the party evince an intention no longer to be bound by the contract." The learned Chief Justice refers to the case of *Withers* v. *Reynolds*, which Mr. Justice Osler considers as undistinguishable from the present case, as follows: "In *Withers* v. *Reynolds* there was an express refusal by the plaintiff to perform the contract, and Patteson, J., says: 'If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract.'"

The language of Keating, J., in *Freeth* v. *Burr*, seems to be exactly fitted to the circumstances of this case. At page 214 he says: "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract; but there must be an *absolute refusal* to perform his part of the contract. Non-payment is an element. But looking at all the circumstances of this case—a rising market; a failure on the part of the defendant to deliver the iron according to the terms of the contract; a series of deliveries in small quantities long after the time for delivery provided for by the contract; and a refusal on the part of the plaintiffs to pay for the iron delivered, not only accompanied by remonstrances, but with a requisition to the seller to fix a day for the delivery of a certain quantity;—I do not think that they shew an intention on the part of the plaintiffs to abandon the contract."

In this case there was in fact a rising market; it was therefore in the interest of the defendants that the plaintiffs should complete the delivery. The deliveries that took place in small quantities in *Freeth* v. *Burr*, were all before the refusal to pay, and except in so far as this might lead the plaintiffs there to think the defendants would fail in delivering the balance, it was not a circumstance as cogent in warranting a refusal to pay as was the erroneous belief of the defendants in this case, that the plaintiffs had

not delivered the quantity of iron they were claiming for. The defendants here did not remonstrate with the plaintiffs on account of the delay, as did the plaintiffs with the defendant in *Freeth* v. *Burr*, but they asserted that delay had taken place, and on account of that delay it was only reasonable their payments should be deferred till the contract was performed in full by the plaintiffs, a circumstance quite as cogent to shew that it was not the intention of these defendants to abandon or repudiate the contract, or to lead the plaintiffs to suppose that it was their intention to abandon it, as the request on the part of the plaintiffs, in *Freeth* v. *Burr*, to the defendant to name a day for the delivery of part of the iron, that request having been made before and not at the time of the alleged refusal, as in this case.

There is no difference of opinion between my learned brother and myself as to the law applicable to the question in dispute. We differ merely upon the application of the law to the facts as they are shewn in this case; in other words, whether the acts and conduct of the defendants shewed an intention on their part to abandon the contract. He has found they do. I, with the very greatest respect for the opinion of that learned Judge both upon questions of law and fact, feel that I cannot concur in that view. I think upon the weight of authority it cannot be reasonably contended that anything done by the defendants amounted to an abandonment of the contract in fact, or furnished any sufficient ground for the plaintiffs to believe they had abandoned it. Their own conduct establishes, as late as the month of June, at all events, that they did not think or believe it had been abandoned.

The case of *Freeth* v. *Burr* does not make the belief of the defendant as to the abandonment an essential consideration. The question was not discussed in that case, but in *Bloomer* v. *Bernstein*, L. R. 9 C. P. 588, much prominence was given to it.

In *Simpson* v. *Crippin*, L. R. 8 Q. B. 14, the contract was on the part of the defendants to supply plaintiffs with

from 6,000 to 8,000 tons of coal, to be delivered into the plaintiffs' waggons at the defendants' collieries in equal monthly quantities during the period of twelve months, at 5s. 6d. per ton. During the first month the plaintiffs sent waggons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that as they had taken only 158 tons the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. It was held the breach by the plaintiffs in taking less than the agreed quantity during the first month did not entitle the defendants to rescind the contract. Blackburn, J., said: "It cannot be denied that the plaintiffs were bound in every month to send waggons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract, and the question is, whether by this breach the contract was determined. * * No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that *Hoare* v. *Rennie* is in point, and that we ought not to go counter to the decision of a Court of co-ordinate jurisdiction. It is however difficult to understand upon what principle *Hoare* v. *Rennie* was decided. If the principle on which that case was decided is, that whenever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow *Pordage* v. *Cole*. No reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. *Hoare* v. *Rennie* was questioned in *Jonassohn* v. *Young*," 4 B. & S. 296.

Lush, J., said, at p. 18: "If the parties intended that a breach of this kind should put an end to the contract, they ought to have provided for it by express stipulation."

There is no pretence I assume for saying, in this case, if the contract was not determined by the defendants' qualified refusal to pay on the 21st February, the plaintiffs did not fail to perform their contract in not delivering the balance of iron within a reasonable time, and that an action would lie at the instance of the defendants against the plaintiffs for such failure. But what cause of action would the plaintiffs have had against the defendants on the 22nd February? Could they then have sustained an action not merely for non-payment of the iron delivered, but also for the refusal to accept the balance of the iron, without other evidence of such refusal than the letter of the 21st February. If they could not, I do not see how it can be contended that the contract was abandoned by that letter. There certainly was not a mutual rescission of the contract. If the refusal was not sufficient to justify the plaintiffs in maintaining an action at once for all the loss they might have sustained if the price of iron had fallen, the right remained in the plaintiffs to put themselves in a position to claim to have the balance of the iron accepted, and if they had that right the defendants had also. There is no room for saying that the plaintiffs could not have obtained ample compensation for the defendants' breach of their obligation to pay for the iron delivered.

I think that an abandonment, to operate as a bar to any action by one of the parties to the contract, must be such that the other party may recover by reason thereof the full damages that he has sustained in respect of such portions of the contract as shall then be unperformed, or there must be such a concurrence in it as to amount to a mutual rescission of the contract. If it is open to one party to say the contract is still existing, and he can by any act to be done by him require the other party to go and perform what yet remains to be done by him by reason of such act, the latter has also a right to treat it as existing for all purposes. And so if the plaintiffs here had power, and I think they had, after the 21st February, to tender the balance of the iron to the defendants, and to compel

them to pay therefor, or damages for the non-acceptance of such iron, the defendants had also the right to insist upon the delivery of such balance and to be compensated for its non-delivery.

In the *Mersey Steel and Iron Co.* v. *Naylor*, L. R. 9 Q. B. Div. 648, a case which I had not seen when I wrote the above, and which affirms the principle decided by *Freeth* v. *Burr*, the observation of Bowen, L. J., at page 671, strongly, I think, supports the view I have put forward. He said: "A fallacy may possibly lurk in the use of the word 'rescission.' It is perfectly true that a contract as it is made by the joint will of the two parties can only be rescinded by the joint will of the two parties, but we are dealing here not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it." I take the words complete renunciation as equivalent to a refusal to perform the contract, so as to give a complete right of action for all loss flowing from such renunciation, or, in other words, the non-performance of the contract.

In *Honck* v. *Muller*, L. R. 7 Q. B. D. 92, Bramwell, L. J., draws a distinction in cases where there has been part performance and where there has not, holding that after part performance a failure or refusal further to perform does not justify the other party in also refusing further to perform his part of the contract. This distinction is not approved by Jessel, in *Mersey Steel and Iron Co.* v. *Naylor*. But both cases support the conclusion I have arrived at.

ARMOUR, J., concurred with CAMERON, J.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## BELL V. RIDDELL ET UX.

*Stifling prosecution for felony—Promissory note—Illegal consideration.*

The defendant was arrested on the charge of embezzling fines which he had received as a Justice of the Peace on the information of the Reeve of the township claiming the fines, who took the proceedings with a view to force the defendant into a settlement. He was brought before a Justice and committed for trial, and while under arrest pressure was brought to bear on him to compromise by giving security to procure his release, and the plaintiff, who proposed to act on his behalf, gave a note to the township for the amount claimed, and induced the defendant to give him a note for the amount, endorsed by his wife. The note included the amount of the fines, and also expenses incurred by the township in an investigation of the defendant's alleged default, to which the latter was not a party. The defendant was then brought before the deputy County Judge, but no evidence was offered, and it was stated that the affair had been settled, and that the charge would not be proceeded with, whereupon the defendant was discharged. The plaintiff now sought to recover upon the defendant's note.

*Held*, that the consideration therefor being the stifling of a prosecution for felony was illegal, and rendered the note void, and that the plaintiff was in no better position than the township would have been had they taken the note.

*Held*, per BURTON, J., at the trial, that the defendant Catharine, who joined in the note with her husband, the other defendant, was not, under the facts stated below, possessed of separate estate, and was therefore not liable, notwithstanding her admission endorsed on the note that the payee had advanced the money on the faith of such separate estate.

ACTION on a promissory note made by the defendants, dated the 9th day of March, 1882, whereby they or either of them promised to pay, on demand, to the order of the plaintiff, five hundred and forty dollars, at the Federal Bank in Simcoe, for value received,

Statement of defence:

1. The note sued on in this cause was made and delivered under the following circumstances. The defendant James Riddell had been for several years before the making of said note a justice of the peace in and for the county of Norfolk, and it was alleged that as such justice of the peace he had received divers fines and other moneys, which were claimed on behalf of the township of Woodhouse in said county, and which fines and moneys were alleged to have been fraudulently and felon-

iously appropriated by the said James Riddell for his own use and benefit, and thereupon, to wit, on the 7th of March, 1882, one John Stickney, the reeve of said township, and acting on behalf of said township, laid an information before one Murray Anderson, then being a justice of the peace in and for the said county, against the said James Riddell, on the said charge; and such proceedings were thereupon had that said justice of the peace duly issued a warrant under his hand and seal, directed to the constables of said county, and commanding them forthwith to apprehend the said James Riddell, and to bring him before said justice, or some other of Her Majesty's justices of the peace, in and for the said county, to answer unto the said charge and be further dealt with according to law, by virtue of which warrant the said James Riddell was arrested; and that while he was under arrest by virtue of said warrant, an arrangement was made between the said reeve and others acting for and on behalf of said township, the plaintiff, who had full knowledge and notice of the facts hereinbefore alleged, and the defendants, that the said charge should be compromised and settled by the plaintiff giving to said reeve his promissory note for $540, and the defendant giving to the plaintiff the promissory note in question in this cause; and that the defendant James Riddell should then be discharged from custody; which said arrangement was thereupon immediately carried out and completed. The defendants claimed that both said promissory notes were, under the circumstances aforesaid, null and void on account of having been given to compromise a criminal offence.

2. That there was, at the time of the making and delivering of said promissory notes, no amount actually due by the defendant James Riddell to the said township of Woodhouse for fines or moneys in the first paragraph of the statement of defence mentioned, or for any other amount whatsoever; and that there was no consideration for making and delivery of said notes.

3. The note sued on was null and void by reason of the

same having been made and delivered by the defendants while and because the defendant James Riddell was under duress and imprisonment.

4. The defendant Catharine Riddell was, at the time of the making and delivery of the said note by her, a married woman, the wife of her co-defendant James Riddell.

Joinder of issue.

The cause was tried by and before Burton, J. A., at the last Assizes at Simcoe.

The following facts appeared at the trial. The defendant James Riddell had been a justice of the peace for the county of Norfolk, and a complaint had been lodged against him by one McLean for malfeasance, and a commission was issued apparently by the government to the County Attorney, Mr. Ansley, to enquire into the charges. The enquiry took place at Port Dover, on the 13th February, 1882. Riddell was advised by counsel not to appear, and did not appear, his counsel stating that he would telegraph the Attorney-General resigning his office of justice of the peace. The township of Woodhouse was represented by counsel on the enquiry, and evidence was given of the payment to Riddell of fines imposed by him.

After this enquiry was closed it appeared that the township of Woodhouse was claiming that a considerable amount of fines had been paid to Riddell as justice of the peace, which he ought by law to have paid over to the township, and which he had never paid. Riddell was called as a witness by the plaintiff, and deposed as follows:

"On the 8th of March the reeve of the township sent for me to come to the plaintiff's hotel in Port Dover; took me into a private room and locked the door, and said to me, 'By this investigation that has been going on we find you are indebted to the township of Woodhouse in a considerable sum for fines you did not pay over.' I told him I did not know anything about the township of Woodhouse, that I did not have anything to do with it. He said, 'I have you now, and if you don't settle the claim you will have to take the consequences; I shall lay a complaint for embezzlement, and you will have to go to gaol.' He said,

'You are getting well up in years, and I do not wish to be hard; if you like to pay $250 I will settle with you.' I said I did not know what authority he had to collect money from me in that shape at all. I said I would not do anything till I went to Simcoe and got advice. I went to Simcoe that afternoon, and he went too. I went to Mr. Robb, talked to him, told him the circumstances of the case, and asked him to come to Mr. Wells's office with me; we went down and we arrived at the conclusion, if I would give security for $250 or $300, I am not sure which, they would not make any criminal charge against me. I arranged that I would go on Thursday and bring security that was settled upon, and I left for home. * * * About 7 o'clock the same night they came to my door and rapped, it was (Stickney) the Reeve and Deputy Reeve, and they said after consulting with some friends they were determined to have the thing settled to-night. I must get security for $400 or they would lay an information. I said I could not do that at 10 o'clock at night, but I said I would see Robb, and perhaps he would go my security, and that would enable me to see what the accounts were. I went and saw him, and he advised me not to give security. I came back and I told them that I had made up my mind, and that I would not do it at that time. Stickney said he would see whether he could do it or not. I understood afterwards they laid an information before Mr. Anderson. I was arrested next morning by constable Long. I came to Simcoe again, and we went to Wells's office. I think Robb went with me that time. He said he could not understand why Stickney acted so. We went there to settle the amount, and I offered a chattel mortgage till I could see what to do. They agreed to accept that as security; that was done, and the matter was settled so that I could make out the proper amount due them. I was still in the hands of the constable. We came back home again that night. Next morning I expected to have the thing arranged. I was given to understand that Wells was coming from Simcoe, and I was sent for to the hotel. When I got there I was given to understand that the chattel mortgage would not be accepted. While we were talking Stickney came out of a room and said, 'Riddell, we have come to the conclusion that we cannot take that chattel mortgage. You must pay $540; that is the sum and nothing less, or take the consequences.' I could not understand how they made that amount. I found that Bell had made an offer to my

wife to settle the matter in the way that was stated. I did not know myself exactly what to do: if my wife would sign it, of course I would give it. I understood it was not to be that amount I was to pay in full. I expected all the time I would only have to pay what they were really entitled to. Wells had instructions to have the note drawn up; my wife did not like to sign it. They told her that Wells was coming to see her. He came, argued around a little bit, and told her it was the best thing she could do to sign it. She signed it, and I signed it. I got a statement of the report of the investigation. It was arranged that I should appear before the magistrate. Wells went with me to the magistrate and told him that the thing had been arranged for the time. On the Tuesday following, while I was still under the charge of the constable, I went to the office, a charge was laid against me and the evidence was taken. He thought he had sufficient evidence to send me up, which he did. I came to Simcoe and expected I would be released at once. I was brought into the gaol, where I was kept till 9 o'clock at night. I do not know why." Q. "You were brought before the Deputy County Judge? What took place? any evidence given?" A. "No evidence. I would not have signed the note if I had not been under arrest. I was not indebted in any thing, but I had my wife and family to think of, and I did not want to be placed in a bad position; that is what induced me to sign the note. There was not at that time anything due by me to the township for fines. I did not owe the township; I did not recognize them at all." Q. "In making up the account, were the constable's fees included?" A. "Everything was included. I cannot say what the $540 was made up of. I am satisfied Bell knew the facts I have been stating, and about my being under arrest: he was in a different part of the room at the time. When I settled I got a receipt from the reeve."

This receipt was as follows: "Port Dover, March 9, 1882. Received from James Riddell the sum of five hundred and forty dollars, being amount of claim in full for fines and costs of investigation, held by J. H. Ansley, Esq., commissioner appointed to hold such investigation, into certain charges made against the said James Riddell, not inclusive of J. H. Ansley's charges. John Stickney, Reeve."

Mr. Wells was also examined as witness on behalf of the plaintiff, and stated that the note was given to the plain-

tiff to cover an advance he was to make to cover an indebtedness of Riddell to the township, and was signed by the defendants at their house, the constable being present, and having Riddell under arrest at the time: that the understanding between Riddell and the township as to the criminal charge was, that if he made restitution of the amount claimed, that the case would be sent for trial, the matter would be stated to the Court and the Crown officers, and so far as the township was concerned, they would not press the matter; if the Court was willing the matter should be settled, knowing the facts, the township would not interpose any objection. Riddell was sent up by the magistrate, and taken before the Deputy Judge. The matter was explained, no evidence was given, and Riddell was acquitted. He also stated that the fees of witnesses who attended the investigation before the commissioner were included in the sum of $540, as was also his fee of $75 for attending the investigation on behalf of the township.

The plaintiff was examined on his own behalf, and deposed as follows:

"At the time he was under arrest for not paying over fines, people were talking that he would be sent to gaol or to the penitentiary. I said that before I would see him sent up I would settle the matter. Long heard this, and told it to Mrs. Riddell, who sent for me. I went over; she was in a great deal of distress. She asked, 'What does all this mean?' I said, 'I suppose you know your husband is under arrest for not paying over township funds.' I told her if she and her husband gave me security I would arrange it. She asked me to arrange it, and I went over and told Stickney not to push the case, and I would pay it. Stickney was rather against it. He said, 'You must be a man with a big heart.' I told him I was acquainted with him for a long time, and with his family, and then sometime afterwards they would pay up the amount. * * I said in the bar-room, if they would give me security, rather than see him go to gaol, I would settle it. That was told to Mrs. Riddell. I told Stickney not to press the case. He said they would send him up, and if the Crown attorney and the Judge were satisfied they

would let him go, and would not press the case against him, that is, if they could do it legally."

It appeared also that the plaintiff gave his note to the township for the amount for which he took the note in question. It also appeared that the defendants were married in 1845 without any marriage contract or settlement: that certain land had been conveyed to the defendant Catharine in 1849: that buildings were erected upon it in 1849, partly with her money and partly with her husband's: that the husband received the rents: that in 1857 the defendants conveyed to one Gillespie in trust for the payment of creditors: that the creditors having been paid, Gillespie, in 1878, conveyed it to the defendant James, in mistake, instead of to the defendant Catharine; and that to rectify this mistake, the defendant James, in 1878, conveyed it to James Riddell to the use of the defendant Catharine.

At the time of the giving of the note sued on the defendant Catharine signed the following endorsement on it:

"It is declared and understood that the advance for which this note is given is made by the payee at the request and for the accommodation of the maker Catharine Riddell, and on the faith of her separate estate; in admission of which the said Catharine Riddell has endorsed her name hereon."

No evidence was given to shew that the defendant James Riddell was indebted to the township in respect of any fines received by him to which the township was entitled, or in any other respect; nor was it proved that the plaintiff had paid the note given by him to the township.

The learned Judge gave the following judgment:

"Riddell was liable to the municipality for fees wrongfully retained to the amount of the note sued on, and possibly to prosecution, though that is questionable: but he was arrested and in custody on a criminal charge when the note in question was given. It was so given to indemnify the plaintiff against the payment of a note he had given to the township in settlement of their claim against Riddell. It is quite possible that the township could not have enforced the note against Bell, but, having enforced it, the defendant ought to be estopped from raising such a defence in this action—in morals if not in law. I have not time to consider the authorities before Term, and I shall hold that it constitutes no defence.

There was a just debt enforceable by the township, and if the defendant intended to raise this unconscionable defence, she should have prevented the payment by plaintiff. Not having done so, I think the money was paid at her request, and forms a good consideration in itself. And so also on the second ground of defence raised—even if the bill given by the plaintiff could have been avoided, the defendant should not be allowed to resist this note, having laid by and allowed the plaintiff to pay without any dissent. But upon the question of separate estate I find that the defendant was married in 1845 without a marriage settlement; she was then possessed of certain real estate which the husband had taken possession of before the 4th May, 1859, and therefore was in no sense separate estate. This was conveyed to Mr. Gillespie in trust for creditors by husband and wife, and was, in 1878, conveyed by him to the husband, it is said, by mistake; and in order to correct it a deed was executed on the 5th of October, 1878, reciting these facts and conveying the property to one Jas. D. Riddell to the use of the defendant. This then is the case of a married woman married before 1859, and acquiring property during coverture, and comes within the second section of the Married Woman's Act, R. S. O. ch. 125. The first section of the Act of 1872, had it not been repealed, would have extended to such a case, and would have operated as a settlement to the separate use of the wife free from any claim of the husband as tenant by the curtesy; but the amendment to that statute 40 Vic. ch. 7, confines its operation to marriages subsequent to the 2nd March, 1872. I must therefore hold, in accordance with previous decisions, that the estate held by the defendant was not of a character which would enable her to bind itby her contract. If she was not in point of fact possessed of separate estate, it does not seem to me that the plaintiff's case is advanced by the admission signed by the married woman on the back of the note. I must, I think, hold, in accordance with the decisions binding upon me, that the defendant was not possessed of estate to her separate use, and therefore that she is entitled to a verdict on that issue."

The learned Judge thereupon found a verdict and judgment for the plaintiff, with costs, as to the defendant James Riddell, and directed judgment to be entered for the other defendant, but declined to give costs.

In Michaelmas Sittings last *Falconbridge* moved, on behalf of James Riddell, to set aside the verdict and judgment against him, and to dismiss the action against him with costs.

*Osler*, Q. C., moved, on behalf of the plaintiff, to set aside the verdict and judgment of the defendant Catherine Riddell, and to enter it for the plaintiff.

December 2, 1882. *Osler*, Q.C., for the defendant cited

*Kneeshaw* v. *Collier*, 30 C. P. 265; *Kier* v. *Leeman*, 6 Q. B. 316; *Morgan* v. *Palmer*, 2 B. & C. 729; *Lawson* v. *Laidlaw*, 3 A. R. 77; *Berry* v. *Zeiss*, 32 C. P. 231; *Ingram* v. *Taylor*, 7 A. R. 216; *Thompson* v. *Dickson*, 28 C. P. 225.

*Falconbridge*, contra. The female defendant had a right in equity to compel a reconveyance to her of the property after payment of the husband's composition debts, and therefore she is to be considered as having acquired the property before the 4th of May, 1859, and so she is not within the operation of sec. 2 of the R. S. O. ch. 125. The general current of the decisions is to the effect that the husband's tenancy by the curtesy in such a case still exists, and the property here cannot therefore be held to be separate estate. What occurred here is not within the scope of the Married Woman's Act, even if the property were her separate estate. There were no advances made to her. The contract of suretyship entered into by her for the benefit of the husband, was in no sense an obligation entered into by her respecting her separate estate. See *Griffin* v. *Patterson*, 45 U. C. R. 536; *Johnston* v. *White*, 40 U. C. R. 309; *Horner* v. *Kerr*, 6 A. R. 30; *Lawson* v. *Laidlaw*, 3 A. R. 77. As to the verdict against the husband, that cannot stand, because the note sued on was given to stifle a criminal prosecution, even if it is not void for duress. There is no satisfactory evidence shewing a debt justly due to the municipality, and there is no consideration whatever for the note but the compromise of the alleged criminal offence. See *Williams* v. *Bailey*, L. R. 1 H. L. Cas. 200; *Kneeshaw* v. *Collier*, 30 C. P. 265; *Watts* v. *Mitchell*, 26 Grant 570, and cases there cited.

December 30, 1882. HAGARTY, C. J.—The evidence was presented at the trial in a very unsatisfactory manner, but no objection to its form seems to have been made.

The criminal proceedings were not formally proved. Neither the information nor the examinations before the magistrate, nor the commitment for trial, nor the proceedings before the Deputy Judge were produced.

All the evidence was called by the plaintiff. It would seem as if the gentlemen engaged in the case assumed every thing from personal knowledge.

The solicitor, Mr. Wells, for the township, appeared as one of the counsel for the plaintiff, and the learned Judge, before whom the defendant was brought on the criminal charge, appeared as counsel for the defence.

We gather from the evidence that defendant was arrested on a charge of felony for embezzlement of township funds.

I am satisfied that if this note were sued by the township no recovery could be had. It was openly and avowedly obtained from defendant, the consideration being the stifling of the criminal prosecution..

The amount of $540 was arrived at and insisted on by the township in a very remarkable way. Nearly a seventh of the whole amount was a claim made for legal expenses by a solicitor against the township, on an investigation of accounts to which defendant was no party.

The defendant strongly denied owing any sum approaching to $540 (if any), and apart from his testimony there is clear evidence that in answer to his remonstrances he, while under arrest, was told he must agree to that sum.

Lord Denman said, in *Kier* v. *Leeman*, 6 Q. B. 316, it mattered not whether the party accused were innocent or guilty of the crime charged; "if innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe."

In my brother Osler's judgment in *Kneeshaw* v. *Collier*, 30 C. P. 265, the class of cases is set out in which such compromises and settlement of criminal proceedings may be allowable. They do not apply to such a case as is now before us.

It is not easy to see from the evidence how the plaintiff "settled" or "arranged," as he says, with the township, or whether the alleged settlement was understood to be contingent on his recovery against these defendants.

The plaintiff had the most complete knowledge of the

whole facts. He states that he proposed to the wife to sign the note to save her husband from the gaol, and induced her to sign. The evidence as to the reeve's proceedings points to the opinion that the plaintiff was acting in concert with him.

Mr. Wells says that the reeve stated that the Riddells repudiated the note, and that if they were going to beat Bell (plaintiff), he felt inclined to let the matter take its course. This was when defendant was going up to the mock trial. He seemed to have been afterwards satisfied by defendant's son saying there was no intention to repudiate this note.

It seems impossible, I think, on the evidence to place the plaintiff's right to recover on any higher ground than the township's right.

If the plaintiff could recover when they could not, the law as to compounding a felony or stifling a prosecution would be a mockery, as all a person charged with felony and his prosecutors need do would be to interpose a third person, as the plaintiff is here interposed, between them and the alleged criminal.

The whole affair presents an unpleasant appearance. As the matter stands before us the inference is strong, that if this claim be enforced a demand of a most questionable character will be recovered by most unquestionably suspicious means.

Lord Denman's terse epitome of the case before him seems especially applicable. If it were necessary to consider the question, I am inclined to hold that the wife would be entitled to relief against this note, on the ground of undue and improper influence and pressure exercised on her to induce her to endorse.

ARMOUR, J.—The conduct of the authorities of the township of Woodhouse towards the defendant James Riddell, as disclosed by the evidence, cannot be characterized more mildly than as harsh, oppressive, and illegal. It may be that the township had a perfectly legal claim against him

to some amount for fines imposed by him, to which the township was entitled, and which he had received and had failed to pay over to the township treasurer; but the township had no claim against him for the expenses of witnesses and fees to counsel in attending the investigation into his conduct by the commissioner. They resorted to criminal proceedings against him not in the interest of public justice, but solely with the view of extorting from him by such proceedings a claim which, in part at all events, they could not otherwise have obtained, and of preventing him from making any investigation as to what, if anything, was due by him, and from resisting the payment of whatever he was not legally entitled to pay. The arrangement that the defendant should give the note sued on to the plaintiff, and that the plaintiff should give his note to the township, and the giving the said notes, was all one transaction, managed and superintended by the attorney for the township, and it was agreed that this being done the prosecution should be stifled. The consideration for the giving of the notes was the stifling of the prosecution, and the township authorities having gained the end they had in view in resorting to the criminal proceedings, abandoned them. The requiring the defendant to appear before a magistrate, and be sent for trial, and be brought before the judge, and acquitted, no evidence being offered, was a mere farcical device designed to cloak the illegality of the transaction.

It is quite clear that, under these circumstances, the note sued upon is void, and no recovery can be had thereon.

It may be that the plaintiff intervened in the matter, as he says he did, as the kind hearted benefactor, to shield the defendant from prosecution. There is, however, a grain of suspicion that his intervention was really on behalf and in the interest of the prosecutors, and to enable them the more effectually to carry out their design.

With whatever view, however, he intervened, he is equally remediless. If he paid the note he gave to the township he could not recover the amount so paid, as it was paid in furtherance of an illegal object.

Embezzlement, which was the charge made against the defendant, is a felony, and is not therefore an offence which the prosecutors could settle.

There is no ground for saying that there was any estoppel.

I refer to *Toponce* v. *Martin*, 38 U. C. R. 411, and the cases there cited; to *Kneeshaw* v. *Collier*, 30 C. P. 265, and the cases there cited; *Cannan* v. *Bryce*, 3 B. & Ald. 179; *McKinnell* v. *Robinson*, 3 M. & W. 434; and to *Weeb* v. *Brooke*, 3 Taunt. 6.

If the imprisonment of the defendant Riddell was illegal the note was as against him void for duress: *Smith* v. *Monteith*, 13 M. & W. 427; *Cummings* v. *Ince*, 11 Q. B. 112.

In my opinion the plaintiff's motion should be dismissed, with costs, and the defendants' motion should be allowed, with costs, and the action dismissed, with costs.

CAMERON, J., concurred.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## FORRESTER v. THRASHER.

*Insolvent Act of* 1864—*Assignment without assets—Discharge—Personal action.*

In 1866 judgment was recovered against the defendant in this action for breach of promise of marriage, and in another for seduction. The defendant then made an assignment under the Insolvent Act, 1864, having no assets, and his only creditors being the plaintiffs in the two actions. No creditors appeared, and after twelve months he petitioned for his discharge. The application was duly advertised, and no opposition being made, was granted. He subsequently acquired some property, and execution was then issued in this action. The Master in Chambers refused to set aside the execution on motion made by the defendant, and his order was reversed by Osler, J.

*Held*, affirming the decision of Osler, J., that the want of assets at the time of making the assignment could not be set up on the application as a ground for avoiding the discharge, but was a matter for the consideration of the Insolvent Court upon the application therefor, and that unless attacked for fraud it was a complete answer to the plaintiff's claim.

*Held*, also, that the plaintiff's claim was one which was barred by the discharge.

APPEAL from an order of Osler, J.

The facts of the case were as follow:

Judgment was recovered, in 1866, against defendant in an action for breach of promise of marriage. The father of the plaintiff also, about the same time, recovered judgment for the seduction of the plaintiff.

The defendant was without any property. On the judgment in this cause he was arrested on a *ca. sa.*, and, after a certain term of imprisonment, was discharged as being without means.

In the same year, these two judgments being his only liabilities, he made the statutable assignment under the Insolvent Act to the official assignee.

He seemed to have had no property whatever. No creditor apparently appeared.

After the expiration of twelve months he petitioned for his discharge, and no opposition being offered, he was formally discharged by the County Judge by the usual certificate of discharge, dated 6th December, 1867. This was under the Insolvent Act of 1864, amended by the Act of 1865.

These proceedings seemed to have been duly advertised. Many years passed, and no proceedings appeared to have been taken on this judgment until lately, when, it appearing that defendant had acquired some property, a *fi. fa.* was issued against his goods and lands. This he sought to set aside, as being barred by his discharge in insolvency.

The learned Master, before whom the application was made, refused to set it aside, holding that though it was in its nature a claim barred by the discharge in insolvency, yet, as there was no estate to assign, the whole proceeding was a sham and pretence to escape payment of these claims.

This decision was reversed on appeal to Osler, J., in Chambers, and from his decision (*a*) the plaintiff appealed to this Court.

*Holman*, for the plaintiff. The learned Judge below was wrong in holding that it was not open to the plaintiff, in opposing the defendant's motion, to question the validity of the discharge in insolvency. Under the old practice the only remedy open to the defendant would have been by a writ of *auditâ querela*. Any pleas that were pleaded in an ordinary action could be pleaded to that writ, and had the defendant proceeded by *auditâ querela*, the fraud could have been pleaded: *Giles* v. *Hutt*, 5 D. & L. 387; *Simons* v. *Blake*, 4 Dowl. P. C. 263. Sec. 125 C. L. P. Act, Judicature Act, Rule 359, abolished the writ of *auditâ querela*, and gave defendant liberty to apply for like relief on motion, and declared that the court or Judge might give such relief, and upon such terms as might be just. It is consequently open to the plaintiff in answer to this motion to set up fraud. The whole insolvency proceedings were a contrivance and a fraud. The defendant had no assets to assign, and the wording of the Insolvency Act clearly shows that it was intended for the benefit of a debtor who had something to assign: *Ex p. Morrison*, 10 Jur. N. S. 787; *In re Smith*, 4 P. R. 89; *Re Dennis*, 6 L. T. N. S. 755; *Park* v. *Day*, 24 C. P. 619; *Re Pearse*, 9 L. T. N. S. 349. The

(*a*) Not yet reported.

Insolvency Act of 1864, sec. 9, subsec. 5, provides that a discharge shall not apply without the express consent of the creditor for any damage due for personal wrong. An action for breach of promise of marriage comes within the definition laid down by Cameron, J., in *Benninger* v. *Thrasher*, 9 P. R. 206. See also *Williams* on Executors, vol. 1. p. 800; *White* v. *Elliott*, 30 U. C. R. 253. The other grounds taken in the notice of motion were disposed of in *Benninger* v. *Thrasher*, 1 O. R. 313.

*Clute*, (with him *Aylesworth*), contra. The plaintiff cannot raise the question of fraud on this application. The discharge was granted the defendant in 1867, and cannot be attacked in this proceeding. It was not void. Gwynne, J. modified his views, as expressed in *Thomas* v. *Hall*, 6 P. R. 172, by his judgment in *Parke* v. *Day*, 24 C. P. 619. An action for breach of promise of marriage is not for a personal wrong. The subsequent Insolvent Acts define what is meant by the term personal wrong, and breach of promise of marriage is not included.

December 30, 1882. HAGARTY, C. J.—I agree that this is a claim barred by a proper discharge in insolvency. The only question is, as to whether the insolvency proceedings can be upheld.

My brother Osler points out clearly that the decision of Gwynne, J., in *Thomas* v. *Hall*, 6 P. R. 172, is not necessarily a decision on the precise point, as he himself fully explains in the decision of *Parke* v. *Day*, 24 C. P. 622, in the full Court, and holds that, as the decision of the Judge who granted the discharge had never been appealed from under the statute, the Court would hardly, after the lapse of nine years, or at any distance of time, treat it as void on motion: that as the assignment itself was not *ipso facto* void, the jurisdiction of the Court attached, so that the granting or refusing a certificate was a question not of jurisdiction so much as the exercise of a legal discretion, and if not appealed might be found very difficult to assail, except on the ground of fraud.

It was pointed out that not only the assets possessed at the time of assignment, but also whatever he might possess up to the time of discharge, would vest in the assignee.

*Re Thomas*, 15 Gr. 196, was referred to. VanKoughnet, C., said that the want of assets was not in itself a sufficient reason for refusing the discharge.

Two questions arise. 1st. Does the non-existence of assets destroy the *status* of the defendant to take advantage of the provisions of the Insolvent Act, so as to render his discharge wholly void and invalid?

2nd. Can this objection be raised at any distance of time, or must it be raised as an objection to the granting of his discharge in the Insolvent Court?

I entertain a very strong opinion that the mere non-existence of assets at the time of the assignment to the official assignee does not render it *ipso facto* void, so that all the proceedings taken subsequently in the Insolvent Court are nullities, and in fact *coram non judice*.

The fact that the Act of 1864 provides (sec. 2, sub-sec. 7,) that it shall vest in the assignee all his estate, &c., "which he has or may become entitled to at any time before his discharge is effected under this Act," seems a strong reason for not treating it as a nullity.

It would be a singular result if his father had died a month after the assignment, leaving him heir to valuable properties, or that the validity or nullity of the proceedings were to depend on the contingency of such an event happening; or again, if he make the assignment on the demand of his creditors under the compulsory clauses of sec. 3, sub-sec. 2.

Discharges are regulated by sec. 9. Sub-sec. 10 applies to the case where the insolvent applies after twelve months. Under sub-sec. 11, any creditor may appear and oppose. By sub-sec. 12, the Judge may, after hearing the parties, make either an absolute or conditional or suspensive discharge, or refuse it; and such order shall be final, unless appealed from as provided.

In *Thompson* v. *Rutherford*, 27 U. C. R. 205, this Court

held that to a plea of discharge it was a good answer that a corrupt agreement had been made with a creditor for an additional sum above the general composition. It was said, at p. 209: "The discharge or composition or confirmation, if not appealed against, appears to be final and conclusive as a discharge as to all matters anterior to the matters mentioned in the 13 sub-sec. of the Act, but is avoidable if such discharge, &c., be obtained by fraud or fraudulent preference, or by means of consent thereto being procured by payment, &c. * * It is quite true that the objections now urged to the validity of the discharge" might have been urged before the Court below on the application to confirm. The fraud was not then known, and could not have been urged. Even if known the Court did not say the creditor was then bound to urge. Such objections are specially declared by the statute may be urged against the validity of the discharge: *Horn* v. *Ion*, 4 B. & Ad. 78; *Golloghy* v. *Graham*, 22 C. P. 226; *McLean* v. *McLellan*, 29 U. C. 548.

When the discharge has been obtained by fraud in fact its efficacy can be impeached in a legal proceeding when it is set up as a defence, and especially in the cases pointed out in the Act of 1864, on which this case depends, and also I presume where it is shewn or appears that the insolvency proceedings were wholly a nullity, and in fact *coram non judice*. But I think these proceedings do not fall within such a description.

It is a wholly different question whether the non-existence of assets may not be urged as a reason in the Insolvent Court for dismissing the proceedings or refusing the discharge.

In *Ex parte Neumark*, 6 L. T. N. S. 755, 1862, Mr. Commissioner Holroyd dismissed a petition, as there were no assets, and that in such a case the insolvent, "being clearly a pauper, ought to have complied with the provisions of the statute applicable to that class of petitioners."

This decision is vigorously combatted in a long note by the reporter, as the Act of 1861 did not contain provisions as to assets to be found in the earlier Acts.

This proceeding was under the Act of 1861. Section 98 provides for a debtor petitioning *in formâ pauperis*, that he has no means, &c.

*Ex parte Morrison*, 10 Jur. N. S. 787, was a motion before Lord Westbury, C., to discharge an order of Mr. Commissioner Fane refusing leave to a creditor to issue process against E. H. Clunn, notwithstanding the registration of a trust deed under the Act of 1861.

It seemed a very fraudulent case—no assets, large debts. Lord Westbury gave leave to proceed, saying it was "a fraudulent attempt to accomplish the release of the debtor" under the Act. He says: "I have been told that the man may have made himself a bankrupt although he was not worth a farthing. The condition of the law compelled that to be done; but the man who applies to be made bankrupt in that state of things does so openly and without fraud, that is to say, without falsehood, without attempting to pervert the sections of the Act given for one purpose to another and a different purpose."

The subject is treated in *Archbold* on Bankruptcy, vol. I, 226-7-8.

I see in a case, *Re Perry*, 2 U. C. L. J. N. S. 75, the learned Judge of the County Court of Brant seems to think that there being no estate to assign was no objection to granting a discharge, when the creditors consented, without an assignment.

Now, it must be borne in mind that these cases as to non-existence of assets are in the Bankruptcy Courts, not in suits at law.

It may be that the absence of assets may form an important ingredient in arriving at a decision favourable or adverse to releasing the insolvent from liabilities.

But it is a totally different matter to question the discharge on such grounds in a proceeding like the present.

*Pennell, Assignee*, v. *Butler*, 18 C. B. 209, may be referred to as illustrating the dealing of a Court of law on such points. Under the Bankrupt Act, 17 & 18 Vic. ch. 119, sec. 20 required the bankrupt to shew to the satisfaction of

the Court that his available estate is sufficient to produce £150 at least, or his petition should be dismissed.

At the trial Crowder, J., said, that in his opinion the question of value was for the Court of Bankruptcy to determine. The Court upheld this view in Term. Jervis, C. J., says: "I think * * the question of value was concluded by the decision of that Court, and closed for ever, and could not be called in question on the trial."

It had been pressed by counsel that it could not be that the judgment of the Court of Bankruptcy was conclusive. Nothing can be gathered from our Act of 1864 as to the necessity of any existing assets.

I am of opinion that we must accept the certificate of discharge in this case as disposing of this application.

The defendant comes before us under unfavourable circumstances, and it might seem more consonant with our feelings of right and wrong to prevent his escape from the plaintiff's claim; but any rule of decision that we adopt in this case must be of general application, to the deserving as to the undeserving debtor.

Benninger, the plaintiff's step-father, says he has the management of the suit, and that no notice of the application for discharge was ever served on him, or on plaintiff, or his attorney. He does not deny ever hearing of the insolvency proceedings. It is stated in the discharge that the required notices had been given in the *Official Gazette* and the local paper for two months, and no opposition was offered to the discharge.

It is utterly improbable that the plaintiff herein or her stepfather, Benninger, could have been ignorant of the fact of defendant having made an assignment and taken proceedings in insolvency.

I think the appeal must be dismissed, with costs.

ARMOUR and CAMERON, JJ., concurred.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## PARSONS V. THE QUEEN'S INSURANCE COMPANY.

*Fire insurance—Statutory condition—Variation—Misrepresentation.*

The plaintiff applied for an insurance upon his stock-in-trade with the defendant company. Pending the negotiations the company's agent told the plaintiff he thought the company's condition was to allow twenty-five pounds of powder to be kept, and the plaintiff said he did not keep more than ten pounds. The insurance was then effected by an interim receipt, and on the same night the premises were burned. The plaintiff had more than ten pounds, but less than twenty-five pounds of powder in stock when the fire occurred. The statutory condition prohibited more than twenty-five pounds being kept in stock without permission, and the company's variation of their condition relieved them from liability if more than ten pounds was "deposited on the premises, unless the same be specially allowed in the body of the policy and suitable extra premium paid." The case having been dealt with on other grounds on an appeal to the Privy Council was remitted to this Court to try whether the variation was a just and reasonable one. The learned Judge at the trial found it to be reasonable.

*Held*, HAGARTY, C. J., dissenting, that under the circumstances of this case, inasmuch as the company's agent had represented that twenty-five pounds of gunpowder were allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one to be set up by the company, or one which they could have inserted in the policy, and was therefore void, and that the plaintiff should recover.

*Per* ARMOUR, J.—The condition being more onerous than the statutory condition relating to the same subject matter, was for that reason to be deemed not just or reasonable.

*Per* HAGARTY, C. J., and GALT, J.—The variation was not, under the circumstances, necessarily unjust or unreasonable, and the judgment should not be interfered with.

*Per* HAGARTY, C. J.—The statutory condition exempting the company from liability if more than twenty-five pounds of powder were kept without permission, does not preclude or prohibit the insurers from bargaining that they will not be liable if more than ten pounds be kept, except on certain conditions as to extra premiums, &c.; and as the plaintiff at the trial did not in his evidence mention the representation of the agent, or allege that it influenced him, and it was not relied upon there, it should not now be given effect to.

THIS case was tried before Patterson, J. A., at Guelph, without a jury.

The plaintiff claimed under an interim receipt granted by the agent of the defendants. The case had been before the Courts on a former occasion, and it had been held by this Court and the Court of Appeal (*a*) that the statutory conditions not having been complied with the

(*a*) See 43 U. C R. 271, 4 A. R. 103.

receipt should be read as not containing any conditions. The case was then brought before the Supreme Court, and finally was appealed to the Privy Council (*a*). The judgment was delivered on 26th November, 1881.

After the judgment of the Privy Council on the appeal was made known this Court, after argument, in February 1882, as was considered in accordance with the directions of the final Appellate Court, ordered the case to be sent down for trial to ascertain whether the company's condition with respect to the quantity of gunpowder kept in the building containing the property insured was just and reasonable.

It was accordingly tried, as above stated, when the learned Judge, after evidence taken, found that the condition was a reasonable one, and he therefore gave judgment for the defendants, with costs.

The evidence material to be stated sufficiently appears in the judgments.

May 20, 1882. *Creelman* obtained an order *nisi* to set aside the judgment and enter it for the plaintiffs.

May 31, 1882. *McCarthy*, Q.C., and *Creelman* supported the order *nisi*. The evidence taken at the trial disclosed no special circumstances surrounding the insurance in question which would justify the insurance company in varying the statutory condition as to gunpowder. The statutory condition must be accepted as a legislative declaration that twenty--five pounds of gun powder is a reasonable limit, and in view of such declaration any condition imposing any other or narrower limit must *ipso facto* be unjust and unreasonable. The variation, as it imposes a condition more onerous and burdensome than the statutory condition, must be unjust and unreasonable, as laid down in *Ballagh* v. *Royal Insurance Co*, 5 A. R. 107, and in *May* v. *Standard Fire Insurance Co.*, 5 A. R. 622; in other words, the question should be tried with reference to the standard afforded by the statute dealing with the same

(*a*) See 4 S. C. 215; L. R. 7 App. Cas. 96.

subject matter. The question as to whether the variation is just and reasonable or not is a question of law for the Court, and not a question to be determined by evidence; but if it is a matter of evidence, the evidence only established that twenty-five pounds of gunpowder stored in the building is more dangerous than ten pounds of those respective quantities are in bulk; and the evidence also established that the gunpowder in the plaintiff's store was in pound canisters, and therefore ten pounds would be equally as dangerous as twenty-five pounds. In view of the decision in the Privy Council, the action should be treated as if the plaintiff had instituted an action for specific performance of the contract contained in the interim receipt, and in such an action the plaintiff would be entitled to a policy with the statutory conditions endorsed thereon, and such conditions as this Court should hold to be just and reasonable. The defendants' agent represented to the plaintiff, at the time the risk was effected, that the company's condition allowed him to keep twenty-five pounds of gunpowder stored in the premises insured, and it would be unjust and unreasonable to allow a variation in the conditions contrary to and in direct contradiction of the representation made by the agent; in other words, because of such representation the defendants are estopped from asserting their right to such variation.

*Bethune*, Q. C., and *Small*, contra.

The argument upon which the plaintiff chiefly relies, that the condition in question is *ipso facto* void because it imposes another and narrower limit than the statutory condition, is displaced by the judgment of Her Majesty's Privy Council, L. R. 7 App. Cas. 123-6. Their lordships were aware that the company's condition restricted the insured to ten pounds of gunpowder, while the statutory limit was twenty-five pounds, but they did not hold that it was therefore unreasonable; on the contrary, they directed that the case should be sent down for trial and final determination upon that very point. Under section 6 of

"The Fire Insurance Policy Act," R. S. O. ch. 162, the *onus* is upon the plaintiff to shew that the condition is not just and reasonable. The defendants submit that the question to be asked with respect to any condition varying from a statutory one is, Is the condition such as to commend itself to the mind of a reasonable man as one which may be reasonably and justly imposed upon the insured? To hold that any variation of a statutory condition is *ipso facto* unreasonable, would be to repeal the greater part of the Act in question. Sections 4, 5, 6, and 7, distinctly provide for the variation and omission of or addition to the statutory condition. Some companies (as was shewn at the trial) entirely prohibit the keeping of gunpowder on the premises insured, and to prohibit entirely so destructive an agent is, it is admitted, by no means unreasonable. Much less is it therefore unreasonable if, in aid of trade, the defendants have made a variation in favour of the insured, by allowing him to keep a quantity of ten pounds. The plaintiff had been a frequent insurer with the company, and had a full opportunity of being aware of all the company's conditions. His statement, made to the defendants' agent, that he never kept more than ten pounds of gunpowder on the premises, leads to the conclusion that he had the company's condition in mind when speaking to the agent. The alleged statement of the defendants' agent to the plaintiff, referred to by the plaintiff's counsel, which was to the effect that he represented to the plaintiff, at the time the risk was effected, that the company's condition allowed twenty-five pounds of gunpowder, was not corroborated in any way by the plaintiff's own evidence, although he was called twice during the trial, and the learned Judge at the trial was not asked to make any finding on the question of the agent's alleged representations, nor was that point in any way pressed at the trial. Both the company's and the statutory conditions prevent the verbal waiver of a condition. The learned Judge who tried the action was best able to come to a conclusion as to the reasonableness of exacting this condition under all the surrounding circumstances, and

he decided in favor of the defendants. The cases of *Ballagh* v. *Royal Ins. Co.*, and *May* v. *Standard Ins. Co.*, do not apply to conditions affecting the nature of the risk or hazard.

December 30, 1882. HAGARTY, C.J.—The evidence of the plaintiff merely shews that he had gunpowder in his stock in trade. The defendants' then agent, who gave the interim receipt, said that he thought their conditions allowed twenty-five pounds. He said he so told plaintiff, who answered that he did not keep more than ten pounds in stock.

The plaintiff before this had obtained policies from these defendants on other properties containing this limit to ten pounds.

It had been shewn that more than ten pounds and less than twenty-five pounds were on the premises.

The statutory condition declares that the company shall not be responsible if more than twenty-five pounds of gunpowder are stored on the premises, &c., "unless permission in writing is given by the company." The provision in the company's conditions is, that they will not be liable when more than ten pounds weight of gunpowder is kept on the premises unless the same is specially allowed in the body of the policy, and suitable extra premium paid.

The Privy Council, L. R. 7 App. Cas. 125, held that the contract was that the company would issue a policy subject to their own conditions, if they could legally do so. * * "The company might issue a policy with its own conditions, provided that care was taken to print the statutory conditions, and shew the variations from and the additions to them which its own conditions present, in the manner prescribed."

We have therefore to treat this case as if a policy were produced first setting out the statutory conditions.

These would shew a limit of twenty-five pounds of gunpowder.

Then would come in different ink—"Variations in conditions:—This policy is issued on the above statutory conditions, with the following variations and additions."

Then we find the ten pound limit.

It has been argued that because the statutory conditons mentioned twenty-five pounds that the defendants could not alter or vary this.

I cannot understand why a declaration in these statutory conditions exempting the company from liability if there be more than twenty-five pounds, except by written permission, is to preclude or prohibit the insurers from bargaining that they will not be liable if not more than ten pounds be there, except on certain conditions.

The statutory conditions do not say affirmatively that the assured may keep twenty-five pounds. If there be, as there is declared to be, a power to vary and add to, subject only to the question of reasonableness, I cannot see how on such an important matter as the quantity of gunpowder we should necessarily hold the parties bound to the statutable quantity. We should not strive to fetter the liberty of contract beyond the expressed words of the Legislature.

In the Privy Council judgment, at p. 125, it is said: "Its own conditions ought to be read into the interim contract to the extent to which they might lawfully be made a part of the policy when issued, by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the Court or Judge."

I am of opinion that they are not restricted by the twenty-five pound limit from declaring a variation from it as allowed by the Act. Nor do I believe that we can determine that the variation is unreasonable because it is such variation.

Assuming the defendants' right to vary, we find the learned Judge, after hearing the evidence, directing that the variation condition of the defendants is not unreasonable. I am not prepared to take a different view.

There can be nothing in itself unreasonable that underwriters should limit the quantity of a highly dangerous article of merchandize kept in property insured by them. Once remove it from the category of unreasonable matters merely because it differs from the statutory provision on the same subject, it falls back, in my judgment, into the class of matters on which the contracting parties may mutually limit or extend their liability.

I think the finding of the learned Judge is right, and that the motion must be dismissed, with costs.

Since I had written the foregoing I understand that my learned brothers think that, as the agent told the plaintiff that he thought their conditions allowed twenty-five pounds of powder to be kept, we should hold the condition or its application to be unreasonable.

The plaintiff in his evidence made no mention whatever as to the agent telling him anything on the subject, or that his mind or conduct had been in any way affected by any statement to that effect. Neither did he when recalled, after the agent had given his evidence, make any statement on the subject. It therefore stands wholly on what the agent said. The latter stated that he told the plaintiff he thought their condition allowed twenty-five pounds, that he said it was a very dangerous article; to which plaintiff said yes, it was, but that he did not keep more than ten pounds in stock, that his stock did not exceed ten pounds.

On this the interim receipt was given. The same night the premises were burned. The plaintiff was not asked anything about the agent telling this, or that his mind was influenced thereby.

I am authorized by the learned Judge who tried the case to say that nothing was suggested to him on this point, and he was not asked to decide or express any opinion thereon.

It appears to have made no impression whatever on the plaintiff's mind, or on that of his counsel at the trial, and as I understand the learned Judge, he gave his finding as

to the reasonableness of the conditions without reference to this piece of evidence, as I should certainly have done in his position.

If any use had been intended to be made of this statement, it seems to me to be clear beyond argument that it ought to have been presented to the learned Judge for his decision just as if a jury had been impannelled to try the case.

I am told it is all before us now for our decision on the evidence.

I must wholly dissent from this view as applicable to this case.

Why should I assume that such a statement had been made to plaintiff to influence or govern his decision in making his insurance when he himself never said or pretended that it was either said or that it did in any way influence him? He and his counsel heard the agent say this; he was recalled for other purposes, and still was never asked anything on the subject.

What would an intelligent jury, to say nothing of an experienced Judge acting as a jury, think of such a proceeding? I think the jury or the Judge, never having been asked to consider or decide upon it, would have discarded it from consideration, or, if pressed upon them, would say, as I think they might righteously have said, that the plaintiff never said he was influenced by it; that they would not think of saying that he was; that, in fact, he would know best.

Then what was really said? The agent says he thinks they allow twenty-five pounds, and the plaintiff says, I never keep more than ten pounds in stock. Is either of these assertions true? It was proved there was more than ten pounds there that night. Did the plaintiff go that afternoon, as he must have done, and bring in a larger quantity of powder?

I cannot find in favour of the plaintiff on any ground connected with this branch of the case, except on assuming that he was deceived by the agent and thereby induced to

effect an insurance on the faith of being allowed to keep twenty-five pounds, which he otherwise would not have done.

I feel that I have no excuse or ground for so finding on such evidence. I am to assume his being influenced, when he will not say that he was.

The issue which we directed to be tried was whether this was a reasonable condition.

The notice of motion against the finding is merely against its having been held to be a reasonable condition. No question is suggested as to there being any deceit or fraud practised on the plaintiff, or that he was in any way misled.

In my judgment a wholly different question is now raised.

With great respect for those who differ from me, it appears to me that if I venture to do anything of this kind I am violating all the rules, as to trial and evidence, which I have always understood should govern our proceedings.

Because a Judge tries a case without a jury, I do not understand that he is a mere taker of evidence.

I think facts are to be presented to him for his decision just as to a jury, and that he should find upon them. He sees the witnesses, and should be asked to find one way or the other on their testimony.

I fear that another miscarriage has to be added to the misfortunes that have attended this most unfortunate case.

As reference has been made to the action of the commissioners who recommended these uniform conditions, although it cannot affect the legal decision of this case, I may say, as one of the members of that commission, it never entered into my views that underwriters should be debarred from contracting specially as to the quantity of gunpowder kept in premises offered for insurance.

GALT, J.—Their Lordships of the Privy Council, after disposing of the several questions raised by the appeal, and

upholding the authority of the Local Legislature to pass the Act respecting uniformity of conditions, L. R. 7 App. Cas. at p. 125, say:

"What then are the conditions of the contract which is the subject of this action? The interim note contains a proposal by the respondent to effect an insurance on the company's 'usual terms and conditions,' and the interim insurance is made subject to these conditions. If the contract of the parties had come to be executed, the company would perform it by issuing a policy subject to their own conditions, if it could legally do so. Indeed, if the assured so required, it would be obligatory on the company to perform it in this manner. In the view their Lordships take of the Act in question the company might, conformably with its enactments, issue a policy with its own conditions, provided that care was taken to print the statutory conditions and shew the variations from and the additions to them which its own conditions present, in the manner prescribed. They think that it ought to be presumed that the company would thus perform the contract when it came to issue a policy; and this being so, that its own conditions ought to be read into the interim contract to the extent to which they might lawfully be made a part of the policy when issued, by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the Court or Judge. For these reasons their Lordships think * * that the action should be remitted to the Court of Queen's Bench in order to the trial of this question," &c.

In consequence of this judgment the case was brought to trial as already mentioned.

The statutory condition is as follows:

"The company is not liable for loss or damage occurring while more than twenty-five pounds weight of gunpowder are stored or kept in the building insured, unless permission is given in writing by the company."

The variation is:

"The company will not be responsible when more than ten pounds of gunpowder is deposited or kept on the premises, unless the same be specially allowed in the body of the policy, and suitable extra premium paid."

The sole question is, is the variation just and reasonable?

The learned Judge before whom the case was tried was of opinion that the variation is just and reasonable, and so is the Chief Justice of this Court. I concur in this view as a general proposition, but I think that under the circumstances the company are not in a position to urge it in this case. The insurance was effected by an interim receipt, and it appears to me that the agent in such case represents the company as to all matters connected with the insurance until the application for insurance is laid before the company. I mean, that any information furnished to the agent must be and should be treated as given to the company until the application is forwarded to them, after which they should be considered as contracting solely on the representations contained in the application, and are not to be considered as affected by any other or additional statements made to the agent, and not transmitted by the agent to them. On the other hand, I am of opinion that all representations made by the agent, as respects the terms and conditions on which the insurance is made, are to be treated as made by the company themselves, provided that they do not contradict or vary the conditions of the interim receipt, until the policy is issued, after which the insured has an opportunity of ascertaining precisely the terms and conditions of the contract by which they are willing to contract, and if he does not accept these he should give notice to the company and demand repayment of the premium. In the present case the agent was aware that the plaintiff kept gunpowder on his premises, and had a conversation with him on this very subject. He states in his evidence, in answer to the question, "At the time you insured this property did you know what the company's condition as to gunpowder was?" "I thought it was twenty-five pounds." "Did you communicate that to the plaintiff?" "Yes; I said it was a very dangerous thing to keep. He said it was, but that he did not keep more than ten pounds in stock—that his stock did not exceed ten pounds." "Was this before he insured or afterwards?" "Before." "You told him you thought the com-

pany's condition allowed twenty-five pounds. Did you communicate that to him?" "I did."

It is plain from the company's own variation that they do not absolutely refuse to insure premises on which more than ten pounds of gunpowder are kept, but require that the larger quantity should be specially allowed in the body of the policy and suitable extra premium paid. It is also shewn that this very subject was, before the contract was completed, the subject of conversation between the agent and the assured, and if a mistake was made it was the mistake of the former not of the latter; and therefore in my opinion it is not a just and reasonable condition to be set up by the company as against the claim of the insured. If the company before the loss had issued a policy containing this variation, I am of opinion the insured, if he disapproved of it, might have cancelled the contract, on the ground that the policy was subject to a more restricted condition than he had contracted for; but if he did not do so he could not afterwards, in case of a claim arising under the policy, contend for any variation in the express terms thereof.

In my opinion this rule should be made absolute to enter judgment for the plaintiff, with costs.

ARMOUR, J.—In giving judgment in this case, in the Privy Council, the judicial committee, said: L. R. 7 App. Cas., at pp. 125, 126: "In the view their Lordships take of the Act in question, the company might, conformably with its enactments, issue a policy with its own conditions, provided that care was taken to print the statutory conditions, and shew the variations from and the additions to them which its own conditions present, in the manner prescribed. They think that it ought to be presumed that the company would thus perform the contract when it came to issue a policy; and this being so, that its own conditions ought to be read into the interim contract to the extent to which they might lawfully be made a part of the policy when issued, by following the directions of the statute, subject always to the statutable

condition that they should be held to be just and reasonable by the Court or Judge.

"For these reasons their Lordships think that the judgment of the Court of Queen's Bench discharging the appellants' rule for setting aside the verdict for the plaintiff, and the judgments affirming it, ought to be reversed, but their Lordships do not see their way to decide the question which now arises, and was not determined by the Judge who tried the action, or by any of the Courts in Canada, whether the company's condition with respect to the quantity of gunpowder kept in the building containing the property insured is just and reasonable. They think the rule *nisi* should be kept open, and the action remitted to the Court of Queen's Bench in order to the trial of this question, with a direction that the rule be disposed of according to the decision that may be come to upon it, and they will humbly advise Her Majesty to this effect."

And on the 29th day of November, 1881, Her Majesty was pleased, by and with the advice of Her Privy Council, to order that the rule *nisi* obtained by the defendants on the 23rd May, 1878, should be kept open, and that the action should be remitted to the Court of Queen's Bench of the Province of Ontario, for the trial of the question whether the company's condition with respect to the quantity of gunpowder kept in the building containing the property is just and reasonable, and the said Court of Queen's Bench was thereby directed to dispose of the said rule according to the decision which might be come to on this question.

The defendants' rule *nisi* was accordingly set down for argument before us on this point, and was argued on the 17th day of February, 1882, and although I then thought, as I think now, that, having regard to the statutory condition on the same subject, the question whether the company's condition was just and reasonable was one of law, and need not be sent for trial, yet, inasmuch as it might be found, irrespective altogether of the statutory condition, to be unjust and unreasonable, I concurred in sending the case down for trial on this point.

The case was accordingly tried at the last Spring Assizes

at Guelph, by and before Patterson, J. A., who, after hearing evidence, found that the condition in question was a reasonable condition to be exacted by the defendants, and he thereupon gave judgment for the defendants, with costs.

The statutory condition is in these words:

10. "The company is not liable for the losses following, that is to say: *(f)* For loss or damage occurring while petroleum, rock, earth, or coal oil, camphene, burning fluid, benzine, naptha, or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, excepted), *or more than twenty-five pounds weight of gunpowder* are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company."

The company's condition is in these words:

10. "This company will not be responsible for any goods or articles stolen at or after any fire, nor will this company be liable for any loss or damage *when more than ten pounds weight of gunpowder*, or where any camphene, burning fluid, kerosene, or refined coal oil is deposited or kept on the premises, unless the same be specially allowed in the body of the policy, and suitable extra premium paid. Spirit gas, petroleum, rock oil, earth oil, benzine, naphtha, crude oil, coal oil, petroleum oil, and castor oil, and all oils made from coal, rock, earth, or petroleum, are absolutely prohibited from being stored in any premises covered by this policy without permission in writing being expressed hereon, or it will be null and void. Refined coal oil for lighting the premises covered by this policy may be kept in quantities not exceeding five gallons, but only in a suitable metal vessel provided for the purpose."

In order to determine whether this condition of the company is just and reasonable, having regard to the statutory condition on the same subject above set out, it will be necessary to advert to the circumstances which gave rise to the passing by the Legislature of "An Act to secure uniform conditions in policies of fire insurance," 39 Vic. ch. 24, in order to determine what was the intention of the Legislature and their object in passing the said Act;

and also to what was done under the authority of the Legislature prior to the passing of the said Act, with a view of securing uniform conditions in policies of fire insurance.

In *Ballagh* v. *The Royal Mutual Fire Ins. Co.*, 44 U. C. R. 70, I had occasion to state the circumstances which gave rise to the interference of the Legislature in the following language: "Before the passing of the Act, R. S. O., ch. 162, insurance companies could endorse just such conditions as they pleased upon their policies, whether such conditions were reasonable or unreasonable; and some insurance companies carried their power in this respect to such an extent that they endorsed conditions upon their policies of such a character that no person insured could comply with them; and whether they would pay a just claim or not was a matter entirely at their option, for it could not be recovered if they resisted it. Thereupon every person began to call upon the Legislature to interfere to put a stop to such injustice; and no one called so loudly as the Judges." And I may refer to the case of *Smith* v. *The Commercial Union Ins. Co.*, 33 U. C. R. 69, and the conditions under discussion in that case, and to the judgment of the Court therein, as shewing the necessity for Legislative interference in the direction in which they afterwards by the above mentioned Act interfered.

The Legislature accordingly, yielding to the appeals that were made to them for their interference, passed the Act 38 Vic. ch. 65, "An Act to amend the laws relating to Fire Insurances," and by the second section thereof, provided that "A commission is to be issued by the Lieutenant-Governor, addressed to three or more persons holding judicial office in this province, *for the purpose of determining what conditions of a fire insurance policy are just and reasonable conditions;* and the commissioners may take evidence, and are to hear such parties interested as they shall think necessary; and a copy of the conditions settled, approved of and signed by the commissioners, or a majority of them, shall be deposited in the office of the Provincial Sec-

retary; and in case after the Lieutenant-Governor, by proclamation published in the *Ontario Gazette*, assent to the said conditions, any policy is entered into or renewed containing or including any conditions other than or different from the conditions so previously approved of and deposited; and if the said condition so contained or included is held by the Court or Judge before whom a question relating thereto is tried to be not just and reasonable, such condition shall be null and void."

Thereupon, on the 10th February, 1875, a commission was issued by the Lieutenant-Governor, under the great seal of this Province, to the Honourable William Buell Richards, Chief Justice of Ontario; the Honourable John Godfrey Spragge, Chancellor of Ontario; the Honourable John Hawkins Hagarty, Chief Justice of the Court of Common Pleas; the Honourable Samuel Henry Strong, and the Honourable Christopher Salmon Patterson, Justices of the Court of Error and Appeal, whereby, after reciting the said section of the said last mentioned Act, the said persons were constituted and appointed commissisoners *for the purpose of determining what conditions were just and reasonable to be inserted in a fire insurance policy;* and they were thereby empowered to take evidence and hear such parties interested as they should think necessary, and to summon before them any witnesses they might consider expedient, and to require such witnesses to give evidence on oath or verbally, or in writing, or on solemn affirmation, if they should be parties entitled to affirm in civil matters, and to produce such documents and things as they might deem requisite to the full investigation of the matters aforesaid; and they were thereby directed to transmit to the office of the Provincial Secretary their report, to be made to the said Lieutenant-Governor in respect of said matters, with a copy of the conditions settled and approved of by them, such report to be signed by them, or a majority of them.

On the 14th of January, 1876, a report was made by the Commissioners the Hon. John Godfey Spragge, the Hon.

John Hawkins Hagarty, and the Hon. Christopher Salmon Patterson, who signed the same, and who stated that the Hon. William Buell Richards, and the Hon. Samuel Henry Strong had been called to the Supreme Court before the conclusion of the labours of the commissioners, but that Mr. Justice Burton and Chief Justice Harrison had been requested to lend their assistance to the commissioners and were present at several meetings, and had concurred in the conditions signed by the commissioners, and lent the weight of their authority towards their acceptance; and the commissioners appended to their report the conditions settled and approved of by them, and stated in their report that these conditions had been settled after consideration of the policies of all the insurance companies doing business in the Province: that suggestions had also been received from several prominent merchants, and the policy suggested by a committee of the Dominion Board of Trade had also been made use of: that the board of fire underwriters of Toronto were furnished with a draft of the proposed conditions, and their suggestions and criticisms were received by the commissioners, and when practicable admitted, and the commissioners stated that it was to be hoped therefore *that these conditions as settled embodied what was reasonable in the views of the two great classes interested, insurers and insured.*

The Legislature thereupon passed the Act 39 Vic. ch. 24, entitled "An Act to secure uniform conditions in Policies of Fire Insurance," and thereby adopted the conditions settled and approved of by the commissioners as the statutory conditions to be contained in insurance policies of fire entered into or in force in this Province.

It will be seen, therefore, that the intention and object of the Legislature was two-fold; first, to determine what conditions should be just and reasonable both to insurers and insured; and, second, to compel the general acceptance of such conditions, thus securing uniform conditions in policies of fire insurance according to the very title of the Act. It is true that variations and omissions of these con-

ditions, and new conditions, were allowed to be made in the manner prescribed by the Act, subject to their being held just and reasonable by the Court or Judge; but this permission was only subsidiary to the main object of the Act, which was to secure *uniform conditions*. The question then arises, can the insurer make such variations or omissions from these conditions, which the Legislature has declared to be just and reasonable both to insurers and insured, as will make them more onerous and burdensome, or, in other words, more unjust and unreasonable to the insured; or can he add new conditions respecting the same subject matter with which these conditions have assumed to deal, making such new conditions more onerous and burdensome, or, in other words, more unjust and unreasonable to the insured, than these conditions are? I think he cannot, for if he could the intention and object of the Legislature to secure *uniform* conditions would be frustrated. Variations might be required to be made to render these conditions appropriate to the subject matter insured, and he can make variations and omissions from these conditions, or may add new conditions respecting the subject matter of them, so long as such variations, omissions, and new conditions, are not more onerous and burdensome to the insured than these conditions are; for if they are they must be held to be unjust and unreasonable, because the Legislature has determined what are just and reasonable conditions; and any increase upon the insured of the burden imposed by these conditions, as to the subject matter of them, must, therefore, be held to be unjust and unreasonable.

Applying what I have said to the case in hand, the Legislature has determined it to be just and reasonable that the insured should have twenty-five pounds weight of gunpowder stored or kept in the building insured, or containing the property insured; how then can it be just and reasonable that he should be compelled to have only ten? If this condition can be thus varied by the insurer, every other of these conditions can be varied, making each

condition more onerous to the insured than the condition so varied. What then becomes of the Act securing *uniform* conditions? And of what use was the issuing of a commission to ascertain what conditions would be just and reasonable both to insurers and insured? And of what use was the legislation compelling general acceptance of these conditions? It is true that these conditions have been found to be reasonable, but of what use is that if they can be varied as contended for here? It is true that such variations are subject to their being held by the Court or Judge to be just and reasonable. Be it so; but what was the use then of legislating on the subject, further than to make all conditions of insurance on fire policies subject to the decision of the Court or Judge as to their justness and reasonableness; and of what use was it for the Legislature to declare these conditions to be just and reasonable, and that they should be deemed to be a part of every policy? It seems to me that if we were to hold the company's condition in this case just and reasonable, in the face of the statutory condition on the same subject which the Legislature has declared to be just and reasonable, we would be not only refusing to carry out the intention and object of the Legislature in passing the Act and refusing to advance the remedy provided by the Act for the mischief it was passed to remedy, but would be nullifying to a great extent the Act itself. If I am alone in these opinions now, I was not always alone.

In *Butler* v. *The Standard Fire Insurance Co.*, 26 Grant 341, the first statutory condition was endorsed on the policy, and also an additional condition that the application should be taken and considered as part of the policy, and that if in the application the assured made any erroneous or untrue representation or statement, or omitted to make known to the company any fact material to the risk, or make any untrue statement respecting the title or ownership, the policy should be void. The Chancellor (Spragge,) who was one of the commissioners, said: "This general condition" (referring to the first statutory condition) "does

not make an incorrect (or say untrue) representation *per se* avoid the policy, but only such as are to the prejudice of the company. * * How are these conditions to be construed? If a policy is avoided by reason of a representation whereby the company is not prejudiced, the first general provision is, as to that qualification, silenced. The policy of the law, as evinced by Legislation, is, that parties insured are a class requiring protection: that insurances are contracts between public companies, some of whom are disposed to act inequitably and to overreach, on the one hand, and individuals, who as a class are in the matter of insurance improvident; and this should be borne in mind in construing a policy of insurance. * * That Act enacts that in case any policy contains any provision other than or different from the conditions set forth in the statutory conditions, if such condition be 'held by the Court or Judge before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void.' Upon that my opinion is, that if the proper construction of that non-statutory condition is that the policy is to be avoided by any incorrect statement, *although* it be not to the prejudice of the company or material to be made known in order to enable it to judge of the risk it is undertaking, then, looking at the statutory conditions and the policy thereby indicated, I should hold such condition not just and reasonable, and therefore null and void."

Why would the learned Chancellor have held it to be not just and reasonable? Plainly on the definite legal principle that it was dealing with a subject matter that was already dealt with by the first statutory condition in a manner that the Legislature had declared to be just and reasonable, and was inflicting on the insured, with respect to that subject matter, a greater burden than the Legislature had deemed just and reasonable to impose.

In the same case, 4 A. R., at p. 398, Patterson, J. A., also one of the Commissioners, speaking of this additional condition, said:

"That is not a statutory condition, but is one added

by the company. * * Part of this condition covers the same subjects to which the first statutory condition is addressed; but where the latter invalidates the insurance by reason of such misrepresentations or omissions only as are material to the risk, and invalidates it only in regard to the property to which the misrepresentation or omission relates, this added condition makes every erroneous or untrue statement fatal, although the error or mistake may be utterly immaterial, and fatal to the entire policy, although it may relate to a small part only of the property insured. In these particulars the learned Chancellor held that the condition was unjust and unreasonable. I have merely to add that in my judgment the Legislature had, by anticipation, done the same thing when the qualifying words were inserted in the condition given by the statute."

In *Ballagh* v. *The Royal Mutual Fire Ins. Co.*, 5 A. R. at p. 107, the same learned Judge (Patterson, J. A.,) says: "It is in my judgment quite out of the question to hold that in view of this statute any condition can be just and reasonable which, in any of the particulars dealt with by the statute, assumes to impose a heavier burden or a more stringent rule than that which would have to be sustained or obeyed under the terms of the statute itself." Although this language was made use of with respect to the Act respecting Mutual Fire Insurance Companies, it is equally applicable to the Act now under discussion.

In *Sands* v. *The Standard Ins. Co.*, 26 Grant 113, the 4th statutory condition was endorsed on the policy, and the 5th additional condition was, "When property insured by this policy or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of this company first endorsed hereon; or if the property hereby insured shall be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, this policy shall cease to be binding upon the company."

Proudfoot, V. C., said: "I think the fifth condition

additional is neither just nor reasonable. The original condition (4) struck at assignments by the act of the party, but expressly excepted change of title by succession, or by operation of law, or by death. The added condition makes the policy void upon any transfer or change of title, which would include change of title by succession, by operation of law, or by death; and if the company do not choose to assent to the heir or next of kin succeeding, or if they do not assent to the death of the insured, or to the assignee in insolvency getting the policy, it is void. Not only so, but if the property be levied upon or taken into possession or custody under any legal process, the policy is to be void; so that the unfortunate insured is not only to be deprived of his property by the fire, but also to lose the equivalent with which to pay his creditors; and this no doubt is in many cases a chief motive with a person insured to endeavour to secure himself against the hazard of loss by fire. And the final clause is even more unreasonable and unjust than the preceding, for if the title (*i. e.* of the property) is disputed in any Court, the policy is no longer to bind the company; so that no matter how unfounded a claim may be made to the property, the company are to be free. The only clause in this condition that has the semblance of fairness is when it speaks of the company being free if the property be alienated. But I shall assume that this term is of precisely the same import as *assigned* in the statutory condition, and shall therefore throw aside the fifth added condition entirely."

This cause was reheard, 27 Grant, 167, and the decision affirmed. Spragge, C., said: "The fifth additional condition to the policy now in question is, I agree, not just and reasonable, as is pointed out by my brother Proudfoot in his judgment." Blake, V. C., said: "I agree in the judgment of the Court below as to the fifth clause of the additional conditions. I am of opinion that this condition is, for the reasons there assigned, neither just nor reasonable, and therefore it does not bind the plaintiff." Upon what definite legal principle was this fifth additional condition held to be

not just and reasonable in any respect except for the reason I have above given for the additional condition in *Butler* v. *The Standard Fire Insurance Company*, having been held by the Chancellor to be not just and reasonable?

The Court of Common Pleas, in *May* v. *The Standard Fire Insurance Company*, 30 C. P. 51, held that part of the same fifth additional condition was just and reasonable.

In the same case in Appeal, 5 A. R. 622, Patterson, J.A., in discussing the question generally as to the justness and reasonableness of conditions, said: "But conditions dealing with the same subjects as those given by the statute, and being variations of the statutory conditions, whether they are classed upon the policy as variations or as additional conditions, should be carefully scrutinized. They should, in my opinion, be tried by the standard afforded by the statute, and held not to be just and reasonable if they impose upon the insured terms more stringent or onerous, or complicated, than those attached by the statute to the same subject or incident. Without such watchfulness on the part of the Courts there will be danger of the statute being evaded, and the evils restored in the name of variations or additional conditions, which it was its purpose to abolish."

I think, therefore, that the company's condition above set out is not just and reasonable.

But on another ground I think that it is not a just and reasonable condition to be exacted by the company, because the agent of the defendants represented to the plaintiff at the time that he effected the insurance that the company's condition allowed him to keep twenty-five pounds of gunpowder. This was a representation made by the agent in the course of his duty and bound the defendants to make good his representation, and they could not have insisted, in opposition to that representation, on a bill filed for the issue of a policy, that the policy should contain a condition against keeping more than ten pounds of gunpowder.

I have to add, owing to what has fallen from the Chief Justice, that this latter ground was fully argued before us,

and no objection was at any time made by counsel that it was not before us for adjudication. I see nothing in the short hand notes to indicate that it was not raised at *Nisi Prius*, but it was certainly raised and argued before us in *banc* without objection, and it is impossible for us to ignore it.

In my opinion the defendants' rule *nisi* obtained on the 23rd day of May, 1878, should be discharged, with costs, and the judgment entered by the learned Judge set aside, and the judgment entered for the plaintiff, with costs.

*Judgment accordingly.*

[CHANCERY DIVISION.]

## REID V. SMITH.

*Specific performance—Partnership—Statute of Frauds—Parol evidence to explain written contract.*

Where S., a partner, had contracted in writing in the partnership name, to sell certain timber limits, property of the partnership, but standing in his name only, and M., his co-partner, when informed thereof, had not dissented, but had shortly afterwards furnished information to the purchaser, which he was only entitled to ask for as such purchaser.

*Held*, having regard to all these circumstances, S. had assented to the said contract, and was bound thereby.

The contract was expressed to sell "Limits No. 1 and 3 for $15,500; also all the plant used in connection with the shanty now in operation in Limit No. 1, included in the list made out last summer, and the material then not included which had been in use for the winter's operations of 1880 and 1881, at the price of $3,000."

*Held*, sufficiently definite to satisfy the Statute of Frauds, since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing, which accompanied the above contract, and which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of the $15,500, and such parol evidence was admissible, though the contract imported *primâ facie* a down payment of the $15,500.

It appeared also, that S., who was the managing partner, and the purchaser subsequently put an end to the terms of credit, and agreed to a cash payment of the $15,500.

*Held*, it was competent for them so to do, and within the power of S., so far as his co-partner was concerned.

THIS was an action brought by one Matthew Reid, for the specific performance of a certain agreement for the sale of certain timber limits, and for damages sustained by him by reason of the non-performance thereof. The defendants in the action were Robert Charles Smith, Malcolm McDougall, Thomas Smith, and Charles Smith. The writ was issued on March 2nd, 1882.

By his statement of claim the plaintiff set out that, on or about October 31st, 1881, the defendants R. C. Smith and Malcolm McDougall, then carrying on a partnership business as lumber-men and dealers in timber limits, under the name and style of Smith and McDougall, made an offer in writing to the plaintiff, in the words and figures following, that is to say:

"PORT HOPE, Oct. 31st, 1881.

"Smith and McDougall offer to sell to Matthew Reid limits Nos. 1 and 3, North Shore, Nippissing, for the sum of $15,500, also all the plant used in connection with the shanty now in operation in Limit No. 1 included in the list made out last summer and the material then not included which had been in use for the winter's operations of 1880 and 1881, at the price of $3,000, Reid to take the operation as it stands at any time between this and the 1st of January next, and pay all expenses incurred in putting in and furnishing provisions, and all other expenses connected therewith and all wages to that date, and to assume a portion (say) one half of the contract, about to be made with R. R. Dobell, of Quebec. This offer to remain open until the 1st day of January next, if not sooner accepted or declined.

(Signed) "SMITH & MCDOUGALL."

The plantiff went on to allege that this offer was duly accepted by him: that subsequently to his so accepting it, it was agreed between him and the defendants Thomas Smith and Charles Smith, then and at the time of the present action, carrying on a partnership business, under the name of Smith Bros., that he, the plaintiff, should convey to them, the said Smith Bros., the timber limits and other property comprised in the agreement between him and the defendants Smith and McDougall: that this arrangement was assented to by and on behalf of the said defendants Smith and McDougall, and certain instruments and conveyances were prepared in pursuance of the said agreements, and the purchase money was duly paid into the Bank of Toronto at Port Hope, and the said instruments and conveyances were duly executed by the defendant R. C. Smith, and forwarded to the defendant M. McDougall for execution; but that the said McDougall refused to execute the said instruments and conveyances, and repudiated the agreement between him, the plaintiff, and them, the said R. C. Smith and M. McDougall. And the plaintiff prayed that the above agreement might be specifically performed, and that proper conveyances of the said timber limits and other property, either to himself or to the defendants T. Smith and C. Smith, might be executed by the defendants R. C. Smith and M. McDougall; and an assessment of the damages sustained by him by reason of the non-perform-

ance of the said agreement, and an order for payment thereof, and of the costs of this suit, against the said R. C. Smith and McDougall.

To this statement of claim the defendants R. C. Smith and M. McDougall, put in a joint statement of defence, wherein they stated that on October 31st, 1881, the plaintiff went to Port Hope, where the defendant R. C. Smith was residing, and induced him to sign some papers and memoranda agreeing to sell the timber limits and other property in question in the present action, or some part thereof, and some other property, to the plaintiff; but they refused to admit that R. C. Smith signed the papers referred to in the statement of claim They asserted that the papers which were signed by R. C. Smith, were so signed by him upon the assumption that M. McDougall would also sign the same, and that it was not intended by R. C. Smith to bind himself, or M. McDougall, unless the latter, also signed the said papers, as the plaintiff then knew; that R. C. Smith did not enter into any contract, except one subject to the approval and adoption of the same by M. McDougall; but that M. McDougall declined to sign the said papers, or to enter into any contract respecting the said property: that R. C. Smith had no authority to sell the said property without the consent of McDougall: that no final or concluded agreement was arrived at between the plaintiff and R. C. Smith, as some of the terms of the said pretended agreement were not concluded: that the amount of expenses incurred by R. C. Smith and M. McDougall in putting in and furnishing provisions and all other expenses connected therewith, and all wages up to the 1st of January, 1882, had never been ascertained as agreed to: that no arrangement had ever been made between the plaintiff and them, the said R. C. Smith and M. McDougall, or by the plaintiff with one R. R. Dobell, for the assumption by the plaintiff of a portion of the contract about to be made with the said R. R. Dobell into which they, the said R. C. Smith and McDougall, had since entered; that the plaintiff was a man of no means,

and of bad reputation as a business man, and if he had assumed control of the operations then being carried on by them, the men at work would have quitted work, and as their contract with Dobell would have been broken, they would have been put to large damages; and they also pleaded the Statute of Frauds in bar of the present action.

The defendants T. Smith and C. Smith also put in a joint statement of defence, whereby they admitted the agreement for sale to them as mentioned in the statement of claim, and alleged that on December 13th, 1881, they duly paid the purchase money into the Bank of Toronto at Port Hope, on the faith of the express promise and agreement of R. C. Smith, that he and McDougall would convey the timber limits to them; and they submitted that they were entitled to the limits in question, and that the same should be conveyed to them either by R. C. Smith and M. McDougall, or by the plaintiff; and they prayed accordingly, and for their costs of the present action.

The timber limits in question stood in the name of R. C. Smith only.

Accompanying the agreement set out in the statement of claim was the following document, which is referred to in the judgment:

"This offer to be subject to the contingency of the contemplated Syndicate not going into operation, in which case we agree to his having a cut for this season, 10c. for board, and 5c. for square.

"SMITH & MCDOUGALL."

"MEMO. October 31, 1881.

| | |
|---|---|
| Chattels and plant | $3000 |
| Note | 2000 |
| Bank account | 1500 |
| | 6500 |
| 1882, in March | 2000 |
| In Quebec | 5000 |
| 1883, in March | 2500 |
| In Quebec | 2500 |
| | $18500 |

"SMITH & MCDOUGALL
"M. REID.

"The above are the terms agreed upon for payment except money expended this season, which is to be cash."

Amongst the other documents and papers produced was the following letter from M. McDougall to the plaintiff—also referred to in the judgment.

*M. Reid, Esq., Sunderland:* PARRY HARBOUR, Nov. 29, 1881.

DEAR SIR,—Yours of the 21st inst., is just to hand. I only got back from our shanties on Saturday night. I enclose you statement. As near as I can make out at present this amount will pay men's wages up to December 14th. Men left here on October 14th. They have not made any timber yet on No. 3. McDonell don't report any ways favourable on No. 3; he had two men over it, and they don't seem to think it worth while to cut roads to No. 3 for the amount of pine they can get there. Joclin's men left here three weeks ago for French River—have not heard from them since; no doubt but they will have a hard time of it getting to 52. The horse you brought here is still here, and don't know what is best to do with him. I have not settled with M. Renkin yet; he claims more stumpage than what is credited to him on Mr. Pink's books. * *

"Yours truly,

"M. McDOUGALL."

With this letter was the following enclosure:

"PARRY HARBOUR, Nov. 29, 1882.

Estimate of costs of Smith & McDougall's camp at Nipissing:

| | |
|---|---|
| Provisions and goods, &c. (about) | $1520 00 |
| Men's expenses going to camp (say) | 400 00 |
| Cadging (about) | 500 00 |
| Men's wages until Dec. 14, 1881 (say) | 2000 00 |
| Chattels bought this season (say) | 175 00 |
| Sundries (about) | 500 00 |
| | $5095 00 |

The action came on for hearing at the Spring sittings of Toronto, on April 28th, 1882.

*W. Cassels*, and *C. A. Brough*, for the plaintiff. This is partnership property, and there was power to make the sale; McDougall assented; his letter, with the estimate, is evidence of acquiescence; the plaintiff is at any rate entitled to damages against R. C. Smith. He referred to *Bigg v. Strong*, 6 W. R. 173, S. C., 3 Sm. & Giff. 592, in App. 6 W. R. 536.

*J. Bethune*, Q.C., for defendant M. McDougall. This was the chief asset of the partnership, and selling it was in effect to end the concern; there is no inference of agency to sell in such a case; the contract is not sufficiently set

out under the Statute of Frauds; it is defective in respect to time of payment, if the sale was on terms of credit that should be set out: *Wright* v. *Weeks*, 3 Bosw. N. Y., 372. Part of the subject matter is "plant included in the list made out last summer," but there is no evidence of what this list contained; till the wages and cost of operations were ascertained there was no concluded contract. Again, time is of the essence of the contract, and there has been no tender of the money: there was no obligation to convey until payment of the whole price.

*C. Moss*, Q.C., for defendant R. C. Smith. No damages can be recovered against Smith: the claim is a joint one against both, it is not charged that Smith represented that he had any authority to bind McDougall; here no question of compensation should help the contract against R. C. Smith. He referred to *Re Arnold*, L. R. 14 Ch. D., at p. 284.

*T. S. Plumb*, for the defendants T. and C. Smith. There should be a declaration that the bargain of the plaintiff should be carried out with the defendants T. and C. Smith; and the plaintiff should pay costs and damages to these defendants, if he fails. He referred to *Fry* on Spec. Perf., 2nd ed., p. 246; *Lindley* on Part. 4th ed., p. 236.

*W. Cassels*, in reply. The year is indicated, so that parol evidence of the time of payment can be given; parol acceptance is enough. It has not been set up that time is of the essence of the contract. Cash for the whole was offered but not paid, because, in the interests of all, McDougall was to join.

May 10, 1882. BOYD, C.—In *Phillips* v. *Humphray*, L. R. 6 Chy. 770, the evidence of ratification was less than in this case. There, one of two tenants in common, without any authority from his co-tenant, contracted to sell the estate. The latter when informed of what had been done, objected on the ground that the price was too low, but he did not inform the purchasers that he repudiated the sale, but allowed the matter to proceed, though he did not actively consent in the subsequent proceedings. In

these circumstances Lord Hatherley expressed the opinion that there was a ratification of the agreement made by the one, and that it was the duty of the other, if he dissented, to express his dissent as soon as he was informed of what had been done. See also *Bigg* v. *Strong*, 3 Sm. & G. 592, affirmed, 6 W. R. 536; and *Naylor* v. *Goodall*, W. N. 1877, p. 225.

In the present case, however, we are dealing with timber limits, which are partnership property, which both partners were anxious to sell; and which one partner, in the name of the firm, agreed in writing to sell to the plaintiff. This being forthwith communicated to the other partner, was not objected to or dissented from, even as between themselves; and shortly afterwards the partner who now objects furnished information by letter to the purchaser, which he was only entitled to ask for in pursuance of the agreement to sell. According to the language of Lord Mansfield, in *Fox* v. *Hanbury*, 2 Cowp. 445, "Each partner has a power singly to dispose of the whole of the partnership effects." That is too broadly put in view of the present state of the law, but here only a portion of the timber limits owned by the firm were dealt with, and there was a desire on the part of both to sell. The opinion of Mr. Justice Lindley in the last edition of his book (*Lindley* on Partnership, 4th ed., p. 284,) is to the effect that one partner may create by deposit of title deeds an equitable mortgage upon partnership real estate. And in an Indian appeal case *Juggeewundas, &c.* v. *Ramdas, &c.*, 2 Moo. Ind App. 487, it was held that one partner who had not executed a mortgage of the land made by his co-partners to raise money for partnership purposes was bound thereby on the ground of ratification. Even stronger is the view taken in *Moderwell* v. *Mullison*, 21 Penn. 257, 259, where it is said: "When real estate is brought into the partnership business, it is treated in equity as personal estate; and a lease of it by one partner is as much a partnership transaction as a sale of partnership goods by him would be."

But in the present case the timber limits stand in the

name of the partner who signed the agreement in the firm name, and the interest of the other therein is therefore only equitable. Having regard to all these considerations, I find as a fact that the defendant McDougall was aware of the sale by his partner and of his use of the partnership name to authenticate the transaction, and that he assented thereto and is bound thereby. So far then as authority to contract is concerned the agreement to sell is binding upon the partnership, though as a matter of precaution the joining in the conveyance by both the partners, as advised by Mr. Benson (*a*), is still desirable, unless for some reason the defendant McDougall is able to escape therefrom.

The contract as set out in the statement of claim is, in my opinion, sufficient as complying with the provisions of the Statute of Frauds. Evidence may be given to shew that this was not the real agreement; and it is proved that some terms of credit were to be given, as set forth in memoranda put in evidence, signed by the firm name.

The contract is sufficiently certain as to the plant referred to therein, as it could easily be identified by parol evidence as being that specifically described in the writing. *Fry* on Spec. Perf., 2nd ed., 322, 328; *Shardlow* v. *Cotterell*, L. R. 18 Chy. D., 280; and in Appeal, L. R. 20 Chy. D., 90, S. C. 30 W. R. 143. So as to the Dobell contract, the plaintiff offered to do and did all that lay in his power, or that he was required to do by the partner who managed the transaction. The conveyance which was prepared provided amply for the security of the partnership in their dealings with Dobell. If this part of the agreement were impossible to be performed, then I think that it might be severed from the rest of the agreement: *Marsh* v. *Milligan*, 3 Jur. N. S. 979; *Middleton* v. *Greenwood*, 2 DeG. J. & S. 142; *Wilkinson* v. *Clements*, L. R. 8 Chy. 96; *Fry* on Spec. Perf., 2nd ed., secs. 629, 830.

See also the judgment of Turner, J., in *Wilson* v. *West Hartelpool R. W. Co.*, 2 DeG. Jo. & Sm. 475, at p. 495, as to securing the performance of the Dobell contract.

(*a*) Mr. Benson was the solicitor who acted for the parties with regard to the sale of the timber limits.

But it is said that the terms of credit are uncertain. As to the $3,000 plant, that was to be a down payment. I do not see any default as to this, because it lay upon the sellers to furnish the list mentioned in the agreement, and also an inventory of the additional material not therein, and used in the winter's operations of 1880 and 1881. This the defendants failed to do. So they failed to furnish the account of expenses incurred in the season's operations, which the plaintiff agreed to pay. The written agreement imports *primâ facie* a down payment as to the $15,500, but by the memoranda I have referred to it was provided that the payments should be thus distributed:

| | |
|---|---|
| On the 29th September, 1881 | $3500 |
| In the year 1882, in March | 2000 |
| And in Quebec | 5000 |
| In the year 1883, in March | 2500 |
| And in Quebec | 2500 |
| | $15500 |

The reference to Quebec was, that the payments were to be made when the timber arrived there in the years 1882 and 1883, and is a form of expression used and understood among lumbermen. These payments and the payments to be made in March of the years mentioned, are both, I think sufficiently definite, as within the rule laid down in *Ashforth* v. *Redford*, L. R. 9 C. P. 20; if it was necessary to decide upon this aspect of the case. See also *Browne* on Stat. of Frauds, 2nd ed., secs. 382, 383; and *Skinner* v. *McDouall*, 2 DeG. & Sm. 265. But these terms of credit were subsequently put an end to, and a cash payment for the $15,500, was resolved upon and agreed to by the managing partner Smith, and the purchaser. In effect the parties reverted to the terms of payment contained in the contract set forth in the statement of claim. This, I think, it was competent for them to do, and within the power of the defendant Smith, so far as his co-partner was concerned. The transaction thus to be carried out is evidenced by the deed of assignment of the limits executed by the licensee Smith, and also by the partnership in its firm name: *Gillatly* v. *White*, 18 Gr. 1; *Firth* v. *The Midland R. W. Co.*, L. R. 20 Eq. 100; *Leiden* v. *Lawrence*, 2 N. R. (Ex.) 283.

These considerations suffice to dispose of all the questions argued before me, and my conclusion is, that the plaintiff is entitled to a decree for specific performance, with costs. The conveyance of the limits should be made to the defendants T. & C. Smith, the appointees of the plaintiff; and they should get their costs from the other defendant. As between these last defendants, Smith and McDougall, McDougall should bear all the costs.

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[CHANCERY DIVISION.]

## WILMOT v. STALKER.

*Sale of land—Statute of Frauds—"Vendor."*

Where a written agreement for the sale of land contained the following condition of sale: "The vendor shall have the option of a reserved bid, which is now placed in the hands of the auctioneer," and the reserved bid was worded as follows: "*Re* sale of Allan Wilmot's farm; reserved bid, $105 per acre."

*Held*, that the above words, even though read together, as they should be, did not so identify the vendor as to satisfy the Statute of Frauds. "Vendor" is not a sufficient description of the party selling to satisfy the requirements of the said statute.

In this action the plaintiff, Allan Wilmot, sought to enforce specific performance of an agreement for the purchase of certain lands against the defendant Angus Stalker.

The statement of claim set out that by a certain agreement in writing, dated June 25, 1881, the defendant agreed to purchase, and the plaintiff agreed to sell to him the lands in question, on the terms as to payment and taking possession therein mentioned; but that though the plaintiff had done all things necessary on his part, and had requested the defendant to carry out his said agreement, the latter refused to do so, and the plaintiff had consequently sustained damage. And he claimed specific performance of the said agreement, or cancellation thereof,

and payment of damages sustained, with the costs of the action, and such further relief as he might be entitled to.

In his statement of defence, the defendant set out the contract in question, which commenced as follows:

"In the matter of the sale of the south three quarters of lot number 35, in the 2nd concession of the township of Clark.

CONDITIONS OF SALE."

The agreement then set out in their order the conditions of sale: Condition No. 7, being as follows:

"7. The vendor shall have the option of a reserved bid, which is now placed in the hands of the auctioneer."

And the agreement concluded thus:

"I agree to purchase the property above mentioned, being the south three quarters of lot No. 35 in the 2nd concession of the township of Clarke, for the sum of $14,800, and upon the terms set forth in the above conditions.

"ANGUS STALKER,

"Dated this 25th day of June, A.D., 1881.

"Witness:

"R. Russel Loscombe, H. F. Phillips."

And the defendant set up the Statute of Frauds and claimed the benefit thereof, and said that the proposed contract was not a valid and binding contract in law. And the defendant also alleged that the plaintiff could not make a good title, and in the event of the said agreement being held binding, he begged that an enquiry might be made as to title.

The plaintiff joined issue upon this statement of defence. The terms of the reserved bid referred to are set out in the judgment of the learned Chancellor.

The action was tried at Toronto, on April 19, 1882.

*J. Maclennan*, Q. C., for plaintiff. The question is, do the contract and the reserve bid together constitute a binding contract? We contend they do: *Long* v. *Millar*, 4 C. P. D. 454, 456; *Shardlow* v. *Cotterell*, L. R. 18 Ch. D.

293, *S. C.* in App., when over-ruled on another point, 20 Ch. D. 90, 51 L. J. N. S. 353; *Rossiter* v. *Miller*, 3 App. Ca. 1124.

*W. A. Foster*, for the defendant. "Vendor" is not enough to satisfy the statute; *Potter* v. *Duffield*, L. R. 18 Eq., 4; *Thomas* v. *Brown*, L. R. 1 Q. B. D. 723; *Williams* v. *Jordan*, L. R. 6 Ch. 517. The plaintiff seeks to go behind the conditions of sale, and refer to what is only referred to in the conditions. This is not permitted. But if he does read both together, this will not avail. "Sale of Allan Wilmot's farm," does not necessarily identify "vendor" to be "Allan Wilmot," and is not as strong as "Purchase of Allan Wilmot's farm" would be: *Long* v. *Millar*, is distinguishable from this case.

April 22, 1882. BOYD, C.—In *Rossiter* v. *Miller*, 25 W. R. 892, Jessel, M. R., says: "What will be a sufficient description must depend on the circumstances, and very much on the opinion of the Judge or jury who have to decide the point. On behalf of the vendor, on behalf of the seller, merely means on behalf of somebody unnamed. It is no description of anybody. I am instructed by somebody, who shall be nameless, to sell this estate. In my opinion, it is not a description at all." This decision was affirmed by the House of Lords. To the same effect is the language of Kay, J., in *Shardlow* v. *Cotterell*, L. R. 18 Chy. D., 293: "'Vendor' is not necessarily the description of an individual proprietor. 'Proprietor' means A. B., somebody whose name can be put in the contract; but 'vendor' may be very indefinite, and if you can introduce parol evidence to explain who the vendor is, you are doing the very thing which the Statute of Frauds was intended to prevent." This decision was reversed on appeal, but the observations I have cited are not affected thereby.

It is here agreed that the case rests on the sufficiency of the contract having regard to the statute, and the plaintiff relies upon the juxtaposition of the agreement signed by the defendant with the seventh condition of sale and the

memorandum referred to therein, embodying the reserved bid. I agree with this position that the paper containing the reserved bid may be read as incorporated with the agreement signed by the purchaser at the foot of the conditions of sale. The seventh condition is: "The vendor shall have the option of a reserved bid, which is now placed in the hands of the auctioneer," and *that* reserved bid was couched in the following terms: "Re Sale Allan Wilmot's farm—reserved bid—$105 per acre." The question is, will these words read together, so identify the vendor as to satisfy the statute. These words in the reserved bid, "Allan Wilmot's farm," refer primarily to the description of the property sold, or to be sold, and identify it by the name of the owner, as indicated by the Master of the Rolls in the case put by him in *Potter* v. *Duffield*, L. R. 18 Eq., at p. 7. But does it follow that this sufficiently identifies the vendor as the same person as the proprietor? The juxtaposition of the two documents does not produce necessarily, or indeed properly, any other result than this: "The vendor in the matter of the sale of Allan Wilmot's farm, has the option of a reserved bid." It does not strike me that this identifies the "vendor" with the owner, so that you can say they are one and the same person without further evidence. The seller may be owner, he may be mortgagee, he may be trustee. Who the seller of Allan Wilmot's farm is, is a matter which still must depend on extrinsic parol evidence.

I find no case going so far as to justify a decision in favour of the plaintiff; and there is at least one case leading to an opposite conclusion. I refer to *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316, an action for goods sold, in which the seller, who was the plaintiff, relied on a memorandum signed by the defendant, to this effect: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at" such a place, at such a price. The Court held the writing insufficient, inasmuch as the seller's name, as seller, was not mentioned in it, but occurred only as a part of the description of the goods.

I cannot successfully distinguish the present case from the one last cited; and although it has been somewhat shaken by the observations of some of the Judges in *Newell* v. *Radford*, L. R. 3 C. P. 52, it is my duty to follow it, leaving the dissatisfied party to take the course indicated in the judgment of Willes, J.

The defence succeeds on a ground technical and unmeritorious, and, while dismissing the action, I withhold costs.

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[CHANCERY DIVISION.]

## DOWNEY v. PARNELL.

*Mortgage—Interest—Penalty.*

Where a mortgage to secure the re-payment of money with interest at 10 per cent. provided that, "should default be made in payment of the principal money or interest, or any part thereof respectively, then the amount so over-due and unpaid to bear interest at the rate of 20 per cent. per annum until paid."

*Held*, the said proviso was not invalid, or relievable against on the ground of forfeiture.

THIS was an action for foreclosure of a mortgage on certain lands dated December 7th, 1878, and made in pursuance of the Act respecting Short Forms of Mortgages; and for immediate possession. The writ was issued January 20th, 1882. The proviso for repayment contained in the mortgage was as follows:—

"Provided this mortgage to be void on payment of two thousand five hundred dollars of lawful money of Canada, with interest at 10 per cent. per annum, as follows, at the end of five years from date hereof, with interest at the rate aforesaid to be paid half-yearly; but should default be made in payment of the principal money or interest, or any part thereof respectively, then the amount so overdue and unpaid to bear interest at the rate of 20 per cent. per annum until paid."

In his statement of claim the plaintiff set up, amongst other things, the above proviso, and claimed interest on the instalments of interest then remaining unpaid at the rate of 20 per cent. per annum from the time the same became due.

The defendants were the widow of the mortgagor, who was a party to the mortgage for the purpose of barring her dower, and the infant heirs of the mortgagor, who were entitled to the equity of redemption. By their statement of defence the infants submitted their rights and interests to the protection of the Court.

On April 13th, 1882, the matter came up on motion for judgment, and a decree was made for sale with a reference to take the accounts. When the accounts were being taken before the Registrar, the mortgagee claimed interest at the rate of twenty per cent., relying upon the above proviso. The mortgagor, however, disputed this, maintaining that he should not be called upon to pay more than ten per cent. By consent of both parties the matters were referred to the Judge in Chambers, and on June 10, 1882, the point was argued, before Ferguson, J.

*Hoyles*, for the mortgagee, contended that the mortgagor having made default in payment should be compelled to pay interest at twenty per cent., and cited *Clarkson* v. *Henderson*, L. R. 14 Ch. D. 348.

*J. Hoskin*, Q. C., contra, objected, holding that the proviso for repayment was in the nature of a penalty and should not be enforced, and cited *Fisher* on Mortgages, 3rd ed., p. 983; *Coote* on Mortgages, 4th ed., p. 871.

June 12, 1882. FERGUSON, J.—I have looked at the authorities to which I was referred, *Clarkson* v. *Henderson*, L. R. 14 Ch. Div. 348; *Fisher* on Mortgages, 3rd ed., p. 893, and *Coote* on Mortgages, 4th ed., p. 871. I have also read the case of *Waddell* v. *McColl*, 14 Grant, 211, and some of the cases there cited, and I am of the opinion that the contract in regard to an increased rate of interest, &c. contained in this mortgage is not *invalid*.

I think the matter one of contract simply, and, that it, the contract, is not in violation of any existing law. I do not think it relievable against on the ground of forfeiture.

[CHANCERY DIVISION.]

## RE HOUSTON—HOUSTON V. HOUSTON.

*Mortgage—Notice of payment—Parol agreement to pay higher rate of interest.*

Where a mortgagee comes in under a decree for partition or sale and proves his claim, and consents to a sale, he is not entitled to six months' interest, or six months' notice.

A parol agreement to pay a higher rate of interest than that reserved in the mortgage, is ineffectual to charge the land.

*Totten* v. *Watson*, 17 Gr. 235, and *Matson* v. *Swift*, 5 Jur. 645, followed.

THIS was an application on motion for a partition or sale of the lands of one Richard Houston, deceased. The original parties were various heirs-at-law of the said Richard Houston. The usual decree for sale, with reference to the Master at Chatham, was made on October 16th, 1879. The lands were accordingly sold, as appeared by the report on sale, dated November 16th, 1880, and the said Master made his final report on March 1st, 1882. By this report he found that at the death of the said Richard Houston there existed on his lands a certain mortgage, which had been assigned to and was then held by one James Henderson, a practising solicitor, whom he had accordingly made a defendant to the proceedings; and he found that no payments on the said mortgage had been made since November 1st, 1878, and that at the present date there remained certain sums due to the said Henderson, for principal and interest, respectively, on the said mortgage, and he allowed the said Henderson subsequent interest on the said principal moneys up to April 1st, 1882, at the rate mentioned in the mortgage, viz., seven per cent.

This was a motion before the Chancery Division on behalf of the said Henderson by way of appeal from the said Master's report, for the following reasons:

1. Because the said Master had only allowed the said defendant Henderson interest upon his mortgage to April

1st, 1882, whereas the said Henderson was entitled to six months' interest in advance upon the payment thereof, it being an over-due mortgage.

2. Because the said Master had only allowed the said Henderson interest upon the principal overdue on the said mortgage at the rate of seven per cent., whereas the said Henderson was entitled to an additional one per. cent. upon the principal overdue upon said mortgage.

With reference to this latter ground of appeal, it must be said that in his affidavit proving his claim in the Master's office, J. Henderson set out that by arrangement made between himself and the mortgagor, the mortgagor was in the habit of paying a bonus of one per cent., upon the instalments of principal overdue upon the said mortgage and remaining unpaid, and did so regularly for several years prior to his decease, and he produced as an exhibit a copy of the mortgage account of Richard Houston, shewing the charges and payment made by him thereon during his life, from which it appeared that he, Henderson was regularly paid one per cent. interest in advance upon all payments of mortgage principal extended for him from time to time; and he deposed, in the said affidavit, that these payments and arrangements for extension were annually made through one Sharpe, who acted as solicitor for Richard Houston, and who was fully aware of the terms upon which all overdue principal had been from time to time extended; and also that about March 11th 1880, his, the deponent's, firm sent to the said Sharpe a statement of the amount due upon the said mortgage wherein such additional interest was claimed, and that no objection whatever was made to the said claim, but delay only was asked for; and he produced a letter from the said Sharpe wherein he asked for further time for payment, but made no objection to the correctness of the account which had been sent to him, and in which interest had been computed at eight per cent.: and he, the deponent, alleged that he always understood and believed the additional interest of one per cent. would be paid, or

he would not have consented to the delay which had occurred.

On May 11th 1882, the motion was argued before His Lordship Mr. Justice Proudfoot.

*J. T. Small*, for the defendant James Henderson. As to the first ground of appeal the authorities are clear, that in case of an overdue mortgage mortgagees are entitled to six months' interest, or to six months' notice before payment: *Snell's* Equity, 2nd ed. 250; *Williams* on Real Property, 13th ed. 431; *Thornbrough* v. *Baker*, 2 Wh. & Tud. L. C., 5th ed. 1080; *Grugeon* v. *Gerrard*, 4 Y. & C. 128. The mortgagee is entitled to know when his mortgage is to be paid off, this is only reasonable: *Bartlett* v. *Franklin*, 15 W. R. 1077. As to the second ground of appeal, the mortgagee's affidavit shews the circumstances under which the additional one per cent. was charged and paid, and the grounds we have for claiming it.

*T. Langton*, for the plaintiff, and the adult defendants other than Henderson. The English cases should not govern. The usual practice here in such a case is only to allow interest up to date: *Letts* v. *Hutchins*, L. R. 13 Eq. 176. The mortgagee had reasonable notice, sufficient to enable him to look out for another investment. He has proved his claim, which is analogous to taking proceedings to enforce it. He consented to the sale which has taken place. As to the second ground, the mortgagee has proved no agreement, certainly no agreement in writing, to have an increased rate of interest: *Totten* v. *Watson*, 17 Gr. 233. The Evidence Act, moreover, (R. S. O. ch. 62, sec. 10), requires corroborative evidence, the mortgagor being dead. The affidavit is too vague. All payments ceased in 1879, and if any arrangement is to be presumed, it must be presumed also that in 1879 the arrangement was altered.

*T. S. Plumb*, for the infants. A mortgagee proving his claim is not entitled to notice: *Fisher* on Mortgages, 3rd ed. vol. ii. p. 787, referring to *Matson* v. *Swift*, 5 Jur. O. S. 645 is express authority. This disposes completely of the

first ground of appeal. As to the second ground of appeal, there is no agreement proved. The payments were no proof of a continuing and existing agreement. Even if the agreement were proved it would be an agreement binding on the personal representative, not on the heir-at-law. But there is no personal representive either before the Court or in existence.

*Small* in reply. The affidavit shews that the mortgagor and his solicitor knew perfectly well that they were paying eight per cent. Can the parties come in a Court of Equity now and say it is inequitable that they should pay what for years had been paid, after lying back these three and a-half years? Sharpe acted for the parties all through. There is no dispute about the facts. Again, there is no evidence that the mortgagee was ever served with the decree, nor did he consent to the sale. *Inglis* v. *Gilchrist*, 10 Gr. 301, shews the extra rate can be charged. No doubt when a mortgagee brings proceedings, he only gets his principal and interest up to date; but here the parties come to the mortgagee, who holds an overdue mortgage, and there is nothing to shew that he can be forced at any moment to take his principal and interest. The principle in England applies equally here.

May, 12, 1882. PROUDFOOT, J.—The questions in this appeal are concluded by authority. The general question as to when a mortgagee is entitled to six months' notice or six months' interest does not arise; for in this case the mortgagee has consented to a sale in the partition proceedings and has pressed his claim, and under the authority of *Matson* v. *Swift*, 5 Jur. 645, he cannot claim either.

The other point has also been determined in *Totten* v. *Watson*, 17 Gr. 233, which decides that a parol agreement to pay a larger interest than is reserved by the mortgage is ineffectual to charge the land. Here, as there, no agreement at all is proved; there is the mere fact of payment of the increased rate of interest, from which perhaps an agreement might be inferred as to these particular pay-

ments, but there is no evidence of an agreement applicable generally to arrears whenever they might occur, and certainly there was no agreement to charge the land with the additional rate. And had the agreement been established the difficulty under the Statute of Frauds would remain. The agreement in this case, if any, being with a deceased mortgagor, the evidence of the mortgagee would require corroboration, of which there is none

The money in Court will, therefore, be paid out pursuant to the findings in the Master's report, and the appellant will pay the costs of this appeal, to be deducted from the money in Court coming to him: See *Latshaw* v. *Davis*, Blake, V. C., Note Book, 18, p. 286; *Day* v. *Day*, 23 Beav. 391; *McDermid* v. *McDermid*, 7 P. R. 457.

[CHANCERY DIVISION.]

## HOWES v. THE DOMINION FIRE AND MARINE INSURANCE COMPANY.

*Insurance — Subrogation — "Subrogation" or "Unconditional clause" — Parol evidence — Material change of risk.*

The agent of a Loan Company insured certain mortgaged property, for collateral security, in the name of the said company, but at the request and on behalf of the mortgagor, who had in his mortgage covenanted to insure and was charged with and paid the premiums, and who was specified as the owner in the policy, and in the application therefore. The policy purported to be an insurance of the property itself, loss payable to the Loan Company, and contained a "subrogation clause" to the effect that the insurance, as to the interest of the mortgagees only therein, should not be invalidated by any act of the mortgagor; but that if the insurers should pay to the mortgagee any loss, and should claim that as to the mortgagor no liability therefor existed, they should to the extent of such payment be subrogated to the rights of the party so paid under any securities held by him; or they might, in such case, pay the mortgagee the whole debt due under the mortgage and obtain an assignment thereof.

*Held*, that the policy was a general insurance of the property itself, and not merely of the mortgagees' interest, and parol evidence was not admissible to prove that the Loan Company, and the insurers had, in effecting the insurance, only the interest of the mortgagees under consideration.

The circumstances being as about stated, and a fire having occurred, the insurers, on paying the whole amount due on the mortgage, obtained an assignment thereof, but had notice at the time that the mortgagor claimed credit on his mortgage, for the moneys due under the policy, he having done no act which invalidated it.

*Held*, the mortgagor was entitled, on redeeming the mortgage, to have such credit; and this, although the insurers neither assented to, nor acquiesced in, his paying the premiums to the mortgagees.

The policy was by its conditions avoidable on any change of occupation material to the risk. On it was endorsed: "This property used to store doors and sashes." The application, however, stated that the property had been used as a bending factory and was intended to be used as a sash factory, and the application was by the policy, made a part thereof, and a warranty by the assured. The assured used the property as a sash factory.

*Held*, that though a sash factory was more hazardous than a bending factory, yet reading the application and policy together, the policy was not thereby avoided.

*Held*, also, the use of the premises for ripping timber for building, as well as for the proper purpose of a sash factory, was not under the evidence, such a material increase of risk so as to avoid the policy.

*Held*, further, the subrogation clause itself afforded some evidence that an interest in the mortgagor was recognized, and that it was not merely the mortgagees' debt which was being insured.

THIS was a suit to redeem a mortgage under the following circumstances:—The plaintiff, William John Lloyd Howes, alleged in his bill that in July, 1879, he

was the owner of certain land in the village of London East: that on June 4th, 1879, he mortgaged the same to the Royal Standard Loan Co. of Canada to secure the repayment of $1,403, and therein covenanted to insure the buildings on the said land: that the Royal Standard Loan Co., in pursuance of the said covenant to insure, and on his behalf, insured the buildings on the said land, to wit, an extensive bending factory, and also the contents of the said factory, with the Dominion Fire and Marine Insurance Co., who were the defendants to the present suit, for the sum of $1,000; that he, the plaintiff, paid the insurance premiums, and was charged therewith by the said Loan Co., as the defendants well knew: that on June 7th, 1880, and during the existence of the said policy, the said buildings and the contents thereof were destroyed by fire, and notice and proofs of loss were duly furnished to the defendants, who admitted the said loss, and their liability to pay the said insurance; that after the said fire, viz., on July 30, 1880, the defendants procured an assignment of the said mortgage from the said Loan Co. to them for the sum of $1,618.12, being the amount due on the said mortgage; that he, the plaintiff, suffered loss by the said fire to the amount of $1,900; but the defendants refused to pay him the amount of the said policy, or any part thereof: that the said mortgage was in arrear and the defendants were threatening to sell the property, but refused to allow him credit for the amount of the said policy; and the plaintiff submitted that he was entitled to redeem the said lands, and to be allowed credit for the sum of $1,000 and interest, being the amount of the said policy; and he prayed that the defendants might be ordered to give him credit on the said mortgage for the amount of the said policy, and might be enjoined from legal proceedings on the said mortgage until the matters in question in this suit should be disposed of; that he, the plaintiff, might be declared entitled to redeem the said land after being allowed credit for the amount of the said policy; and for the costs of the suit, and further relief.

The defences raised by the defendants sufficiently appear from the judgment.

The policy in question was dated July 14th, 1879, No. 3914, and by it the defendants insured the property as follows: — "In consideration of $35 do insure the Royal Standard Loan Co., of London, for the term of one year, for the amount of $1,000, viz., on the two storey frame, shingle roofed building, 30 x 60, owned and occupied by Abram Efner as a steam bending factory, situate on the north side of York street, village of London East, $500 on fixed and movable machinery contained therein, $500 as more particularly described in their application and diagram filed in this office, which are hereby made a part of this policy and a warranty by the assured."

"$1,000, no other insurance."

The said policy contained the "unconditional clause" as set out in the judgment, and was subject to the statutory conditions endorsed thereon, and certain variations thereof duly endorsed.

On June 19th, 1879, J. Burnett, the defendants' agent, wrote to F. R. Despard, their manager, with reference to the property to be insured, as follows:—

"DEAR SIR,—Your favour to hand and contents noted. Send you application for 23 by book post. Premises unoccupied at present. As soon as occupied will let you know for what purpose. Will take you to see it when you come up."

The application or special survey referred to in the said letter, contained a statement referring to the property sought to be insured in the words following:—"Has been used till now as a bending factory by the former proprietor, Mr. Efner; now owned by W. J. L. Howes, and rented by him to George Holyoke, intended to be used by him as a sash factory."

It was in answer to this that the letter of June 20th, 1879, from Despard to Burnett, referred to in the judgment, was written, which was as follows:—

HAMILTON, June 20, 1879.

J. BURNETT, Esq., London.

DEAR SIR,—Your letter of 19th and special survey 23 received. With reference to this risk, I must say it does not look very prepossessing. We could not hold it if it is to be turned into a sash factory, as we do not write this class of risks. In fact, I should prefer it if you could place it elsewhere. If you cannot we will accept it, as the Royal Standard have given us business, and I suppose will give us more. In any case if occupied as sash factory, it will have to pay seven per cent. We hold it in the meantime, while unoccupied, at the rate sent, three and a half. Let me know if you place it in any other company."

The rest of the facts of the case, and the evidence taken, sufficiently appear from the judgment.

The case came on for hearing at the Spring Sittings at London, on March 28, 1881, when the witnesses were examined, but the argument of the case was adjourned.

The case came up for argument at Toronto, on May 16, 1882.

*W. Cassels*, for the plaintiff. The moment the mortgage reached the hands of the insurance company, they took it subject to the equities existing between the mortgagor and mortgagee. So far as the defendants are concerned, if we can establish that as between the mortgagor and mortgagee the money paid to the mortgagee had to be deducted from the mortgage, this is sufficient, even if there was no contract between the insurance company and the mortgagor: *Pressey* v. *Trotter*, 26 Gr. 154; *Baskerville* v. *Otterson*, 20 Gr. 379; *Smart* v. *McEwan*, 18 Gr. 623; *Ryckman* v. *Canada Life Ass. Co.*, 17 Gr. 550. These cases shew that, apart from notice or knowledge, the assignee of a mortgage always takes subject to the equities. Furthermore, an agreement as to subrogation such as is said to be included in this policy, cannot be set up against the mortgagor. It is not as though the contract had been made with the mortgagor: *Wood* on Fire Insurance, sec. 471; *May* on Insurance, 2nd ed., sec. 449; *Kernochan* v. *New York Bowery Fire Ins. Co.*, 17 N. Y. 428; *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454; *Ulster County Savings Institution* v. *Decker*, 18 Sup. Ct. N. Y.

515. These authorities shew that where the contract is between the mortgagees and the insurance company, but the mortgagor pays the premium, the insurance company cannot get rid of the fact that payment to the mortgagees reduces the mortgage. This has been determined in our own Courts in *The Provincial Ins. Co.* v. *Reesor*, 21 Gr. 296. In *Burton* v. *The Gore, &c., Ins. Co.*, 12 Gr. 156, there is this important distinction, that there the mortgagor made the contract which bound him. Then *Reesor* v. *The Provincial Ins. Co.*, 33 U. C. R. 357, shews that it is not incumbent on the mortgagee to inform the insurance company that as between him and the mortgagor the insurance is for the benefit of the mortgagor. In our case it is clear on the evidence the insurance was made for the mortgagor, and was for his benefit; and the fact that the company made no contract with the mortgagor, supported, as it is, by their own answer, estops them from setting up any conditions which they might set up as between them and the mortgagee. This disposes of the case. If, however, the subrogation clause is set up as a contract binding on the mortgagor, I say this is collateral; its something made after the policy; is not sealed or countersigned, and is not binding on the mortgagor. As to the contention of the defendants that, if it be held that there was a contract between them and the plaintiff, then the policy is void for condition broken, because there has been a change material to the risk, we say there is no evidence that the plaintiff knew that the property was used as a sash factory; moreover, the evidence shews that it was only used for a month or so as a sash factory, while the insurance company's own letter proves that they knew of such use, and assumed the risk, though not willingly.

*E. Martin*, Q. C., for the defendants. The policy must have some effect given to it; and the subrogation clause was a part of it when issued. It could not be urged that if the property had been burnt by the plaintiff, the policy would not have been defeated. As to the arrangement between the defendants and the Loan Company, I refer to

*Springfield F. & M, Ins. Co.* v. *Allen*, 43 N. Y. 389; *Wood* on Fire Ins. pp. 783, 785; *Druiff* v. *Lord Parker*, L. R. 5 Eq. 131; *Wyld* v. *The Liverpool, &c., Ins. Co.*, 21 Gr. 458; *S. C.*, in App. 23 Gr. 466; *Wyld* v. *London, &c., Ins. Co.*, 33 U. C. R. 284; *Crawford* v. *The Western Ass. Co.*, 23 C. P. 365. We had nothing to do with the mortgagor and never received anything from him. All we insured was the interest of the mortgagee, and we had a right to make what contract we liked with him. *Phillips* on Insurance, secs. 1512, 1712, show that under these circumstances we can claim subrogation. I refer also to *Provincial Ins. Co.* v. *Reesor*, 21 Gr. 296; and to *Westmacott* v. *Hanley*, 22 Gr. 282, which followed *Reesor's* case, and was decided after it; also to *Livingstone* v. *Western Ins. Co.*, 16 Gr. 9. The very point which Blake, V. C., refers to in *Provincial Ins. Co.* v. *Reesor*, that there was no bargain for the transfer of securities, is what distinguishes this case from it, for here there was a bargain. *Burton* v. *The Gore District Mutual Fire Ins. Co.*, 12 Gr. 156, is undistinguishable. The memorandum on the face of the policy shows that the buildings were to be used for storing doors and sashes, and the insured had no business to use it for anything else. No notice of the change was given. The plaintiff cannot blow hot and cold on the policy. If he is interested in it, he must be bound by its terms, which forbade a change of occupation increasing the risk. He knew perfectly of the change, and could at least have given the defendants' notice. The subrogation clause in these policies is a perfectly fair agreement, and for the benefit both of mortgagor and mortgagee; and we say the change of occupation was one material to the risk, and vitiated the policy; *Johnston* v. *Canada Farmers Ins. Co.*, 28 C. P. 211, where the rate paid covered the risk; *Naughter* v. *Ottawa, &c., Ins. Co.*, 43 U. C. R. 121; *Worswick* v. *The Canada Fire and Marine Ins. Co.*, 3 App. 487; *Whitlaw* v. *Phœnix Ins. Co.*, 28 C. P. 53; and as to the communication with the agent: *Fowler* v. *The Scottish Equitable Ins. Society*, 28 L. J. N. S. (Ch.) 225.

*W. Cassels*, in reply. In *Whitlaw* v. *The Phœnix Ins. Co.*, 28 C. P. 53, the party owning the mill was a party to the insurance. In *Westmacott* v. *Hanley, Burton* v. *The Gore &c., Ins. Co.*, and *Springfield* v. *Allen*, the insurance was made by the mortgagor. In the *Ulster Co. Institute* v. *Decker*, 18 Sup. Ct. N. Y. 515, the contract was made by the mortgagee, the mortgagor not being a party to it, and the Court held that the mortgagor was not affected by it. Here the mortgagee has not effected an insurance as a mortgagee only, and the insurance money having been paid to the mortgagee, only the balance of the mortgage debt remains due. The defendants are subrogated to the rights, but only to the rights of the mortgagee. There is no evidence the plaintiff knew of the change of occupation. Why should the mortgagee or the plaintiff suffer because the defendants did not demand a higher rate of interest? There is no defence whatever; the defendants had actual notice how the premises were going to be used, and they acquiesced in it.

June 22, 1882. PROUDFOOT, J.—The plaintiff files this bill to redeem a mortgage, given by him to the Royal Standard Loan Co., of London, and assigned by them to the defendants; and he claims that $1,000, the amount of an insurance effected with the defendants, under the circumstances hereinafter detailed, should be taken as paid upon the mortgage.

The plaintiff, having recently become the owner of the property by purchase from one Efner, on the 4th June, 1879, mortgaged it to the Royal Standard Loan Co. to secure $1,403, and covenanted to insure the building on the land for $1,000. Efner had, before selling to the plaintiff, mortgaged the land to the same loan company, and had the building, a bending factory, insured. Soon after the sale to the plaintiff, McMillan, the agent of the loan company, met him on the street and told him the insurance would be expiring in a few days, when the plaintiff told him to renew it, and he would call and pay the premium.

In pursuance of this direction, McMillan insured the premises with the defendants, and the plaintiff paid him the premium required by the defendants for doing so, $35. McMillan was examined as a witness for the plaintiff, and says he was acting on behalf of the plaintiff in having the property insured; and that if the money had been received on the policy it would have been credited on the mortgage: that he insured it on behalf of the plaintiff, and to hold it as a collateral security to the mortgage.

Burnett, the agent of the defendants, says that, in cases of insurance by the loan company, they take the policy as part of their security.

As between the plaintiff and the loan company, I am satisfied that the insurance was for the plaintiff's benefit: that he paid the premium: that the policy was held as collateral security for the mortgage; and that was done in pursuance of the covenant in the mortgage.

The application for the insurance was made by McMillan, in the name of the loan company, to Burnett, the agent of the defendants; and the plaintiff's name is identified in it, and in the policy, as the owner. The application was for an insurance of $1,000, for one year, on "Buildings of wood and wooden shed, steam engine, 30 horse power, and boiler, and fixed and movable machinery, shafting and belting. Has been used till now as a bending factory by the former proprietor, Mr. Efner; now owned by W. J. L. Howes, and rented by him to Geo. Holyoke; intended to be used by him as a sash factory."

The policy contained what is called the *unconditional*, or *subrogation*, clause, which is in the following terms:

"Loss, if any, payable to Royal Standard Loan Co., of London, as hereinafter provided. It is hereby agreed that this insurance, as to the interest of the mortgagees 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. It is also agreed that whenever this company shall pay to the mortgagee any sum for the loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once and to the extent of such payment be

legally subrogated to all the rights of the party to whom such payment shall be made under any and all securities held by such party for the payment of said debt; but such subrogation shall be in subordination to the claim of the said party for the balance of the debt so secured, or said company may, at its option, pay to the mortgagee the whole of the debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said party for the payment thereof."

The exhibits proved at the trial have not been left with me, but a copy of some have been left. Upon the copy of the policy there is an insertion in red ink: "On 8th August, 1879, consent given by letter to Burnett as follows: 3,914, insurance by Royal Standard on Efner property. This property since sold to Mr. W. J. L. Howes and used to store doors and sashes."

Among the conditions indorsed on the policy is one, No. 3, avoiding the policy on any change material to the risk, and within the control and knowledge of the assured, being made.

The letter of 20th June, 1879, from Despard, the manager, to Burnett, the agent of the defendants' company, cannot be used as evidence against the plaintiff, as it does not appear to have been communicated to the loan company.

The defendants resist the plaintiff's claim because they never insured him or any person on his behalf, and if the plaintiff paid the premium it was without their knowledge or consent: that in pursuance of the unconditional clause they paid the loan company the whole amount of their claim, $1,618.12, and on 30th July, 1880, obtained from the loan company an assignment of the mortgage: that if the plaintiff should be held to be insured, then that the policy was avoided by a change of occupation of the premises.

It was not argued that the defendants were purchasers of the mortgage for value without notice, and indeed it could not have been so argued, for before the assignment they had notice of the plaintiff's claim.

The general rule is quite clear, that the assignee of a mortgage takes it subject to all the equities affecting it in

the hands of the mortgagee: *McPherson* v. *Dougan*, 9 Gr. 258; *Elliott* v. *McConnell*, 21 Gr. 276; *Pressy* v. *Trotter*, 26 Gr. 154.

Where there is no covenant, and no agreement, on the part of the mortgagor to insure, any insurance made by the mortgagee he is entitled to hold for his own benefit: *Russell* v. *Robertson*, 1 Chy. Ch. R. 72; but where there is such a covenant, and the mortgagor is liable for, or has paid, the premium, the insurance must be considered as effected for his benefit.

How far is the case varied by the unconditional or subrogation clause, bearing in mind that not only was there a covenant to insure on the part of the plaintiff, but that he, in fact, paid the premium?

I do not think that in any of the cases cited from our own or from English Courts there was such a clause as this in question, and I must decide upon the papers before me, with such assistance as may be had from the American cases.

Mr. Wood, in his work on Insurance, sec. 471, lays down the rule in the following terms: "But if the policy is in the name of the mortgagor, and assigned by him to the mortgagee; *or if it is in the name of the mortgagee, and paid for by the mortgagor; or if by virtue of an arrangement between the mortgagor and mortgagee, the mortgagor is liable for the premium paid by the mortgagee,* the insurance, while primarily for the benefit of the mortgagee, is for the ultimate benefit of the mortgagor, and goes in liquidation of the mortgage debt, *pro tanto*, and the right of subrogation does not exist on the part of the insurer." He cites, in support of this statement, the case of *Foster* v. *VanReed*, 5 Hun (N. Y.) 321, where the mortgage contained a condition that the mortgagor should keep the premises insured; and in case of failure to do so, the mortgagee might procure them to be insured, and the premium should be a lien on the mortgaged premises. The mortgagor having failed to comply with the condition, the mortgagee procured a policy in his own name, and paid the premium

therefor. The policy contained a stipulation that, in case of loss, the assured should assign to the company an interest in the mortgage equal to the amount of loss paid. The Court held that the mortgagor was entitled to the benefit of the insurance, being liable for the premium paid for it by the mortgagee; and that the assignment was inoperative, except as to the balance remaining unpaid above the loss. In a note he says that the Court of Appeal had reversed the judgment; but, as it had not then been reported, he was unable to say upon what grounds.

The case in Appeal is now reported in 70 N. Y. 19, and the reversal proceeds upon the ground that the insurance there was effected by the mortgagee against loss on *her interest as mortgagee*, and that the covenant by the mortgagor to insure did not exclude the mortgagee from insuring his interest as mortgagee. So that it leaves untouched the case of a mortgagee insuring the property. It is referred to in *May* on Insurance, s. 458, as an authority where the mortgagee insures his interest. There is much force in the reasoning by which this judgment is supported, and in a similar case I would be inclined to follow it.

But in the case before me the mortgagees did not limit the insurance to their interest as mortgagees; they did not insure the debt; but it is a general insurance of the property itself, just as an owner would have desired it to be effected: and the original decision in *Foster* v. *VanReed*, which seems to have assumed the insurance to be of the property, and as interpreted by Mr. Wood, is applicable, and establishes that the insurance, while primarily for the benefit of the mortgagee, is for the ultimate benefit of the mortgagor, and goes in liquidation of the mortgage debt. I concur in this conclusion.

Much of the evidence on behalf of the defendants was directed to prove that the loan company and the defendants had under consideration only, in effecting the insurance, the interest of the mortgagees. But I do not think that parol evidence was admissible for that purpose. The language of the policy is quite plain—an insurance of the

property itself; and it is desired to establish another and different contract from that made by the parties, entirely changing their rights: (see 70 N. Y. 26.) In one way, perhaps, such evidence might have been admissible, viz., if a case had been made for rectifying the policy as having been executed under a mistake; but no case of that kind is made in the answer, nor was any application made to put in such a defence. The plaintiff is not suing upon the policy, but upon the mortgage; and the defendants set up the policy and endeavour to defeat the plaintiff by its terms; not terms appearing upon the face of it, but which they say ought to appear there. They are in the position of plaintiffs seeking to recover on an instrument varied by parol; and *Druiff* v. *Parker*, L. R. 5 Eq. 131-9, shews that they cannot do so.

But the evidence of the witnesses, instead of making out any such case, seems to me to prove the contrary. McMillan intended to insure for the benefit of the mortgagor, and Burnett knew that it was for his benefit. McMillan's evidence is so clear and precise that it is abundantly evident there was no *common mistake*, which would alone justify a reformation of the policy. And the unconditional clause itself affords evidence that an interest in the mortgagor was recognized, and that the defendants were not insuring merely the debt due to the mortgagee. That clause first protected the mortgagees against any act of the mortgagor that would invalidate the policy; and the agreement was that, when the insurers claimed that as to mortgagor no liability existed, and so on, they might obtain an assignment of the policy. These terms seem to imply that some interest of the mortgagor was involved in the policy. How could the defendants be liable to the mortgagor under any circumstances if he had no interest in the policy? This has apparently been prepared for a case where the mortgagor insures and assigns the policy to the mortgagee, and is not adapted to the case of the mortgagee insuring his interest only.

But the defendants further contend that, assuming the

policy to have been effected for the benefit of the mortgagor as well as of the mortgagee, it was avoided through a violation of the third indorsed condition, by a change material to the risk, and within the knowledge and control of the insured, and not notified to the company or their agent.

The defendants gave evidence to shew that a *sash* factory was more hazardous than a *bending* factory. And it was contended that the expression in the letter of the 8th August, 1876, from the defendants to their agent, and which appears on the copy of the policy in red ink, *used to store doors and sashes*, was the kind of occupation that the defendants contracted for.

A *bending* factory I understand to mean where pieces of hard wood, intended to be bent for mechanical purposes, are put in boxes, and subjected to the influence of steam to render them more tractable.

What a sash factory is will be explained by extracts from the evidence, and there is no doubt that, as pine is chiefly used in it and shavings made, it is more hazardous than a bending factory.

But the policy specifies that the application is made a part of the policy and a warranty by the assured. The application states that the property had been used as a bending factory, and that it was *intended to be used as a sash factory*. Uniting the terms of the policy and application, the property might be used as a sash factory, or for storing doors and sashes. It is immaterial, therefore, to inquire whether the actual use was more hazardous than that of a bending factory; but rather, whether it was more hazardous than a sash factory, or a store for doors and sashes.

The property was used by Holyoke, the plaintiff's tenant, for making door-frames and window-frames, and in some instances doors. Grayson, a witness for the defendants, says that the making of door-frames and window-frames, and sash, would be common to the same place: that the place where the frames were made would naturally be part of a sash factory.

Heath, another witness for the defendants, who was employed by Holyoke, says he was employed to make sashes and frames, and anything in the building line: that he carried on the work in the carpenters' shop up stairs. In that shop they were only making doors and sashes.

Halpin, another witness for the defendants, was employed by Holyoke in the sash factory, which is generally called a sash and door factory. The business was in getting the sashes and altering them, and cutting them down, and making them a smaller size, and sometimes making fan-lights, and making doors.

Henderson, an insurance agent, called by the defendants, compares the hazard of the actual occupation with that of a bending factory, which, as I have said, is immaterial. He also says he thinks Grayson mistaken in saying that door-frames are made in a sash factory; what they do is to finish them. Upon this point I rather adopt the opinion of Grayson, an experienced lumber dealer, than that of Henderson.

The machinery was also used for ripping pine and oak plank, for building purposes, as well as ripping pine for the sash frames. But this created no shavings, and did not, so far as I can gather from the evidence, increase the risk beyond the risk of the sash factory.

The letter of the 20th of June, 1879, above referred to, written by the manager, Despard, of the defendants to Burnett, the local agent through whom the insurance was effected, was endeavoured to be used as evidence to prove that the company would not have insured the place as a sash factory at less than 7 per cent. premium, while the premium paid in this case was only 3½ per cent. But the letter is not shewn to have been communicated to the loan company, and as the Chancellor, who took the evidence, remarked, "It is not evidence at all."

My conclusion from the evidence is, that the building was used for the purposes of a sash factory, and for the purpose of ripping timber for building, which, perhaps, is not the proper use of a sash factory, but did not increase

the risk. And that in so using it care and attention seem to have been employed in keeping it clean, and preventing the accumulation of shavings.

I think, therefore, that the plaintiff is entitled to redeem the property on payment of the balance after applying the $1,000 insurance money as a payment on the mortgage.

The plaintiff is entitled to his costs (*a*).

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[QUEEN'S BENCH DIVISION.]

## MILLER V. HAMLIN ET UX.

*Mortagor and mortgagee—Statutes of Limitations—Acknowledgment—Insolvent Act of* 1864*—Possession of husband and wife.*

H., being seised of land subject to a mortgage to L., dated 14th October, 1863, and to one M., dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, he obtained his discharge. On 27th January, 1869, he obtained from M. an assignment of M's mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in this mortgage to F. H. to the use of his, the grantor's wife, his co-defendant, the consideration mentioned being $250, which was credited on the mortgage. On 12th April, 1869, L. assigned his mortgage to M. & B., who, on 28th March, 1873, assigned it to W. In 1879 H., having procured assignments to himself of most of the claims against his insolvent estate, presented a petition signed by himself to compel W. to wind it up. He alleged that M. & B. held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right, title, and interest of the insolvent in the land; and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. H. attended at the sale, and objected to the sale of the land, and bid for the same; but the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to H. as assignee, for the claims against his estate. H. and his wife had remained in undisturbed possession since his discharge in insolvency.

*Held*, reversing the decision of Osler, J., that upon the evidence, set out below, the possession of H. and his wife must be considered to have been the possession of H.: That the title of the first mortgagee was not extinguished, and that defendants were estopped by their conduct from disputing the plaintiff's title.

THIS was an action for the recovery of lot No. 15, 7th concession of Alfred.

(*a*) This case has been carried to Appeal.

The plaintiff claimed as purchaser under the power of sale contained in a certain mortgage made by the male defendant to one Hugh Lough, and by the latter assigned to Mulholland & Baker, and by them assigned to John Whyte, the assignee in insolvency of the estate of the male defendant; and alleged that the female defendant asserted title to the said land as owner, and the male defendant had possession of the same, and refused to deliver it up to the plaintiff, and prayed possession.

The female defendant claimed that she was in possession of the land: that the plaintiff's right was barred by the Statute of Limitations; and that she had made valuable improvements under the belief that she was the owner, which she claimed compensation for in case the plaintiff succeeded in the action. The male defendant claimed that the plaintiff's right was barred by the Statute of Limitations: that the mortgage under which the plaintiff claimed had been purchased by the assignee with the moneys of the estate and had merged in the equity of redemption, and that he had obtained his discharge in insolvency on the 28th day of January, 1868.

The plaintiff replied to the claim of the female defendant, that if she was to be deemed to be in possession of the land, it was without any legal title thereto, and under a pretended conveyance from the male defendant, and by construction of his agency and not in her own proper person, and that when such possession was taken, and up to within ten years of the commencement of this action, the land was vested in the said assignee. The plaintiff replied to the claim of the male defendant, that if he obtained his discharge in insolvency it was by fraud, and was therefore null and void.

Issue.

The case came on for trial by Osler, J., at the last Spring Assizes at L'Orignal, when the following appeared to be the facts so far as material to the question for determination.

The male defendant was, on the 22nd day of November,

1866, the owner in fee of the land sued for subject to a certain mortgage thereon theretofore made by him to one Hugh Lough, for securing the sum of $400 and interest, and subject also to a certain other mortgage thereon, and on 33⅓ acres off from the east side of the north half of lot No. 13 in the 6th concession of Alfred, and on the east half of the south west quarter of lot No. 14, in the 6th con. of Alfred, and theretofore made by him to one Louis Marchand for securing the sum of $663.27 and interest. He thereupon, and on the 22nd day of November, 1866, made a voluntary assignment under the then existing Insolvent Act to John Whyte, an official assignee, who thereafter became the creditors' assignee. On the 28th day of January, 1868, the male defendant obtained his discharge in the proper Insolvent Court. On the 27th day of January, 1869, the said Louis Marchand assigned his said mortgage to the male defendant; and the male defendant shortly thereafter, assuming to act under the power of sale contained therein, and having given notice thereof to the assignee, offered the lands therein contained for sale, and the following was the account he gave of the sale on his examination before an examiner, which was put in at the trial:

"After having got assignment of mortgage from Marchand, I gave it to Mr. Dartnell to exercise the power of sale. I do not recollect taking any steps myself. There was a public sale of these lands held in the Court House here. I do not recollect who was there. I was there. I do not recollect the auctioneer. I do not recollect who bid on the lands. I do not recollect whether Felix Hamlin was there or not. I do not think he was. I do not recollect bidding on the lands. I do not recollect bidding for Felix Hamlin. The day of the sale was a very stormy day. I do not recollect that my wife was at the sale. I had to walk some of the way down. I do not think my wife was with me. I do not recollect whether my wife was at the sale or not. I do not recollect bidding for her myself, nor do I recollect whether Felix Hamlin was there or not. I do not think my wife paid me anything for the land purchased by her at this sale."

And this is the account the female defendant gave of her purchase on a like examination put in at the trial:

"I purchased the land. I do not know how long ago, nor when I purchased the land. I think I purchased from my husband's brother, Felix Hamlin. I do not know who made the bargain. I made the bargain myself. I do not know on what terms the bargain was made. I do not know where or when the bargain was made. I remember when Felix Hamlin gave me the papers. I do not know where it was he gave me the papers. I do not know how much I paid for the land. I do not know how much land exactly. I do not know whether it is a 50 acre, or 100 acre, or 200 acre lot. I think it was Felix Hamlin paid the money. I do not know who paid Felix Hamlin. I did not pay him. I left the managing of the business to my husband and Mr. Dartnell. I had no money of my own with which to purchase land."

On the 3rd day of May, 1869, the male defendant, by deed executed by him on that day, purported to convey, under the power of sale contained in the Marchand mortgage, the lands mentioned therein to Felix Hamlin, in fee, to the use of the female defendant in fee, subject to the mortgage to Hugh Lough. The male defendant being called as a witness at the trial said:

"I live at Longueil; the land is about ten miles distant. I was in possession of it at the time of my assignment in insolvency. I was in possession at time of sale by me under the power of sale in the Marchand mortgage, a private sale. The consideration mentioned in the deed was $250. A credit was given to that amount on the face of the mortgage under which the sale was made (the Marchand mortgage), and I proved in my insolvency as a creditor for the balance due on this mortgage. I still remained in undisturbed possession. I have never been disturbed, or possession demanded, till the plaintiff demanded it. I have farmed the land ever since. Mrs. Hamlin was in the habit of going on the land every year or so. The land was never vacant. I had it rented or worked it right along."

On his examination, above mentioned, he said:

"I claim to be in possession of land sought to be recovered by the plaintiff. It is many years since I first was in possession of the land. I afterwards" (after the deed of 3rd May, 1869, made by him to Felix Hamlin) "sold the 33½ acres of north half of lot 13, 6th con. of Alfred, to one Cadieux for $300 or $400. I think the deed will shew for itself. There was a deed executed, and I think it truly states the consideration. The E. ½ of southwest ¼ lot 14, 6th con., was also sold, I think, for $150. Deed will show for itself. There was a deed of this land to Charles Gratton, executed by my wife and myself, and which, I think, truly states the consideration. After selling the lands I proved against my estate for balance of mortgage for $270.80, as shewn by dividend sheet."

On her examination above mentioned the female defendant said:

"I do not know the number of the lot of land in Alfred to recover which this action is brought. I have been on the lot; it is three years since I was last there. I do not remember when I was there before that. I went up nearly every summer. Mr. Mennier was living there the last time I was there. I do not know his Christian name. I do not know how I claim to be in possession of the land in question in this action. There is a man now on the place. I do not know his name. There have been different parties working the place since I purchased it. I never lived on the land; never remained there over night. I never worked on the place myself. When I went there it was just to look at it. My husband managed the place. He made whatever bargains he wished with regard to it, and I approved of them. I do not remember when I first was on the land; it is over ten years: it may be twelve years, but no more; and since that time I have been in the habit of going to the lot every year except the three years last past. I do not know that my husband owned this land before his insolvency. I have no knowledge of it. I do not remember. I cannot say whether I claim to have a deed of this land or not. I gave my papers to Mr. Dartnell. I do not know enough about business to tell what papers they were."

On the 12th of April, 1869, Hugh Lough duly assigned his said mortgage to Mulholland & Baker, who on the 28th March, 1873, assigned the same to the said John Whyte, assignee of the estate of the male defendant, who paid for such assignment out of the moneys of the estate.

On the 18th day of August, 1879, the male defendant, having previously, and before 1872, bought the claims of most of his creditors, petitioned the Judge for the winding-up of his estate; and in such petition, which was signed by him, among other things he claimed on behalf of the creditors of his estate full benefit of the moneys due on the said mortgage to the said Hugh Lough, and on a certain mortgage to Mrs. Friel, and also on any other mortgages paid by the assignee, but unsatisfied and kept alive for and on behalf of said estate or otherwise; and he alleged that he had in the third schedule to the said petition annexed set forth the names of mortgagees or their assigns holding secured claims against the said estate, who by reason thereof had not filed claims against the said estate, and were not by law entitled to vote at meetings of creditors in relation

to the ordering of said estate, and that in said schedule were shewn the mortgages claimed by the creditors to be then held by the said assignee as assets of the said estate, and for the benefit of the general creditors thereof.

In the said schedule the said mortgages to Hugh Lough and Mrs. Friel were set forth as having been assigned to the said assignee.

Thereafter it was agreed by the petitioner's attorney and the attorney for the assignee that the assignee's account should be taken by the Judge, and all disputed items disposed of by him, including surcharges and falsifications, his decision to be conclusive: that under his order the estate should be wound up, and the residue of the estate sold under the direction of the Judge as to terms and conditions: that the balance, if any, in the assignee's hands, subject to such remuneration for the assignee as the Judge might direct, should, with the proceeds of sale of the residue of the estate, be held for dividend among the creditors: that all mortgages or other securities held by the assignee for the benefit of the estate should be applied in the same way: that after the sale of the real estate the assignee should prepare a dividend-sheet, first deducting all necessary claims allowed by the Judge, and the balance of the estate should be allocated among the creditors. In accordance with which agreement the said Judge made an order that among other things the assignee should, according to law, and without loss of time, proceed to sell all the property, real and personal, of the said estate. Thereupon, in pursuance of the said order, all the right, title, and interest of the insolvent in and to the land in question and other lands, were advertised to be sold by the assignee, on the 20th of April, 1880, with the approbation of the said Judge, and it was a condition of the sale that the purchaser would acquire only such right, title, and interest as the vendor by virtue of his office of assignee of the estate of the said insolvent, and of the insolvent laws in force in Canada, might be possessed of in the said lands.

At the said sale the plaintiff became the purchaser of

the said land, at the price of $610; and the said sale having been approved of and confirmed by the said Judge, the said assignee, by deed dated the 4th day of February, A.D. 1881, granted, bargained, sold, and assigned unto the plaintiff, his heirs and assigns for ever, all the rights and interest which at the time of the execution of the deed of assignment, dated the 22nd day of November, 1866, the said insolvent had, and all the estate and interest which the said John Whyte had since that date, in any capacity, and whether under the said mortgage and several assignments thereof or otherwise howsoever, acquired in and to the said land.

In his said examination the male defendant said:

"It was offered for sale here once or twice by assignee, and I believe it was sold the last time. It was sold by Mr. Whyte, of my estate, I think. I had not much interest, as I did not think sale would amount to anything. I attended the sale and bid on this land up to I think $600. Mr. Miller, the plaintiff, also bid at the sale. He bid higher than I did, bidding, I believe, $610, and the land was knocked down to him. After the sale of lands, a dividend to creditors of my estate was declared. I think proceeds of sale of this land were included in amount out of which dividend was declared. The dividend sheet declared shews $653.64 applicable to division among crenitors. This amount was subsequently increased to $708.76. I got part of this money; that part belonging to creditors whose claims I had purchased—all the claims on my estate except that of Mulholland & Baker—and I got all dividend money except that apportioned to Mulholland & Baker. I do not recollect how much I got. I do not know whether it was over $500 or not. * * I considered that all the land which the assignee had the right to sell was the store lot and the undivided half in Clarence. I objected at the time to the sale to Mr. Miller, claiming that it had already been sold under the Marchand mortgage. I had no other grounds for objection."

At the trial the male defendant swore that notice was given at the sale, by and on the defendant's behalf, that any one who bought would buy a lawsuit. This action was commenced on September 15th, 1881.

The learned Judge found for the defendants, and dismissed the action, without costs.

December 6, 1882. *Bethune*, Q.C., for the plaintiff, moved to set aside the judgment for the defendants, and to

enter it for the plaintiff, with costs of suit, on the ground that the finding for the defendants was wrong.

*Beaty*, Q.C., and *Allan Cassels*, shewed cause, contending against the views on the other side as to the effect of buying in the mortgages, and the relation of the parties to the assignee. They argued that after examining the whole facts in evidence the case resolved itself simply into the question of the possession, on which the verdict rested: that the possession brought the parties within the Statute of Limitations, and the plaintiff could not claim any of the exceptions in the Act, and consequently there was a statutory title, which the trusts and interests introduced in the arguments for the plaintiff could not affect or change. They cited *Regina* v. *Roberts*, L. R. 9 Q. B. 77.

*Bethune*, Q. C., and *O'Brien*, contra. The sale by C. W. Hamlin to Marcella Hamlin, under the power in the Marchand mortgage was a nullity. The equity of redemption passed to the assignee on insolvency, and on the subsequent purchase of the Lough mortgage it did not merge. The insolvent recited the Lough mortgage as subsisting in his pretended conveyance to his wife in 1873, and again recognized it when he accepted from the assignee a dividend on his claim for the balance due on the Marchand mortgage; his position being that, by reason of the prior mortgage, the security was insufficient to satisfy his debt. In his petition to the County Court Judge, over his own signature, the Lough mortgage is set out as being assets of the estate, and an account is asked. Afterwards, on such petition, the assets of the estate are taken account of, and the title of this land adjudicated upon as between the parties by the Judge. The plaintiff bought both the equity of redemption from the assignee and the fee simple under the mortgage.

The insolvent being bound to assist the assignee must be held to have bought in the Marchand mortgage for the benefit of the estate, and it must be held to be security to secure the repayment to him of $100, (what he paid Marchand for the assignment) and no more. This amount

he realized from the sale of the other lot comprised in the mortgage. An insolvent even after discharge cannot set up title by possession as against his assignee. The defendant C. W. Hamlin accepted the purchase money when divided among the claims he held. Under these circumstances he is estopped from disturbing the plaintiff's title.

On insolvency the defendant C. W. Hamlin became tenant at will to the assignee. The tenancy was never determined, even after discharge: see *Garrard* v. *Tuck*, 8 C. B. 231, and *Adamson* v. *Adamson*, 28 Grant 221.

The possession continued to be that of C. W. Hamlin. Defendant M. Hamlin never was in possession. If the possession ever was that of Marcella Hamlin, she was merely trustee or agent for C. W. Hamlin. Under the Insolvent Act of 1864, the insolvent is entitled to the ultimate residue, if any, and the assignee under his deed is an express trustee for the insolvent. The Statute of Limitations would not run against him.

February 6, 1883. ARMOUR, J.—The proper inference to be drawn from the evidence is, that the female defendant never was at any time in possession of the land in question in this suit.

The male defendant was in possession of it at the time of the making of his assignment in insolvency, and has ever since continued in the possession of it.

There is nothing to shew that at the time of the alleged sale by the male defendant, under the power of sale contained in the Marchand mortgage, of the land in question, or at the time of the conveyance thereof by him to Felix Hamlin to the use of the female defendant, or at any time thereafter, any change was made in the possession of it, or that the female defendant entered into possession of it or assumed possession of it in any way.

I do not think that it can be fairly said that the male defendant was, after the said sale and conveyance, holding possession of it for the female defendant; but I think it

can be more fairly said that the female defendant was holding whatever title she acquired by the said sale and conveyance for the male defendant.

She did not bargain for it or buy it; she paid no money for it, nor had she any to pay: the male defendant paid the purchase money by crediting the amount of it on the Marchand mortgage, and he merely made use of her as an instrument to whom the conveyance should be made of the land which really belonged to him, and which she was to hold only for him.

Under these circumstances it is impossible for the female defendant to contend that she had in herself any such possession of the land in question as would extinguish the title of the first mortgagee, and she must be driven to contend that the male defendant had such possession of the land in question as extinguished the title of the first mortgagee to it, and unless she can establish that he had she must fail in her defence.

In order to establish his defence the male defendant must shew that he had such possession of the land in question as would extinguish the title of the first mortgagee, and if he by his conduct has precluded himself from shewing this, she, who is driven to defend by virtue of his possession, cannot avail herself of it.

The male defendant held by purchase nearly all the claims against his own estate; he took proceedings to compel the assignee, who held the first mortgage, to sell the land in question; he attended the sale and bid upon it. It is true that he says he gave notice that whoever bought it would buy a lawsuit, his contention then being that the title of the mortgagee was extinguished by merger, not that it was extinguished by his possession. Having given such notice he ought to have stood upon it, and not have led it to be thought that such notice was not given in good faith, or was abandoned, by bidding upon the land himself. After the land was sold he took the benefit of the purchase money, by himself receiving the greater portion of it by way of dividend upon his claims.

By such his conduct I think the male defendant has precluded himself from shewing that he has had such possession of the land in question as extinguished the title of the first mortgagee.

It is true that it was only "the right, title, and interest of the insolvent in and to the land in question" that was advertised to be sold and was sold, but it was well understood by all parties, including the male defendant, that what the assignee was assuming to sell was the right, title, and interest which he had to the land as first mortgagee thereof, and it does not lie in the mouth of the male defendant, having received the benefit of the price paid by the purchaser for such right, title and interest, to say that such right, title, and interest did not pass to the purchaser, or to say that such right, title, and interest had been extinguished by his own possession. See *Beemer* v. *Oliver*, 19 C. L. J. 36.

In my opinion the plaintiff is entitled to judgment, with costs of suit.

HAGARTY, C. J.—I incline to think that the ground on which the plaintiff must rely for recovery is an estoppel *in pais* as against the defendants.

It is not very clearly stated what the exact nature of the position of the insolvent and his assignee as to the possession of real property is In one sense it may be that of trustee and *cestui que trust*, and it might be argued that the statute would not run between them.

The assignee is a trustee for creditors and also for the insolvent as to any surplus.

Our Act of 1875, sec. 16, expressly declares that the assignee shall hold "in trust for the benefit of the insolvent and his creditors."

In *Banning* on Limitations, 194, it is said: "Ordinarily, therefore, it would seem that on a reasonable construction of the statutes affecting the point no lapse of time will give a *cestui que trust* in possession a title against his trustee, and this view seems supported, so far as they go, by the cases on the subject."

He says there are two qualifications to the rule: "In the first place it applies only to cases where the *cestui que trust* is the actual occupant himself, and not to cases where his assignee or others are in possession. * * And, secondly, the trust must be express."

The statute says that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of the clause: R. S. O. ch. 108, sec. 4 sub-sec. 8.

The subject is discussed in *Sugden's* Real property Statutes, 2nd ed., p. 39 *et seq.*

He cites, approvingly, *Melling* v. *Leak*, 16 C. B. 652, where the doctrine is fully considered. It is held that the doctrine applies only to the case where *cestui que trust* is the actual occupant. If he is only allowed to receive the rents from occupying tenants he is merely agent or bailiff of the trustee, and the actual occupant may acquire title by the statute.

The Court seem to consider that *cestui que trust* must be let into possession by the trustee: the tenant at will cannot determine his tenancy by transferring his interest to a third person without notice to his landlord.

At p. 41 of the real property statutes Lord St. Leonards speaks of the *cestui que trust* holding possession under the trustee, and under the protection of an instrument by which the estate is conveyed to the trustee.

I gather from English cases that the assignee's claim may be barred by the statute. I refer to *Markwick* v. *Hardingham*, L. R. 15 Chy. D. 339; *Cole* v. *Coles*, 6 Hare 517.

Where the insolvent was in possession of property at the time of the bankruptcy, and the assignee knowing it to be encumbered by two mortgages had never interfered in any way, and practically abandoned it to the insolvent, I am under the impression that the Statute of Limitations will be a bar between them, and that the law in some cases preventing its operation between *cestui que trust* and trustee will not apply. There seems to have been no privity, as it were, established between them, and the insolvent, after

obtaining his personal discharge, obtained a conveyance from the second mortgagee, and was in under it at all events for the statutable period, in fact on a freshly acquired title.

Lough, the first mortgagee, apart from the bankruptcy, would certainly have been barred.

If the assignee, in the first year of his appointment, had entered into actual possession of the premises, and a month later the insolvent had forcibly expelled him, it seems to me that the stautute would run from that period against the assignee.

As is said in *Markwick* v. *Hardingham*, by James, L. J., at p. 349 : "In some cases with respect to dealings and transactions of a bankrupt after the bankruptcy he may, with the acquiescence of the assignee, or until the latter interferes, receive, and even sue. But this does not apply to the rents of the real estate which had by the bankruptcy become actually vested in the assignee. The fact that the latter did not choose to trouble himself with the possession of an estate so encumbered as to be profitless to the creditors, and therefore practically abandoned it to the incumbrancer, gives no more authority to the bankrupt than it could to any stranger to receive the rents."

When the insolvent here obtained his discharge he was in a position to acquire new property, and he acquires the interest of second mortgagee. I cannot then see how he could be considered as *cestui que trust* in relation to the assignee, and not entitled to the benefit of the statute.

The case of *Court* v. *Walsh*, 1 O. R. 167, now before the Court of Appeal, may be referred to, though it does not decide this particular question.

Then as to the acknowledgment in writing alleged to be contained in the husband's petition to the Judge, and relied on by the plaintiff. There are difficulties in relying on it. Firstly, it is said to be given after the expiration of the statutable period, and when the title was to be considered extinguished : *Sanders* v. *Sanders*, L. R. 19 Chy. D. 379. The judgment of the Court of Appeal seems

clear as to its being too late if the period elapsed. The title is divested and cannot be thus revived. Secondly—that the acknowledgment cannot bind the female defendant, not being personally signed by her.

The statute R. S. O. ch. 108, sec. 13, says it must be "signed by the person in possession or in receipt of the profits of such land, or in the receipt of such rent."

We might safely assume on the evidence that the possession of this land had always been in the husband, and that he had always received the rents, and that the wife had never been in actual possession or receipt of rents.

If made in due time, I think the acknowledgment would be sufficient.

The very learned and elaborate judgment of Lord St. Leonards, in *Incorporated Society* v. *Richards*, 1 Dr. & W. 290, fully discusses this point. But on the whole, I think that both defendants are concluded by their conduct from denying the plaintiff's title.

The female defendant, the wife, cannot in any way be considered as a purchaser for value. She was a mere volunteer, a passive, we may almost say an unknowing, instrument in her husband's hands as the nominal grantee of the interest sold under the second mortgagee. She gave no consideration for the transfer. She can give hardly any account of what took place. She knew nothing of the land, not even its number or extent. She left everything to her husband, both in effecting this transfer, and, as we must assume on the evidence, in every proceeding down to this suit.

In the deed of 3rd May, 1869, to Felix Hamlin for the wife, the defendant C. W. Hamlin recites his insolvency and that Marchand had assigned this second mortgage to him, subject to Lough's mortgage and the assignee's equity of redemption, and his refusal to pay the amount thereof, and that his wife had become the purchaser at the sale. He then conveys to his brother Felix to her use, subject to Lough's mortgage. She never executed the deed.

I need not describe the petition of the male defendant

and proceedings in insolvency, as my brother Armour has detailed them.

It may be noticed that he states in that petition that in 1872 (within the statutable period) he filed a bill in Chancery for an account, and specially as to the mortgages. But this was not in evidence.

He calls on the Judge to direct the winding up of the estate, specially referring to this Lough mortgage; and then by his consent and desire the properties are exposed for sale. He bids at the sale so procured; the plaintiff is the purchaser, and defendant receives dividends out of the purchase money.

I hold on the evidence that we must assume all this to have been done with the full assent and knowledge of the wife, and that she is equally bound with her husband by all the legal consequences of such an extraordinary proceeding: see *Ley* v. *Peter*, 3 H. & N. 101.

I agree that nothing was said by him at the sale to prevent his being bound by his conduct. I think the plaintiff should recover against both defendants.

It may well be that a further examination of the dealings of defendant and his wife with this estate, in reference to certain legal proceedings stated in his petition, might shew that the assignee has not been barred by the lapse of time.

I think they must be held to have procured the action of the Insolvent Court in this matter to obtain a sale of this land on this mortgage, that they are bound by the sale, and cannot be allowed afterwards to repudiate the right to make it, or to dispute the title that passed to the present plaintiff.

Mr. Justice Proudfoot's judgment in *Beemer* v. *Oliver*, on the authority of such cases as *Cairncross* v. *Lorimer*, in the House of Lords, 7 Jur. N. S. 149, may be referred to.

CAMERON, J., concurred.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## IN RE WILSON V. MCGUIRE.

*Constitutional law—Local Courts Act—County Court Districts—Validity of Act respecting—Jurisdiction of Division Court Judge without his own county—Prohibition.*

Pursuant to the Local Courts Act, R. S. O. ch. 42, sec. 16, *et seq.*, the counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a County Court District. By sec. 17, in such a district the several County Courts, Division Courts, &c., shall be held by the Judges in the district in rotation. By the Division Courts Act, R. S. O. ch. 47, sec. 19, the Division Courts shall be presided over by the County Court Judges in their respective counties. An order for the committal of the defendant was made by the Judge of the County Court of the county of Lambton, sitting in a Division Court in the county of Middlesex under the provisions of the Local Courts Act. A motion for a prohibition was made on the ground that that enactment was *ultra vires*.

*Held*, ARMOUR, J., dissenting, that the Provincial Legislature has complete jurisdiction over the Division Courts, including the appointment of officers to preside over them: that the learned Judge acted in the Middlesex Division Court as one of the persons designated by the Legislature to preside over it, and having regard to the enactment in question, solely in its bearing on Division Courts, it was not *ultra vires*.

*Per* ARMOUR, J.—Sec. 13 of the Local Courts Act is *ultra vires*. The Provincial Legislature having no power to appoint County Court Judges, neither can authorize the Governor-General to appoint one by order as enacted (the appointment being properly made by Letters Patent under the Great Seal), nor can it depute a County Court Judge to nominate another Judge to take his place as enacted. The clear and sole effect of sec. 17 is to appoint the Judge of each County Court in any district Judge of all the other counties, which is *ultra vires*. The Provincial Legislature has no power to appoint the Judges of the Division Courts; but it has not yet assumed to do so, and in this case the Judge acted solely by virtue of being Judge of the County Court of the county of Lambton, and as such assigned to perform the duties of the Judge of the County Court of Middlesex, and was therefore acting without authority.

December 8, 1882. *Bartram* moved on notice for a prohibition.

It appeared that on the 13th July last an affidavit was made by Mr. Bartram stating that he was acting for George McGuire: that a judgment summons was issued out of the First Division Court of the county of Middlesex, on a judgment recovered against McGuire at the suit of Alexander Wilson for $7.61 and costs, requiring him to attend and be examined at the sittings of said Court to be held on the

30th June, 1882: that on that day McGuire failed to attend at said sittings of said Court, which was held at the city of London by Charles Robinson, Esquire, Judge of the County Court of the county of Lambton, under the provisions of secs. 16 and 17 of "The Local Courts Act," (R. S. O. ch. 42,) who made an order to commit said McGuire for ten days to the common gaol of the county of Middlesex, for non-attendance to be examined, on which order a warrant of commitment would be duly issued by W. J. McIntosh, clerk of said Court, and placed in the hands of the bailiff to be executed.

On this an application for prohibition was made to Osler, J., who referred it, on the 31st July last, to the full Court, the applicant having leave to file a further affidavit.

Notice of all these proceedings was given to the various parties interested.

A further affidavit was produced by Mr. Bartram, to the effect that Mr. Elliot, the senior Judge, and Mr. Davis, the junior Judge of the Middlesex County Court, were in the city of London on the 30th day of June, (the day of the sittings) and neither of them was then or before that time ill to deponent's knowledge: that he was informed by said Judges that Judge Robinson had acted as a Judge in the county of Middlesex, and that he did, on the 30th June, hold the sittings of the First Division Court of Middlesex at London, and made this order on McGuire, not by reason of illness or absence of the Middlesex County Judges, or on the appointment of either of them, but under a proclamation of the Lieutenant-Governor grouping the counties of Middlesex and Lambton into a district under secs. 16 and 17 of the Local Courts Act; and that said Robinson was the duly appointed Judge of Lambton, and by virtue of the proclamation he had and still presided in the County and Division Courts of the said county of Middlesex.

*Bethune*, Q. C., and *Bartram*, in support of the motion. Judge Robinson did not act in making the order for com-

mitment of the defendant in the First Division Court of the county of Middlesex under the provisions of sec. 20 of the Division Courts Act, which provides for the illness or absence of the Judge, but by virtue of a proclamation of the Lieutenant-Governor of Ontario, made under the provisions of secs. 16 and 17 of the Local Courts Act, passed by the Ontario Legislature (R. S. O. ch. 42); and the Judges of Middlesex received their commissions as Judges of the County Court of that county. None of these Judges have been appointed or commissioned by the Governor-General as Judges of the County Court district of Middlesex and Lambton. By sec. 90 of B. N. A. Act the Governor-General shall appoint Judges of the County Court. The effect of the Ontario "Local Courts Act," and the proclamation of the Lieutenant-Governor of Ontario, is to create the Judge of Lambton a Judge of the County Court of Middlesex, which power is vested only in the Governor-General. The Judges of this honourable Court required new commissions in consequence of the Judicature Act.

*Irving*, Q.C., for the Attorney-General, *contra*. Prohibition will not be granted if in any case the Judge of Lambton could have acted as Judge in the first Division Court of Middlesex. It is within the power of the Ontario Legislature to appoint Judges of the Division Courts, and Judge Robinson might have been so appointed, notwithstanding he held the office of Judge of Lambton. The proclamation under the Local Courts Act is sufficient to legally constitute him a Judge in the Division Courts of Middlesex, even if it did not make him a Judge of the County Court of Middlesex. The Local Courts Act is not to create Judges, but to enlarge the jurisdiction of these Courts. By sub-sec. 14, sec. 92, B. N. A. Act, the maintenance and organizations of Provincial Courts is vested in the Provincial Legislatures. In the exercise of this power the jurisdictions of the County Courts of Lambton and Middlesex are enlarged, and the Judges are given concurrent jurisdictions in both Courts.

*Bethune*, in reply. It is not a question of jurisdiction of the Judge of the County Court, but of the territory in which such jurisdiction may be exercised. The commission of the Judge confines him to a certain county. Judge Robinson was not legally appointed Judge of the County Court District, and it was only as such that he could act in the Division Courts of Middlesex. It follows that he was not legally authorized to make the order in this case, and prohibition should go.

February 6, 1883. HAGARTY, C. J.—I propose as far as possible to confine this discussion to the one point, the authority to make the order on McGuire in the Division Court.

The argument assumed a wider range, but the point for decision may be compressed within narrow limits.

It is admitted that the Lambton Judge acted under the powers conferred by the Local Courts Act: R. S. O. ch. 42, sec. 16.

Sec. 16 allows any part or parts of Ontario to be divided into districts or groups of counties by proclamation of the Lieutenant-Governor, with power (sub-sec. 2) to dissolve, alter, or rearrange, &c.

Sec. 17: "After the erection of a district, the several County Courts, Courts of General Sessions, Division Courts," &c., &c., "and all other Courts which a County Judge may hold in each county, shall be held by the Judges (including therein the Junior Judges) in the district, in rotation," &c.

Sec. 18: "The Judges in any or each district so erected shall meet at least once in every year, and the Judges present, or a majority of them, shall arrange and appoint which of the said Courts in the district shall be held by each of the Judges of the district throughout the ensuing year."

Sub-sec. 2: "Such Judges may also, subject to the approval of the Lieutenant-Governor in Council, * * fix * * the times * * for the holding of the County Courts and General Sessions," &c.

Sec. 22: "The Judge of any county forming part of a district may, if he sees occasion, perform in any part of the district any judicial acts affecting the Courts or business of the county of which his commission designates him as Judge."

Sec. 10 declares that "every County Court Judge, not including a Deputy Judge, shall be *ex officio* a justice of the peace for every county and part of Ontario, and may act in the office of justice of the peace in any part of the Province."

These grouping clauses first appear in the Act, 39 Vic. ch. 14, passed 10th February, 1876.

The proclamation grouping Middlesex and Lambton under this Act was issued 10th October, 1876.

The Local Courts Act, sec. 13, requires a County Court Judge "to hold any of the Courts in any County other than his own, or to perform any other duty of a County Court Judge in any county, upon being required so to do by an order of the Governor-General made at the request of the Lieutenant-Governor; or without any such order the Judge in any county may, if he sees fit, perform any judicial duties in any county other than his own, on being requested so to do by the Judge to whom the duty for any reason belongs."

Sec. 14: "Any retired County Court Judge may hold any Court or perform any other duty of a County Court Judge, * * on being requested to do so," &c.

Sec 15 declares that no act of any Judge under secs. 13 and 14 shall be open to question in any legal proceeding, either on the ground that he was not the proper Judge to perform the duty, or that the same had not been regularly assigned to him, or had not been performed at such request or by such direction as the law requires.

This provision (except as to retired Judges) also appears in the Grouping Act of 1876, sec. 10.

Secs. 54 and 55 of the Administration of Justice Act, 1874, ch. 7, give County Judges power to sit in other counties, but do not mention Division Courts.

So also 35 Vic. ch. 9, sec. 3, 38 Vic. ch. 12, sec. 5 (1874), allowed every County Judge to have jurisdiction to hold the Division Court in any county in the province, and he may do so either by order of the Lieutenant-Governor or request of the other Judge.

The General Division Courts Act, R. S. O. ch. 47, declares (sec. 19) that the Courts shall be presided over by the County Court Judges, or Junior or Deputy Judges, in their respective counties.

Under sec. 20, in case of the illness or absence of the Judge, the Judge of any other county may hold the Court, or the County Judge may appoint a barrister, &c.

See note on this clause in *Sinclair's* Division Courts Act, p. 18; *O'Brien's* Division Court Manual, notes to sec. 14 and sec. 20.

Prior to confederation, under Consol. Stat. U. C. ch. 19, secs. 16, 17, the County Court Judges are to preside over the Division Courts in their respective counties, and in case of illness or unavoidable absence of the County Judge, the County Judge of any other county may hold the Division Court, or the County Judge may appoint a barrister to act as his deputy.

Sec. 72 allows a case arising in one county to be tried in an adjoining county, on an order being made therefor. Sec. 160 may also be referred to.

Under the British North America Act sec. 96 gives to the Governor-General the appointment of Judges of the Superior, District, and County Court in each Province, &c., and sec. 100 directs their salaries and allowances to be fixed by Parliament.

Sec. 92 empowers the Provincial Legislature exclusively to make laws in relation to property and civil rights.

Subsec. 14: "The administration of justice in the Province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

16. "Generally, all matters of a merely local or private nature in the province."

The Legislature of Ontario has complete power over the Division Courts as to their existence, constitution, rearrangement, &c.

In the case of the Superior and County Courts the general government interpose in the power of appointing the Judges.

The County Judges appointed by the Crown have presided over these Division Courts from their establishment.

The Provincial Legislature, since its establishment, have made many changes in these Courts, enlarging their jurisdiction, and making provisions for enforcing their process over property and persons outside their ordinary boundaries, but have never interfered with the principle of having them presided over by a County Judge, and as already noticed, even before confederation the Judge of another county could act in the case of illness or unavoidable absence.

As they have power to abolish such Courts and to establish others for the disposal of the like or other classes of business, I assume their right to appoint officers to preside over them.

Then, when this grouping Act was passed, regarding it solely in its bearing on Division Courts, I can see no valid objection to the Legislature directing that the Judges, senior and junior, of the grouped counties should arrange amongst themselves that the duty of presiding should be taken in rotation.

The Judges have under the statute so arranged, and the County Court Judge of Lambton under such arrangement has held this Middlesex Division Court, and made the order the execution of which is now sought to be prohibited.

I do not feel that in the case before us any difficulty is created by the fact of the Judge of Lambton being an officer appointed by the Dominion expressly for that county. It was urged that he could not perform judicial duties beyond its limits. It is sufficient here to say that he has in fact performed them under the authority of the Provincial Legislature, and that the latter, having complete power

over the Division Courts, have designated him, amongst other named functionaries, to preside in the Court, and that he so presided.

I think the motion for prohibition must be refused.

My brother Cameron has partly discussed the general question in the recent case of *Regina* v. *Bennett*, 1 O. R. 445.

ARMOUR, J.—At the sittings of the first Division Court in the county of Middlesex, held in the city of London, in the county of Middlesex, on the 30th of June, 1882, the defendant George McGuire was ordered by one Charles Robinson, who assumed to preside at and hold the said sittings, to be committed to the common gaol of the county of Middlesex for ten days for his non-attendance to be examined upon a judgment summons issued in the said suit; and this motion for a prohibition was made to test the right of the said Charles Robinson to make such order. At the time the said order was made, one William Elliot was the Judge of the County Court of the County of Middlesex, and one Frederick Davis was the junior Judge of the County Court of the County of Middlesex, but neither the said William Elliot nor the said Frederick Davis was either ill or absent at the time of the holding of the said sittings of the said Division Court, at which the said order was made.

The said Charles Robinson was at the time of the holding the said sittings the Judge of the County Court of the County of Lambton, and his sole right to assume to hold the said sittings was under and by virtue of the provisions of the Statute of Ontario, 39 Vic. ch. 14.

The first section of this Act provides for the grouping of counties for the purposes of the Act by proclamation of the Lieutenant-Governor; and under it a proclamation was issued by the Lientenant-Governor, on the 10th day of October, 1876, directing that after the first day of December then next inclusive the counties of Middlesex and Lambton should be erected into and should constitute a group of counties for the purposes of the said Act, and

that such group of counties should be styled the County Court District of Middlesex and Lambton.

I may here observe that the Act gives no authority to the Lieutenant Governor to style the group so to be erected and constituted, and the styling of the said group as the County Court District of Middlesex and Lambton by the said proclamation was without the authority of law.

The second section of the Act provides that "after the erection of a district for the purposes of this Act, the several County Courts, Courts of General Sessions, Division Courts, Courts of Appeal under the Assessment Act, Courts for the revision of voters' lists, and all other Courts *which a County Judge may hold in each district*, shall be held by the Judges (including therein the junior Judges) in the district in rotation as far as may in such district be just, convenient and practicable, in view of the respective ages, length of service, and strength of the several Judges, and the special duty heretofore assigned to junior Judges, as well as in view of the other offices (if any), held by any of the Judges, and all other circumstances."

This section is reproduced in the Revised Statutes of Ontario, ch. 42, as section 17, and there the words "*which a County Judge may hold in each district*" are changed to the words "*which a County Judge may hold in each county.*" Whichever one of these two sets of words is made use of, it is difficult to understand what is meant by the section, or to say that it has, as it stands, any meaning at all, for at the time of its enactment there were no Courts which a County Court Judge might hold in each district, or in each county of such district, but only Courts which he might hold in the county of which he was the County Court Judge in each district.

In order, therefore, to give any effect to the section, it must be read as if the words were, which a County Court Judge may hold in the county of which he is the County Court Judge in each district, and this reading appears to me, from the context, to express the intention of the Legislature.

The clear and sole effect of this section so read is to appoint the Judge of the County Court of any one of the counties grouped to be the Judge of the County Court of every other of the counties grouped, and in the case under consideration to appoint the Judge of the County Court of the county of Lambton to be a Judge of the County Court of the county of Middlesex, and to appoint the Judge and Junior Judge of the county of Middlesex to be Judges of the County Court of the county of Lambton.

The ninth section of the Act provides that "in cases hereinbefore not provided for it shall be the duty of a County Court Judge to hold any Court in any county other than his own, or to perform any other duty of a County Court Judge in any county, upon being required so to do by an order of the Governor-General, made at the request of the Lieutenant-Governor; or without any such order the Judge in any county may, if he see fit, perform any judicial duties in any county other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs."

It is unnecessary, perhaps, to advert to the first branch of this ninth section, because in the case in judgment the Judge of the County Court of the county of Lambton was not holding the said sittings of the said Division Court by reason of any order of the Governor-General requiring him so to do, made at the request of the Lieutenant-Governor; and it is quite unlikely that any Governor-General would ever make any such order, nor could he legally do so, for he would thus be appointing a Judge of the County Court of one county to be the Judge of the County Court of another county by a mere order, when he could only do so by letters patent under the great seal, and then only to fill a vacancy.

The second branch of the ninth section in effect empowers the Judge of the County Court of any county in Ontario, by mere request, to appoint the Judge of the County Court of any other county to be the Judge of the County Court of the requester's county, and this involves

two assumptions of power by the Local Legislature, viz., first, the power of appointment of County Court Judges, and, secondly, the power to delegate that power of appointment to the County Court Judges themselves.

The powers attempted to be exercised by the Local Legislature in the second and ninth sections of the said Act, appear to me to be clearly beyond the powers of the Local Legislature, and therefore null and void; and the Local Legislature appears to have been itself conscious that it was exceeding its powers by resorting to the device, weak as it is futile, of enacting in the tenth section that "no act of a County Court Judge in any county shall be open to question in any legal proceeding on the alleged ground that he was not the proper Judge to perform the duty, or that the same had not been regularly or otherwise assigned to him, or had not been performed at such request or by such direction as the law requires."

The 96th section of the British North America Act expressly provides that the Governor-General shall appoint the Judges of the County Courts, and even had there been no such provision in the British North America Act, the power to appoint them would have rested with the Governor-General as representing Her Majesty in the Dominion.

It is, in my opinion, beside the question raised in this case to discuss the power of the Local Legislature to appoint Judges of the Division Courts, for it has not yet assumed to appoint any such Judges, either by the Act I have been considering or otherwise, but only to appoint County Court Judges, who, by virtue of their appointment as County Court Judges, hold the sittings of the Division Courts; and Mr. Robinson, in making the order complained of, was so making it solely by virtue of his office as Judge of the County Court of the county of Lambton, and as being assigned as such Judge of such County Court by virtue of the said Act to do the duty of the Judge or Junior Judge of the County Court of the County of Middlesex.

When that question shall arise I will, I trust, be able to

shew by satisfactory reasons that the Local Legislature has no such power.

The reasoning of the Supreme Court in *Lenoir* v. *Ritchie*, 3 S. C. 575, in which case that Court determined against the power of the local Legislatures to appoint Queen's Counsel, is altogether against their having the power to appoint any Judges.

In my opinion Mr. Robinson, in making the order complained of, was acting wholly without authority, and the rule should be granted for a prohibition.

CAMERON, J., concurred with HAGARTY, C. J.

*Judgment accordingly.*

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[CHANCERY DIVISION.]

## McGEE v. CAMPBELL ET AL.

*Insolvent Act of 1875, 38 Vict. ch. 16, Dom., and Amending Acts—Vacating final order of discharge—Concealment of assets—Parties—Forum—Nudum pactum.*

A final order of discharge obtained by an insolvent upon a deed of composition and discharge duly confirmed, will be vacated by this Court, on bill filed by a creditor, party to the insolvency proceedings, where such discharge has been obtained by a fraudulent concealment of assets.

An insolvent firm, on September 16, 1878, made an assignment under the Insolvent Acts. On October 2, 1878, a deed of composition and discharge, under the said Acts, was executed, whereby the said firm covenanted to pay a certain dividend, and on February 28, 1879, the Judge in insolvency made an order for its confirmation, a sworn statement of the assets and liabilities of the firm having been first duly filed by the members thereof. Long afterwards one of the creditors, who had consented, on payment of a certain dividend, to assign his claim to S. as trustee for the insolvent firm, and for the purpose of executing the said deed, though he himself refused to execute it, discovered that C., one of the members of the firm had fraudulently concealed some of his assets, and he filed a bill in this Court to have the said deed of composition, and the order confirming the same, declared void as against him.

*Held*, that the deed and order of confirmation must be vacated as regards C., and the insolvency proceedings re-opened, so that there might be a due administration of the assets thus withheld, and the assignment to S. must be prevented from being set up as a bar to such relief.

*Held*, also, (PROUDFOOT, J., *dubitante*), inasmuch as the assets fraudulently concealed were C.'s private property, and not the property of the partnership, the discharge should only be vacated as to the private estate of C.

*Per* PROUDFOOT, J., the assignment to S. was invalid, being made without consideration, or for a consideration which was no satisfaction, being the payment of a less sum for a greater; but even if it must be taken to have been for value, it was sufficient for the plaintiff to shew that it was entered into under a mistake caused by the insolvent firm, as to the true amount of the assets, whether the firm acted innocently or otherwise.

It appearing that part of C.'s assets was certain railway stock, obtained by him on a contract, that he was to retain one-half, if he could give the stock a marketable value, but that if he could not do so within a certain time, extending beyond the period of the insolvency proceedings, the transaction was to be void, and he was to re-transfer, *Held*, that the shares should have been returned in his sworn statement as part of his assets, for the language of the statute was large enough to cover such an interest. It was a valid executory contract, and as such passed on insolvency to the assignee.

It, also, appeared that among C.'s assets was a certain sum received by him, or to which he had a claim, from a certain railway company as compensation for services rendered as temporary acting president. *Held*, that C. was bound to return as an asset the portion of the compensation payable for services rendered up to the date of the assignment in insolvency, but not the remainder.

*Held*, further, the assignee in insolvency was not a necessary party to the present suit, which was rightly brought in this Court.

The bill of complaint in this case was filed by one James McGee against Charles J. Campbell, Walter G. Cassels, Edward S. Cox, and Alfred W. Smith (*a*).

The bill stated as follows:—In the years 1877 and 1878, the plaintiff employed the firm of Campbell & Cassels, consisting of Campbell, Cassels, and Cox, who carried on the business of bankers and brokers, in Toronto, as his brokers —and entrusted them with large sums of money.

On the 16th of September, 1878, the said firm was indebted to the plaintiff in the sum of $31,822.70, in a fiduciary capacity.

On or about the said day the firm of Campbell & Cassels, under the Insolvent Act of 1875, and amending Acts, made an assignment to one John Turner, an official assignee, of their estate and effects for the benefit of their creditors.

By a deed of composition and discharge made on the 2nd of October, 1878, under the said Acts, and in the matter of the said insolvency, the members of the said firm covenanted with their creditors to pay to each of them ten cents on the dollar on their liabilities, in consideration of the creditors discharging the said members from all such liabilities. The plaintiff proved his claim as a creditor against the said members for the sum of $31,822.70.

The members of the said firm, on or about the 28th of February, 1879, applied to the Judge of the County Court of the County of York for an order confirming the deed of composition and discharge. The claim of the plaintiff arose through gross breaches of trust on the part of the members of the said firm; the said firm having been entrusted by the plaintiff as his brokers with the moneys which made up his claim for the sole purpose of buying certain shares of bank stock for the plaintiff, but the firm, instead of so doing, having fraudulently appropriated the said moneys to their own use.

(*a*) The statement of facts and pleadings is taken from the judgment of the learned Chief Justice of the Common Pleas Division.

Upon the application of the members of the said firm for confirmation of the deed, the plaintiff appeared as a creditor, and was advised to accept the composition, and he agreed to do it; but regarding the circumstances under which his claim arose he refused to execute the deed, or to acknowledge himself as a party to it, although the members of the said firm then offered him the sum of $2,622.06, in cash, for the composition payment, they alleging they were unable to pay the ten cents on the dollar as provided for by the deed. To obviate the plaintiff's reluctance to execute the deed, and to carry out the composition, it was suggested by the counsel for the said firm that the plaintiff should assign his claim to the now defendant Smith, a friend of the other defendants, who would hold the same as a trustee for the said firm, and for the mere purpose of signing the deed; and that suggestion was carried out, and the sum of $2,622.06 was then paid by the firm to the plaintiff, and an order of confirmation of the deed was then made by the Judge.

The defendant Smith gave no consideration for the assignment made by the plaintiff to him, and the sum of $2,622.06, is the only payment the plaintiff has received on account of his claim.

The members of the firm, before the order of confirmation was made, filed with the assignee of their estate, in pursuance of the Insolvent Act and amending Acts, their sworn statements purporting to set forth all their liabilities, and all their and each of their estates and assets which became vested in the said assignee, and purporting to be a full compliance with the requirements of the said Acts.

The plaintiff alleged that before the said assignment the said Campbell was possessed of certain shares in the capital stock of the Northern Railway of Canada, then and still standing in his name in the books of the company, of the nominal value of £25,000 stg., and upwards, and was also the owner of a large interest in certain other shares in the capital stock of the said Railway Company of the nominal value of £16,000, stg., and upwards; and was

also the owner of certain other shares in the capital stock of the Credit Valley Railway Company. Yet the said Campbell did not, as he was bound to do, disclose the fact in his said statement that he owned such shares of stock, but during all the insolvency proceedings wholly omitted any mention of or reference to the said shares, or his interest therein or thereto; and for long after the confirmation of discharge, and until only a recent period, the plaintiff was wholly ignorant of the facts in regard to the said shares of stock, and of the said Campbell's ownership thereof. And the plaintiff charged that Campbell fraudulently concealed his interest in and to the stock, and submitted that the deed of composition and discharge was void as against him, and should be so declared, alleging that he was induced to do as it is aforesaid stated he did in reliance on the accuracy of the statement of assets so filed as aforesaid; and that notwithstanding the transfer of his claim to the said Smith, the plaintiff should be declared to be a creditor of the members of the said firm, for the amount of his said claim against them, and that the transfer to the said Smith should, if necessary, be set aside, and the said other defendants be ordered to pay the claim of the plaintiff to him; and the plaintiff prayed accordingly.

The answer of the defendant Campbell was in effect as follows:

The said firm were bankers and brokers, and had business transactions with the plaintiff, and were indebted to him at the time of their insolvency, but the amount of it was in dispute, and it was not in a fiduciary capacity. The plaintiff filed his claim for a large sum, but it was not admitted, and it was liable to contestation, and it did not arise out of any breach of trust by the firm, or by any member of it, or from any fraudulent or improper appropriation to their own use of the plaintiff's money.

He believed the plaintiff opposed the Judge's order of confirmation. Negociations for a compromise were going on for some time between the plaintiff and the members of

the said firm, irrespective and independent of the composition and discharge; and it was ultimately agreed that the plaintiff should accept from the said firm the sum of $2622.06 in satisfaction and discharge of his claim, and assign his claim to a trustee for the firm; and in pursuance thereof the said last mentioned sum was paid to the plaintiff, and was received by him in satisfaction and discharge of his claim.

The transaction was a compromise of a disputed claim, and the plaintiff was bound by it, and the assignment he made was a bar to this suit.

He denied that he fraudulently concealed his ownership of, or interest in, the shares of stock or any of them; and he says he was not the beneficial owner of and had no beneficial interest in any shares in the Northern Railway Company at any time during the proceedings in insolvency; but during such proceedings he held certain shares of the Northern Railway Company wholly as a trustee for other persons.

During the insolvency his private liabilities amounted to about $4,300, and before the first meeting of creditors, and long before the settlement with the plaintiff, he filed with the assignee of the estate a statement in writing of his private liabilities and assets, including the stock of the Credit Valley Railway Company standing in his name.

And the said stocks were then and during the insolvency proceedings, as was then well known, worthless and of no value.

The other members of the firm, in their answers, made no claim to the stocks or assets of the partnership.

Mr. Cassels admitted the firm owed to the plaintiff the amount stated by him in the bill.

Mr. Cox did not admit the amount, but said it was still in dispute.

It is not material further to refer to their answers.

The defendant Smith put in no answer to the plaintiff's bill.

There was a great mass of evidence put in, which is referred to sufficiently in the judgment.

The plaintiff now moved before the Divisional Court of the Chancery Division, by way of appeal from the judgment of Spragge, C., reported 28 Gr. 308, whereby it was held that Campbell had not been guilty of any fraudulent concealment of assets, and the plaintiff's bill was dismissed, with costs.

On February 2nd, 1882, the case was argued before Wilson, C. J. C. P. D., and Proudfoot, J.

*S. H. Blake*, Q.C., (*W. Francis* with him), for the plaintiff. As to the Northern Railway stock, one half of the shares held by Campbell formed an asset, which should have been accounted for by him in the insolvency proceedings. We neither allow the truthfulness nor the sufficiency of his statement that he held this stock on a contingency, which at the time of his insolvency had turned against him, so that he then had no actual or enforceable claim upon it. Morever the negotiations which Campbell was carrying on with regard to this stock for weeks before the time of his discharge, March 1, 1879, shew it to be impossible that he could have believed that he had no interest in it of a money value, Yet at the very time these negotiations were going on, he made no mention of the claims he was advancing to this stock. At all events there was no excuse for his failing to mention the 160 shares of the Credit Valley railway stock. He must, indeed, have had them in his mind, for he did return as an asset the ten shares which he subscribed for in that company. His one purpose throughout clearly was fraudulently and wilfully to conceal these assets from the creditors, although he knew or believed he had a beneficial claim to them. Moreover, on the ten shares he had only paid up ten per cent., while the 160 shares were paid up in full. Hence it is absurd for him to say he did not think of them, and no answer at all. This is a merely civil action, and must be treated as such, although raising questions of a higher nature, and though the result might be to shew Campbell had been guilty of

criminal misconduct. Even if it were a criminal proceeding there is evidence enough to support the charge made against him. Again, as to the $6,120 received by Campbell from the Credit Valley Railway Company, for his services as temporary President. When examined Mr. Campbell did not acknowledge more than a third of what he had received on this account; he only acknowledged the rest when compelled to do so by the testimony of other witnesses. The whole of this money is payable to the assignee, for it was a payment for services rendered by Mr. Campbell before the date of his assignmment; $900 was paid before the discharge, the rest, $5,220, after it. The discharge cannot prevail against the plaintiff, for, first. the defendants were trustees of the plaintiff for moneys deposited with them from time to time, and, secondly, because of the fraud and misconduct of Campbell. We refer to *Bump* on Bankruptcy, 10th ed., p. 717 sq., and cases there cited; 1 *Spence's* Equity Jurisprudence, p. 624, and notes as to fraud; *Hargroves* v. *Cloud*, 8 Ala. 173; *Petty* v. *Walker*, 10 Ala. 379; *Re Rathbone*, 1 B. R. 324, 536; *Re Hill*, 1 B. R. 431; *Re Gooderidge*, 2 B. R. 324; *Blumenstiel* on Bankruptcy, p. 511; *Re Adams*, 3 B. R. 561; *Clarke's* Insolvent Acts, p. 201, sec. 63; also *Ib.* p. 209, and cases cited; *McMaster* v. *King*, 3 App. 106; Insolvent Act of 1875, secs, 16, 17, 56, 60, 66, 140; *Re Tyrie*, 13 W. R. 953; *Re Moore*, 5 L. T. N, S. 806; *Re Martin and English*, 5 App. 647, 652; Imperial Bankruptcy Act, 1869, 32-33 Vict. ch. 71, sec. 15, 47.

*Maclennan*, Q.C., for the defendant Campbell. The dealings between the plaintiff and defendants as to the purchase of stock in fact amounted to a system of book-keeping. It is not necessary, under such circumstances, that the stock should be actually bought; this is only required to be done when a purchase is directed and the buyer calls for his stock. The defendants only failed in the performance of their contract because they failed in business altogether. The defendants claim the benefit of the composition and discharge as well against the alleged

fraud in their supposed character as trustees, as also against the alleged concealment of assets. As to the former, Campbell agreed to accept $2,622.06 in full of all claims. As to the charge of fraudulent concealment: With regard to the Northern Railway Stock, Campbell never established any title to any portion of it, for he never succeeded in giving it a market value within the periods fixed by his agreement; therefore these stocks were never an asset of his estate. The subsequent transfer of part of these stock to him was a matter of favour on the part of the transferors, and not of right on the part of Campbell; nor was this transfer till after the final order of March 1, 1879, though the Chancellor states in his judgment that Campbell accepted a portion of Beatty's stock on February 21, 1879. The generality of section 16 of the Insolvent Act must be read along with sections 49 to 60, to give it its true interpretation. The discharge of the defendants should be computed from the date of the deed of composition and discharge, in October, 1878; and that was long before Campbell began to negotiate to be allowed to retain a part of these stocks, and in October he had not the slightest claim upon such stock: *Ebbs* v. *Bulnois*, L. R. 10 Ch. 479; *Re Bennett's Trusts*, L. R. 10 Ch. 490. As to the Credit Valley Stock, it is true Campbell is entitled to it, but he had never claimed the scrip or certificates for it; he had never made any enquiry about them, and has never done so since, hence it is quite likely he did forget all about them. The 160 shares might as well have gone into the schedule as the ten shares, for none were of any value. Lastly, as to the compensation made to Campbell as temporary president. There was no contract for any such remuneration; Campbell had at most an expectation, which he could not insert in his schedule. These payments would not have been made if he had not been in difficulties, and were rather gratuities than dues. $5,200 of the $6,120 was paid after the confirmation of discharge, and does not in any way come within the reach of creditors.

*D. McCarthy*, Q.C. (*Foster* with him), for the defendant

Cox. If the plaintiff is merely suing for payment of his debt, the assignee in insolvency is not a necessary party to the action; but if he is suing for the purpose of reopening the insolvency proceedings the assignee must be made a party to the action. If in this case the insolvents became possessed of the property after their insolvency but before their discharge, such property will pass to the assignee and is now vested in him unless he has conveyed the insolvent estate back to the defendants, or to any of them. In the latter case the estate must be vested in such grantees or grantee. If there has been fraud or concealment on the part of the insolvents, the discharge may be impeached. But there was no such misconduct. As to the Northern Railway stock, as has already been said, Mr. Campbell did not acquire any other than a mere interest as *cestui que trust* in or to it until after the discharge was granted. If however that stock does belong to the assignee, or can in any way be claimed by him, and there be no fraud or concealment, the discharge must stand good. The discharge of the defendants takes effect from the time the discharge was given by the creditors, and not merely from the time of the confirmation of it by the Judge: Insolvent Act, sections 49, 51, 52, 53, 54; *Lewis* v. *Tudhope*, 27 C. P. 505-514; *Re McLaren* v. *Chalmers*, 1 App. R. 68; *Robson* on Bankruptcy, 3rd ed. 359; Imperial Act 32-33 Vict. ch. 71, secs. 15, 47, 48. The 47th section of the English Act, which provides for the closing of the bankruptcy, is the time to which the discharge of the bankrupt has relation, so that all property acquired by the bankrupt after that time, and before the order of discharge is granted, he retains for his own use. The effect of our own enactments contained in section 47, and the following sections, correspond in substance with the English Act. The discharge in this case is therefore to be considered as operating from the 2nd of October, 1878, when this deed of composition and discharge was executed. As to the Credit Valley Railway stock, Mr. Campbell shews he took no account of it, because he had never given it any attention. It had no value, and he had

never taken out the scrip for it, and the Chancellor was of opinion it had not been fraudulently omitted from the schedule or concealed from the creditors. With respect to the compensation received by Mr. Campbell, it forms no part of the bill; and the Chancellor was of opinion no case was made by the plaintiff which entitled him to an amendment of his bill in order to include it, because it was a gratuity only, and not a debt or claim which could have been enforced for his creditors. So far as the credibility of Mr. Campbell is concerned, the opinion of the learned Chancellor who heard the cause, and before whom the evidence was taken, and who saw the witness, is entitled to more consideration than the opinion of Judges who merely peruse the evidence which has been taken. They referred to *Bump* on Bankruptcy, 10th ed., 715; *Blumenstiel* on Bankruptcy, 512; *In re Jones*, 4 P. R. 317; *Close* v. *Mara*, 24 Grant 593; *McNeil* v. *Reliance Mutual Ins. Co.*, 26 Grant, 567, 569; *Parke* v. *Day*, 24 C. P. 619; *Re Martin and English*, 5 App. R. 647, 651; *White* v. *Elliott*, 30 U. C. R. 253; *Davidson* v. *Ross*, 24 Grant 23, 50; *Smith* v. *Hamilton*, 29 U. C. R. 394; *Singer Manufacturing Co.* v. *Loog* 18 Ch. D. 395, 427.

*G. M. Rae*, for Cassels. The bill does not charge that the partners of the firm other than Campbell had anything to do with the stocks or money in question; and if the plaintiff is entitled to any remedy against Campbell, the discharge of the other partners should not be interfered with. The English Act goes further than our Act in that respect. If the moneys deposited by the plaintiff with the defendants were trust moneys, and if the discharge did not and does not apply in such a case, the plaintiff is nevertheless precluded, for he has assigned all his claim against them and against their estate to Mr. Smith, who now represents the plaintiff's rights, and holds them for the benefit of the defendants. If the insolvency is to be opened, the application should be to the Insolvent Court. He referred to *Re Walker*, 2 App. R. 265; *Ex parte Elton*, 3 Ves. 238 242; *Rooney* v. *Lyons*, 2 App. R. 53; 40 Vict. ch. 41, sec.

26 D.; *Bump* on Bankruptcy, 10th ed., 790; *Burton* on Bankruptcy, 439, 440.

*S. H. Blake*, Q. C., in reply. If the discharge be set aside as to one partner, it must be set aside as to all. In *re Code* v. *Crain*, 3 App. R. 555, 564-5. Besides Mr. Cassels claims the stocks as partnership property. The whole case is open upon re-hearing, and evidence not before relied upon may be relied upon now. The charge against the defendants in their fiduciary character for the plaintiff is plainly in issue, and has been answered by the counsel for Mr. Campbell by opposing evidence, for he put in the cross-examination of the plaintiff. [*Maclennan* said he had the right to withdraw that evidence now, and asked leave to withdraw it. Mr. *Holmested*, registrar, referred to Chancery Orders 78, shewing that it was not of right to withdraw it.] The relief sought by the bill may as well be claimed here as in any other Court, and more properly here, because the plaintiff alleges that Smith, the assignee, of his claim against the defendants, is, on the facts alleged, a trustee for him. The charge against the defendants is that the money which the plaintiff gave them to buy particular stock with—Merchants' Bank Stock, and the like—they misapplied. The evidence of the plaintiff and of Mr. Francis, plainly shews the payments made were for specific purchases. The defendants' own evidence confirms it. The plaintiff made the assignment to Mr. Smith without a full knowledge of the facts. He can be in no worse position by making the assignment than if he had himself executed the deed and assented to the discharge. The Chancellor was right in fixing the date of the 21st of February, 1879, as the time when Campbell got Dr. Beatty's stock—for it was then in Campbell's power to take it or not—and he did afterwards take it. As to Robert's stock, Campbell says he arranged about it in New York about the same time, and that time was before the final discharge. The defendants have not fully or satisfactorily answered as to their estate and effects, and Campbell has shewn a great want of good faith throughout the whole of these proceedings. As to

the payments by the Credit Valley Railway Company to Campbell, Mr. Elliott's evidence shews they were made in such a way by the company that the money and the knowledge of the payment should be kept from the creditors. The assignee in insolvency is not a necessary party here—the bill charges that the defendants are liable as ordinary creditors, and that they are not entitled to any protection which they may claim under the Insolvent Act and the plaintiff prays that the assignment to Smith may be delivered up, and the re-conveyance to Campbell may be set aside, and these acts can only be effected in this Court. He referred to *Close* v. *Mara*, 24 Grant 593; *Rose* v. *Hickey*, 3 App. R. 309; *Morton* v. *Nihan*, 5 App. R. 20; *Williams* v. *Corbey*, 5 App. R. 626; *Kilbourn* v. *Arnold*, 5 App. R. 158; Insolvent Act of 1875, secs. 16, 66; *Re Pettit's Estate*, L. R. 1 Ch. D. 478; *Bump* on Bankruptcy, 10th ed., 715; *Kerr* on Fraud, Am. Ed., 43-44; *Bowen* v. *Evans*, 2 H. L. 257; *Richmond* v. *Tayleur*, 1 P. Wms. 733; *White* v. *Hall*, 12 Ves. 321, 324; *Rodgers* v. *Hadley*, 32 L. J. N. S. Ex. 241; *S. C.* 2 H. & C. 227; *Martin* v. *Powning*, L. R. 4 Ch. 356; *Botham* v. *Keefer*, 2 App. R. 595; *Riches* v. *Owen*, L. R. 3 Ch. 820; *Stone* v. *Thomas*, L. R. 5 Ch. 219; *Thompson* v. *Rutherford*, 37 U. C. R. 205; *McLean* v. *McLellan*, 20 U. C. R. 548; *Golloghy* v. *Graham*, 22 C. P. 226; *Shaw* v. *Massie*, 21 C. P. 266-276.

June 22, 1882. WILSON, C. J.—[After stating the facts as above set out:]—The bill charges the defendants with fraud by reason of their misappropriation, it is said, of the moneys which the plaintiff had entrusted them with to buy certain bank shares, and that in place of doing so, they applied the moneys to their own use; and it is also charged that the defendants were guilty of concealment of the Northern and Credit Valley Railway stocks before mentioned, from their creditors.

The plaintiff desires to amend his bill by adding to it the charge of the further concealment by the defendant Campbell of certain monies which he received from the

Credit Valley Railway Company for his services while acting as president of the company for more than a year, during the absence of Mr. Laidlaw, the president, in England, amounting to $6,120, and of which the plaintiff only obtained the knowledge by and in the course of Mr. Campbell's examination at the hearing of the case before the late learned Chancellor of this Court.

That amendment the Chancellor refused, because he thought it unnecessary to make it, as he was of opinion these payments so made by the company to Mr. Campbell, were not made as a debt or claim for which they were liable—or, in other words, that it was not a sum or allowance which the defendant had bargained for with, or could have enforced against the company; but that it was a mere gratuity, an allowance which the directors were induced to make by reason of the insolvency of Mr. Campbell and the necessities of his family at the time; and that in any case the larger sum of $5,200 was a sum paid after the confirmation of the order of discharge, and to that sum at any rate the learned Chancellor was of opinion the creditors could make no kind of claim.

I do not think it necessary to enquire whether the defendants received the moneys of the plaintiff from time to time for the express purpose of buying for him the particular bank stocks which he directed, and of buying the stocks in fact, in place of merely making a matter of book-keeping of such transactions with him.

There are stock transactions, properly called stock jobbing, in which no stock is either bought or sold in fact. The value of the stock in such a transaction, which is a mere speculation, or pure gambling, is agreed upon according to the market value which it bears at that time. The purchaser, if he may be called so, is debited by the broker with the market value. The broker then carries the stock for the purchaser. The purchaser must be prepared to complete the transaction when called upon—not to take the stock or to pay the price of it, for that never enters into the mind of either party—but in case of a fall in the stock,

to pay the broker the difference between the market quotation on the day of the purchase and the price it bears when he is called upon to pay. And in like manner the broker must be prepared in case of a rise in the stock to pay to the purchaser the money value of that rise whenever the purchaser calls upon him to deliver over the stock.

The broker, in such cases, guards himself by requiring what is called a *margin* to be deposited with him by the buyer: that is, a certain sum of money to be left with him to meet any fall there may be in the market; and so long as the margin is sufficient to cover the fall, the broker continues to carry the stock for the purchaser. When it is exhausted, the broker may sell the stock: that is, he may close the transaction; or he may require a further or larger margin, and if it be paid to him he will continue to carry the stock as long as that margin will cover the amount of the fall.

Whether the transactions between the plaintiff and the defendants were mere stock or gambling transactions of that kind, or were actual transactions—that is, whether their business dealings were matters of book-keeping, registering the rise and fall of the particular stocks at specified times, the differences only to be accounted for; or whether the plaintiff was to get in fact the stocks which were bought for him as his property—I need not enquire; because the plaintiff, with a full knowledge of the alleged fraud, or breach of faith, committed by the defendants against him, voluntarily assigned to Mr. Smith, as trustee for the defendants, all his (the plaintiff's) claims against the defendants, or against their estate; and he does not now impeach the validity of that assignment upon the ground that it unjustly excludes him from prosecuting his rights against them by reason of their alleged fraud and breach of trust, but he claims that it should be set aside, or be held in trust for himself, merely because the defendants have been guilty of concealing their property and assets as respects the railway stocks and moneys before mentioned.

If the plaintiff is entitled to relief because of the conceal-

ment of their property, the assignment should, so far as it may interfere with that relief, be prevented from being set up as a bar, because it did cover or relate to, yet was never intended to cover or relate to, such railway stocks or moneys; but it should not be set aside so as to allow the plaintiff to charge the defendant with liability as trustees, or for or in respect of any alleged breach of trust against which it could have been used as a defence if there had been no charge of concealment, because, as I have said, the mere breach of trust has been given up and settled for knowingly and willingly by the assignment of all claims against the defendants and their estate, which was made by the plaintiff to Alfred Smith, to the use and for the benefit of the defendants. The case must therefore be considered with respect to the alleged fraudulent concealment of the railway stocks and the monies paid by the Credit Valley Railway Company to Mr. Campbell, or as a case in which there was no fraudulent concealment, but the property in question, nevertheless, properly belonged, and belongs, to the creditors, and not to the insolvent.

In the latter case there is no reason why the insolvency proceedings if necessary should not be re-opened and carried on, in order to make a due administration of that property, and in that case the deed of reconveyance from the assignee in insolvency to Mr. Campbell should be restricted from operating upon or against the due administration of such assets, which were not dealt with in the prior proceedings In such a case it will have to be considered whether the whole cause should not be remitted to the original Court as a proceeding which has not yet been settled, and is still undetermined, and is now pending for final adjudication. I must, however, in the first place determine whether the stocks and moneys in question were such property which should have been returned by the defendants, or by Mr. Campbell, I should rather say, as assets, to which the creditors were entitled at any time before the making of the deed of composition and discharge, or at any rate before the granting of the final order upon the 1st of March, 1879.

The first enquiry relates to the Northern Railway stocks. The history of those stocks is as follows:—

In 1874 Mr. Campbell got 8,350 shares from Mr. Roberts and 2,235 shares from Dr. Beatty, upon the agreement that he was to retain one-half of the shares if he could give the stocks a marketable value. And if he could not do so as to Roberts's stock within six months, then "all in connection with the business is to be considered void, and papers mutually returned." And as to Dr. Beatty's stock within one year, he was "to retransfer" the shares if "it is found that nothing can be made out of the stock."

The stocks were entered in Mr. Campbell's name, as the holder of them, in the books of the Northern Railway Company, and Mr. Campbell was elected a director in respect of them, and acted as such for several years.

Soon after he got Mr. Roberts's stock, he made an arrangement with a friend here to give him the half of his, Mr. Campbell's, half share for his services, in aiding Mr. Campbell by legislation or otherwise to give value to the stock. That agreement did not apply to Dr. Beatty's stock, although Mr. Campbell in his letter of the 26th February, 1879, represented to Dr. Beatty that it did. In that, however, he was mistaken. The half interest in Dr. Beatty's stock had been claimed from Mr. Campbell, and he may have thought, as he says he did, that he might still be obliged to give it.

I do not think it very material to notice the assignment of these shares by Mr. Campbell to his brother at the time of the insolvency; for if the insolvent had no interest in them beneficial to the creditors, it made no difference to them, and it was only a precautionary measure; and if he had such an interest, the assignment was not fraudulently but mistakenly made, and they were subsequently re-transferred to him.

Excepting as to that assignment and the agreement made to give the one-half of his, Mr. Campbell's, half of the Roberts stock to his ally, the shares in question remained with Mr. Campbell, and on the terms of the original agree-

ment, the periods being by the assent and conduct of all parties indefinitely extended and continuing, when the following correspondence took place:—

As to the Roberts stock, Mr. Campbell, on the 18th of February, 1879, wrote to Mr. Paterson, the agent of Mr. Roberts, which letter is not produced.

On the 20th of that month Mr. Paterson answered, saying: "Mr. Roberts says, as he is anxious to get the matter snugged up, to please, on receipt of this, put his stock in his name, and mail same to him. The proxies to vote on same can be arranged for in the future."

On the 26th of February Mr. Campbell wrote: "I think that considering the labour and trouble I have been put to, and in addition the fact that in carrying on the war I have been obliged to promise a share of my moiety to other parties, that you should consent to abide by the agreement as originally entered into, and allow me to retain half * * * I would propose, therefore, to transfer half of the stock from my individual name to that of C. J. Campbell, trustee, the trust to be properly defined, and a legal instrument placed in your hands to that effect."

There is no further correspondence put in between the 26th of February and the 27th of June.

On the last named day Mr. Paterson wrote that Mr. Roberts would not pay any part of the expenses Mr. Campbell had on the 14th written he was incurring: that he "will simply place himself on the original understanding between you when the stock was sent to you." And in August after, that one-half of Mr. Roberts's stock was declared by Mr. Campbell to be held in trust for him, the other half remaining the property of Mr. Campbell, as I understand it, although the terms upon which Mr. Campbell was to receive the one-half had not been carried out.

There is nothing which shews that Mr. Roberts at any time before the final order of discharge, of the 1st of March, 1879, had proposed or agreed to give Mr. Campbell the one-half of the stock. It only appears that on the 26th of Feb-

ruary *Mr. Campbell proposed to give up one-half*, and that some time afterwards, but whether before the 1st of March, 1879, or not, Mr. Roberts agreed to give, and did give Mr. Campbell the other half.

As to the stock of Dr. Beatty, it remained also just as it had originally been, transferred to Mr. Campbell, until the 21st of February, 1879, when the former wrote to Mr. Campbell, "submitting the following propositions:"

1. That the trustee should re-transfer the stock, and should, in case the stock became of value in a year, receive the moiety of it as originally agreed upon, or

2. That the trustee should recover half of the stock, and retain the other half for a year, under an agreement similar to the original one, but if nothing came out of it in that time that the trustee should give up also one-half of that half.

On the 26th February Mr. Campbell answered: "I think that considering the labour and trouble I have been put to, and in addition the fact that in carrying on the war I have been obliged to promise a share of my moiety to other parties, that you should consent to abide by the agreement as originally entered into and allow me to retain one-half."

On the 3rd of March Dr. Beatty not assenting to the claim of Mr. Campbell renewed the former proposition, by proposing to give him one-quarter of the stock absolutely, the remaining three-quarters to be re-transferred in one year if the stock did not become of market value, but if it did, then to re-transfer only the half of the original stock, and not the whole of the three-quarters.

Mr. Campbell, on the 25th of March, wrote agreeing to that proposition.

The questions as to the Northern Railway Stock are:

1. Had Campbell any interest in these stocks available to his creditors at the time of his insolvency in September, 1878, or in other words, should he have included these stocks, or such interest as he had in them, in his schedule of assets?

2. Had he any interest in these stocks available to his

creditors at any time on or before the final order was made upon the 1st of March, 1879, that is, should he have specified such stocks, or his interest in them, in his statement of assets then exhibited for his final discharge?

The deed of assignment made by the defendants was of "all their estate and effects, real and personal, of every nature and kind whatsoever," according to the provisions of the statute.

By section 16 it is declared the assignment shall vest in the assignee "all right, power, title, and interest which the insolvent has in and to any real or personal property, including his books of account, all vouchers, letters, accounts, titles to property and other papers and documents relating to his business and estate, all moneys and negotiable papers, stocks, bonds, and other securities, and generally all assets of any kind or description whatsoever, which he may be possessed of or entitled to up to the time of his obtaining a discharge from his liabilities, under the same charges and obligations as he was liable to with regard to the same, * * but not such real and personal property as are exempt from seizure and sale under execution by virtue of the several statutes in that case made and provided in the several Provinces of the Dominion respectively, nor the property which the insolvent may hold as trustee for others."

The statutes contain no "order and disposition clause" such as is contained in the English Acts.

The interest which Campbell had in these shares was not that of a trustee only. He had a personal interest and property in them in or to which the assignors of the shares had no interest and over which they had no control. That interest might or might not be beneficial or profitable to Mr. Campbell. It would depend upon whether he could within the time agreed upon make the stock marketable, and entitle himself to his share of the stock bargained for.

So long as the contract remained in force, Campbell retained that interest in the stock; and the contract did remain in full force up to the time of the making of the deed of assignment in insolvency and after it.

There was, until that time, that is, so long as the contract subsisted, the possibility of the stock being rendered or becoming marketable; and if the insolvent had, on the day or in the month after his assignment, by means of his prior services, become entitled to the one-half of these shares, it cannot, I think, be doubted that his share of the stocks would have passed to the assignee of the estate. There was, however, no such profit made at that time. The stock was merely a fund from or by means of which a profit might, by possibility, be made; the original contract remaining just as it was until, on the 20th of February, 1879, Mr. Roberts desired his stock should then be returned to him.

And he had that right, as Mr. Campbell's services had not improved its value and there was no probability of any such improvement taking place. If Mr. Roberts had persisted in getting his stock back, according to the terms of the original agreement, the assignee in insolvency could have made no successful resistance to the demand; but he did not do so, but negotiated with Mr. Campbell, as before stated; and in June, 1879, he carried out his proposal of the 26th of February, 1879, by giving Mr. Campbell one-half of the stock, according to "the agreement as originally entered into."

At no time was Mr. Campbell's interest in the stock absolutely put an end to. He had, I think, as his efforts had quite failed, no enforceable claim against Mr. Roberts for any part of the stock. He thought he had an equitable, perhaps I should say, a conscientious or moral claim to one-half of the stock in respect of his past services, and he urged his claim in that form, and it was allowed. If these shares should have been returned as part of Mr. Campbell's assets—and I think they should have been, because he had a personal interest and property in them contingent upon the result of his services, and the language of the statute is wide enough to cover such an interest, and he could have maintained an action upon it, or he could have defended himself upon it in respect of one half of the stock if he had,

in fact, given it a marketable value—then whatever remuneration Mr. Roberts made to Mr. Campbell for his services in respect of these shares while the assignee in insolvency held them, or, what is the same thing, while he should in law have held them, the assignee would and should have received the benefit of it.

It was a valid executory contract, under which Mr. Campbell held the shares; and such a contract, in my opinion, passed, upon insolvency, to the assignee; and any benefit resulting from it by any arrangement made with the actual owner of the shares, for the past services rendered by the insolvent in respect of these shares, passed to the assignee, or should, in law, have passed to him, because the shares had, in law, passed to him and were, as to Campbell's interest, then vested in him.

If the stock of Mr. Roberts passes to the assignee, much more should the stock of Dr. Beatty be held to have also passed by the insolvency, because Dr. Beatty did not require the stock to be returned to him; and the proposition proceeded from him, on the 21st of February, 1879, to allow the insolvent to retain one-fourth of the stock absolutely, returning the remaining three-fourths in the event before stated, and that proposition was ultimately accepted and carried out.

*Wright* v. *Fairfield*, 2 B. & Ad. 727, and *Beckham* v. *Drake*, 2 H. L. 579, S. C. 13 Jur. 921, shew that "every beneficial matter belonging to the bankrupt's estate," passes to his assignee; and *Carvalho* v. *Burn*, 4 B. & Ad. 382, 393, shews that as the assignee held, or was entitled to hold the stock in respect of the insolvent's interest in it, he was entitled also to the benefit which the insolvent received in respect of his past services, under the circumstances before mentioned, upon the final settlement which was made with the actual owners of the stock, although that settlement was not perfected until after the final order was granted.

I do not think it of any consequence to say, when the discharge of the insolvents took effect, whether from the

execution of the deed of composition and discharge, that is from the time of their discharge by the creditors, or from the time of the granting of the final order by the Judge. Although I may say I think that sections 15, 25, 39, 53, 61, 63, 66, shew the act which acquits the insolvent is the confirmation of the discharge granted by the Judge, and not the discharge granted by the creditors, unless it may be when all of them join in the deed.

But it is not material here as regards this stock, because the settlement made in respect of it was not finally closed until after the making of the final order.

The cases arising under the English Act, *Ebbs* v. *Boulnois*, L. R. 10 Ch. 479; and *In re Bennett's Trusts*, L. R. 10 Ch. 490, do not apply here, because it is differently worded from our Act. In England the bankruptcy may be closed, according to the interpretation of that Act, before the order of discharge is granted. By section 25 of our Act the insolvent is subject to examination, &c., until "the confirmation of his discharge," and that enactment corresponds with the general tenor of the sections already referred to.

Then as to the Credit Valley Railway stock, Mr. Campbell gave no other reason for not returning it as an asset than that he did not think of it at the time; he said also the omission was of no consequence because it was of no value. There is no reason, therefore, why Mr. Campbell's interest in that stock should not have been transferred to the assignee in insolvency.

Mr. Campbell says he desired to transfer it, and he put it upon a memorandum, which he left for the assignee, in order that it might be treated as part of his estate.

I think he is mistaken in saying or in supposing the stock was put upon the memorandum. He returned, it is said, the ten shares of subscribed stock, amounting to $1,000, on which $900 remained unpaid, but he did not return the 160 shares of stock, amounting to the nominal sum of $16,000, upon which nothing had to be paid, and it certainly was not put upon the supplementary list, or in

any other list before the final order was made. The creditors knew nothing of it.

The remaining claim of the plaintiff relates to the sum of $6120 paid to Mr. Campbell by the Credit Valley Railway Company. Mr. Campbell's evidence relating to it is to the effect that he acted as president of the company, in the absence of Mr. Laidlaw, the president, for more than a year, ending in November, 1878. He was compensated for his services after Mr. Laidlaw's return. The sum of $500 was placed at his disposal, and he afterwards got the note of the company for $1,200. He did not put that claim for compensation in his assets; he said he did not think it fair to do so; he did not think his creditors had any claim upon it—he had no right to it till the resolution was passed allowing it. He expected his services would be paid for.

The counsel for the plaintiff in the examination of Mr. Campbell at that stage of it told Mr. Campbell if he wished to explain anything he had the opportunity of now doing so, but he said he had nothing to explain, excepting what was in the letters. Next day, however, Mr. Campbell was called by his counsel, in order to make an explanation as to the $6120. He said he had stated $500 was paid to him as compensation for his services.

The following were the dates of the payments.

| | | | |
|---|---|---|---|
| 1878. | October | 24 | $50 00 |
| " | " | 26 | 50 00 |
| " | Nov. | 2 | 150 00 |
| " | " | 30 | 500 00 |
| 1879. | Jan. | 10 | 10 00 |
| " | " | 14 | 10 00 |

And he subsequently, on the 24th of April, 1879, got two notes of the company for $2,000 each, and on the 12th of May, 1879, a note for $1,200. "I got this information from the books of the company this morning. I thought I was not bound to tell anything about what transpired after the insolvency. It had not been earned; it was not bargained for.

Q. But your services had been given? A. Yes.

Q. The consideration for which the $4000, the $1,200, and the $500 were paid had been given? A. Yes. There was no agreement for any remuneration.

Q. It was understood during Mr. Laidlaw's protracted absence that you were to discharge his duties, for which he was paid, and for some salary? A. Yes. * * I understood it was for compensation. * * Perhaps I did understand the $500 was not a complete compensation, but was just on account. I understood and believed it was on account. * * I did not draw more for some time, but I was not settled with.

Q. If Mr. Laidlaw did return in October or November, this conversation (about the compensation) might have been in January or February? A. It might have been * * I think Mr. Elliott, one of the directors, told me the sum I was to receive was $6,000 * * as a honorarium for my services."

Mr. Campbell said the two notes, amounting to $4,000, were paid by him to Mr. Hay, a director of the company, who was also a creditor of the insolvents for accommodation paper to the extent of $5,000, and who had signed the deed of composition and discharge, in October, 1878. He said: "I had it in my mind that whatever I received out of this I would devote to that purpose. * * I never mentioned my intention to any one—to the assignee, the Judge, or the creditors."

Mr. Laidlaw said in his examination, that about five weeks before he left England, in the fall of 1878—and he left about the beginning of November—he wrote to Mr. Elliott, a director, to do something for Mr. Campbell and his family. He thinks he got a letter before he left England, saying that the sum of $6,000 had been allowed to Mr. Campbell, which he, the witness, thought was too much, and he complained of it.

Mr. Elliott, one of the directors, said, he thought that $6,000 was the sum that was settled to be paid to Mr. Campbell by the directors before Mr. Laidlaw came back from England. But, as money was scarce, Mr. Campbell

was not to take it any faster than he required. The money was to help to put him in some way of business. He thinks the money would not have been paid but for Mr. Campbell's necessities. It was arranged "that it should in no way be put so that the creditors of his general estate should get hold of it. * * It was distinctly thought that it was a sum they had not a right to interfere with, and it was tried to put it in that shape that they could not interfere with it."

I have stated the evidence bearing upon this part of the case, because it appears to me to be established very plainly that Mr. Campbell's services were from the first to be paid for.

That long before the final order of the 1st of March, 1879, and sometime before the 1st of November, the amount to be paid for these services was $6,000, and that the compensation was to be managed and dealt with in such a way that the general creditors of Mr. Campbell should not be able to interfere with it.

It is said the allowance was made to help Mr. Campbell and his family, and to enable him to re-establish himself in his business, but it appears that $4,000 of the amount was not applied to the purposes of the family, or to re-establish Mr. Cambell in business, but to pay off a debt to a co-director of this company, who had, months before he received the notes, discharged Mr. Campbell from all liability by executing the deed of composition and discharge.

I entertain no doubt that the portion of the allowance of $6,120, which was payable and was allowed for services rendered up to the 16th of September, 1878, the date of the assignment in insolvency, was and is an asset, which Mr. Campbell was bound to account for to his creditors.

Mr. Laidlaw was absent about fourteen months. He returned about the middle of November, 1878. He must have left the country, then, about the middle of September, 1877; and from the middle of September, 1877, to the date of the assignment in insolvency, the 16th of September, 1878, the portion of the salary earned between those dates

should have been transferred to the assignee; that is 12/14 of the $6,120, or $5,245.72, and the remaining two months—that is, from the date of the assignment to the middle of November, 1878, or $874.28—belonged to the insolvent.

Having formed the opinion that the railway stocks, and the compensation allowed by the Credit Valley Railway Company to Mr. Campbell were a part of the assets, and should have been returned by him as such when he made the assignment in insolvency in September, 1878—I think from the evidence that I must take these assets to have been the individual assets of Mr. Campbell; they were never carried into the books of the firm; the firm knew nothing of them; the whole of the correspondence connected with the Northern Railway stock was carried on by Mr. Campbell, as if it were his separate transaction; and as to the compensation paid by the Credit Valley Railway Company to Mr. Campbell, it was, I think, part of his own estate, and I do not see sufficient to induce me to treat the Credit Valley Railway stock in any different manner from the other assets just referred to.

The next question is, whether the fact that these assets were not so returned should be held upon the evidence to have been a fraudulent concealment by Mr. Campbell of the property so as to avoid the final order of discharge, and to leave him liable for the balance of his unpaid debts, or whether the omission to make the return of such property can be excused, and the fraudulent and criminal intent can be held to have been successfully or fairly negatived?

The omission of the 160 paid-up shares from the assets, while the 10 unpaid shares were returned, were relied upon as cogent if not conclusive evidence of the fraudulent intent to conceal the property of the insolvent generally so far as he could from the reach of his creditors, and there is much to be said in favour of that contention. . . .

It is difficult to understand why the 160 shares of paid-up stock should not have been returned, while 10 shares of unpaid stock were returned. The answer of Mr.

Campbell, that he did not think of it, it must be admitted, is not satisfactory.

The reason he gave for the omission, that it really made no difference, because the stock was of no value, is entitled to more consideration, but still it is not a satisfactory one, because the want of value would equally have excused his omitting the 10 shares as the 160 shares.

Mr. Campbell further said that he had never taken out the scrip or certificates for the 160 shares, or made any use of the stock. Mr. Laidlaw does not consider these shares as valueless, although he does not place any particular value upon them. There is more excuse for the non-return of the Northern Railway stock at the time of the assignment in insolvency as part of his estate, because the actual proprietors of it were strictly entitled to the restoration of it without making any allowance to Mr. Campbell for his labour and services; and although they had not recalled it at that time, there was no prospect whatever of its being made or becoming of any real market value; and Mr. Campbell may quite reasonably have believed that he remained the mere holder and the trustee of it for the proprietors—and he says also he was advised not to put it in his schedule.

Then as to the compensation made by the Credit Valley Railway Company of $6,120. I think there is also much to be said in support of the plaintiff's contention as to it. The purpose of the directors of the company was to pay Mr. Campbell, but to keep it from his creditors; and I am of opinion that was the purpose of Mr. Campbell also. I think the evidence expressly discloses that such was the purpose both of the directors and of Mr. Campbell.

At the hearing of the cause, Mr. Campbell's examination showed, I think, an intention to withhold from the Court much information with respect to these payments, which he should have disclosed. It was said it was not until it was made manifest that the facts would come out by other means that he reappeared as a witness, and testified to the large sum of $4,000, which the company had paid him.

The learned Chancellor, from whose judgment we are now sitting in review, was of opinion these payments were not made in discharge of a debt at all, but were a mere gratuity; and he added, "I feel satisfied at any rate that the non-insertion of these moneys in the schedule, was not a fraudulent concealment within the meaning of the Act."

I think the learned Chancellor in stating "that Mr. Campbell was not informed of the resolution for granting them till after he had obtained his discharge," may be right so far as any *resolution* is concerned; but I think it is quite clear from the evidence of Mr. Laidlaw and Mr. Elliott, the directors had before Mr. Laidlaw left England, which was about the 1st of November, 1878, fixed the sum Mr. Campbell was to be paid for his services at $6,000, and as Mr. Campbell was a director, it is very improbable he was the only one who remained ignorant of a matter that was of so much importance to himself. The payments of the $4,000 and $1,200 were, from the evidence, in my opinion, postponed until after the final order was made.

I do not consider the payments to have been a gratuity. Upon the evidence there was actual service rendered by Mr. Campbell to and for the Company, and the moneys paid were given in satisfaction and discharge of those services; and if no technical objection could have been raised to an action for the recovery of the sum allowed, a jury would have been quite warranted in finding a verdict for Mr. Campbell on the merits against the Company.

The learned Chancellor said also, in speaking of the omission of the Credit Valley Railway stock, that although the excuse of Mr. Campbell that he did not think of the stock, "should be received with hesitation and caution, still, looking at the several circumstances to which I have adverted, I do not feel that I ought to come to the conclusion that the excuse he offers is untrue, and if not untrue, there was no fraudulent or even wilful omission."

The opinion of the Chancellor upon this point is entitled to the very greatest consideration, and I should have been

glad to follow it, if I were not constrained from the facts of the case to express a different opinion.

I am obliged to say that, in my opinion, the final order is impeachable and has been impeached upon the grounds stated in the bill, or, in the language of the statute, that it was "obtained by fraud."

The discharge should not be affected further than is absolutely required, and as the property in question which was not returned by the defendant as part of his estate was never entered in the books of the partnership, or treated as partnership property, but was always considered and treated by Mr. Campbell as his own private property, the discharge should not be vacated excepting as to the private estate of Mr. Campbell, if the discharge can be so dealt with.

It appears to me it can, because the insolvency proceedings were, in fact, in regard to four distinct and independent persons and properties:—Firstly, the proceedings against the partnership and partnership property; and secondly, against the three individual partners and their respective estates.

And I do not see why a matter of a penal character affecting one of the partners in respect of his private estate should invalidate the discharge as against the other two individual partners, and their respective estates: for what has Mr. Cassels's private and personal estate, or creditors, to do with Mr. Campbell's private and personal estate, or creditors? And if it have not, then what has Mr. Campbell's private estate, or creditors, to do with the partnership estate or creditors?

If Mr. Campbell's personal or individual insolvency be re-opened, or vacated altogether, he will be liable to his individual creditors, and the surplus, if any, must go to the partnership creditors, and to that extent and for that purpose the partnership insolvency may have to be opened up.

An instrument void in part is void altogether, but this discharge consists of four distinct and separate parts.

I may refer to the following cases, which shew the claims

in question passed to the assignee in insolvency. Property which is settled to take effect in possession, whenever the grantee is entitled to hold it for his own use free from his creditors, is property which the grantee is entitled to have upon a contingency, and it passes to the assignee in bankruptcy whenever the contingency happens. If it did not so pass, it would be a means of keeping creditors from getting the benefit of the estate of their debtors: *Davidson* v. *Chalmers*, 33 Beav. 653, 10 Jur. N. S. 910.

In *Webb* v. *Ward*, 7 T. R. 296, 297, Lord Kenyon, C. J., mentions a case where a lottery ticket was given to the bankrupt by a creditor who had signed the certificate, as a mark of his approbation of the debtor's conduct, but the ticket having drawn a considerable prize before the actual allowance of the certificate, it was claimed and shared by the creditors at large. In *re Dowling Ex p. Banks*, 4 Ch. D. 689; *Elliot* v. *Clayton*, 16 Q. B. 581; *Hall* v. *Pickersgill*, 1 B. & B. 282.

It is also clear that a mere gratuity cannot be claimed unless it be in the hands of the insolvent before his confirmation of discharge: *Ex parte Wicks In re Wicks*, 17 Ch. Div. 70.

The only other part of the case to be considered is whether the assignee is not a necessary party to the action, and whether the proceeding should not have been carried on in insolvency instead of in this Court, and I think it is not necessary the assignee should be a party to the action. The relief asked for does not necessitate his joinder. The bill should also be amended as desired.

PROUDFOOT, V. C.—I concur in the result of the judgment just given by the Chief Justice, though, in some respects, on somewhat different grounds.

The plaintiff gave the defendants money to invest in the purchase of Merchants Bank Stock. Money so received is held in a fiduciary capacity, (see the cases in Clarke's Insolvent Acts 203,) and is not affected by the discharge under sec. 63, of the Insolvent Act, without the express consent of the debtor; and proving the claim, and receiving

a dividend, are acts the creditor may do, without affecting the character of his claim as a fiduciary one, by the language of that section itself. In the present case the plaintiff has given no express consent to his claim being barred by the discharge. He refused to sign the composition deed. The plaintiff did however, on payment of a dividend, of eight and a half cents in the dollar I think, purport, to assign his debt to the defendant Smith. The assignment was not by deed. There was no consideration moving from Smith, but it is said he was to hold it as a trustee for the defendants. He did not sign the discharge. This whole transaction seems to me of no force or validity. Receiving the dividend does not bar the plaintiff, and beyond the dividend there was no consideration for the transfer. Smith does not pretend to have any interest, and has suffered the bill to be taken *pro confesso*. The assignment was not made in conjunction with the other creditors, which might have supplied the want of a consideration. And assuming the dividend to have been the consideration for the assignment, and the assignees to have been, as in truth they were, the debtors, then it was simply the payment of a less sum in discharge of a greater, which is no satisfaction; not even a canary has been thrown in: *Addison* on Contracts, 6th ed. p. 6. Then the assignment is not an express assent to be bound by the discharge; it is at most but a constructive assent, which under the statute is not sufficient

But if we are to take it as a compromise of the debt for a valuable consideration, it was based on a statement of the assets of the defendants, and in reliance upon its accuracy; and to enable the plaintiff to rescind the compromise it would suffice for him to show that it was entered into under a mistake caused by the defendants as to the true amount of the assets, whether the defendants acted innocently or otherwise: *Kerr* on Fraud, 332. And that it is not necessary to establish a case of *fraudulent* concealment or omission on their part, and that there was such an omission of material assets, is apparent from what has been said by the Chief Justice.

If, however, we must treat the plaintiff as having expressly assented to be bound by the discharge, and that to avoid it fraud or fraudulent preference must be shown, under sec. 56, then I have nothing to add to the judgment expressed by the Chief Justice; and agree with him that Campbell had such an interest, contingent it might be as to some of the items, in the railway stocks and in the compensation for services to the Credit Valley Railway, as ought to have been disclosed to the assignee, which he must have known, which was of value, and the non-communication of which must be taken to be such fraud as contemplated by the act.

I think, however, that the discharge should be set aside as against all the defendants.

Under our Insolvent Act provision is only made for one discharge in case of a partnership. In the case of *In re Code* and *Crain* 3 App. 555, the late Chief Justice Moss discusses the construction to be placed on sec. 56 in regard to the necessity of the requisite proportion of joint creditors and separate creditors being obtained to make valid a discharge. And at p. 564 he makes the following remarks that seem to me apposite to this case. "There is no question that the term insolvent may, if the context requires it, be read as extending to a partnership, and the argument for the respondents therefore is, that the first branch of this section is the same as if it said, 'The partners in our insolvent firm shall not be entitled to a confirmation, if they have not obtained the assent of the proportion of the whole body of their creditors in number and value required by the Act. That is a possible interpretation, but is it the only one? I think not. It seems obvious that that construction cannot be given to the very next branch of the sentence, which is separated from the preceding portion by a simple disjunctive. It will scarcely be contended that the fraud, or fraudulent preference, or evil practice, or prevarication, or false swearing, which is to prevent confirmation, must be predicable against both parties. If an application be made for the confirmation of a deed

of composition and discharge of A. and B., I apprehend that a creditor may successfully object that A. has been guilty of fraud. The result will be, that confirmation must be refused. The Court will say: A. has been guilty of fraud; the deed which seeks to discharge him cannot be sustained; and B. however innocent, must take the consequences of his unfortunate connection with such a partner, one of which is, that he must be content to obtain his discharge in the ordinary way. In such a case, it is true, a deed of composition and discharge is impossible, but that is what the law intends, because it could not be sustained without giving A. that discharge which he has forfeited by his misconduct." These remarks were made upon the 56th section, which enumerates the objections to the confirmation of a discharge, but they apply with equal force to a proceeding to set aside a discharge under sec. 66, which enacts that every discharge obtained by fraud or fraudulent preference &c., shall be null and void. It is no doubt a hard case on the innocent parties, but it is the result of a connection with Campbell, who has done the acts that avoid the discharge, and they must take the consequences.

As the Chief Justice, however, thinks the setting aside the discharge may be limited to Campbell, I assent to it, though I think the relief should be more extensive.

In this suit we have nothing to do with the administration of the insolvent estate. The suit is for the purpose of recovering a debt, on the ground that the discharge was affected by such circumstances as not to preclude the plaintiff from recovering. It is just such a right of action as might have been sued upon in a Court of Common Law before the jurisdiction of this Court was enlarged, as in *Fryer* v. *Shields*, 45 U. C. R 188, 6 App. 57, and the assignee is not, therefore, a necessary party. Indeed, I do not see what end is to be gained by making him a party. Nothing is asked against the insolvent estate. No lien or claim is made upon the property which ought to have been delivered to the assignee. The plaintiff only seeks a judgment against the defendant for payment of his debt.

[QUEEN'S BENCH DIVISION.]

## ROBERTSON ET AL. V. KELLY.

*Contract of lunatic—Validity of.*

The plaintiffs made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, one of the plaintiffs knew that the defendant was subject to insane delusions, believing that people were conspiring against him. He, however, superintended the repairs, and talked intelligently to the workmen; but some months after he became violent, and was confined in an asylum for the insane. *Held*, that the plaintiffs were entitled to recover for the work done.

IN this case the defendant was sued for work and labour performed by the plaintiffs for him upon a scow or vessel of which he was the owner.

The defence was, that at the time the work was done the defendant was, to the plaintiffs' knowledge, insane and incapable of contracting.

The case was tried at the Winter Assizes in Toronto, on the 29th January, 1883.

The work it appeared was done in the latter part of May and the fore part of June, 1880, and there was no doubt that during that time, and so long before as the previous February and March, the defendant was afflicted with a mental weakness which manifested itself in the belief that persons were conspiring against him to do him some injury, and were listening to what he was saying; and could, though at a distance, hear it though uttered in a whisper, and he would hide himself under a bed or the bedclothes, and in a dark room, in order to avoid his supposed enemies. On one occasion he endeavoured to stab a young man in the adjoining house whom be supposed to be one of those plotting againt him. It was also proved that one of the plaintiffs heard before the work was done that the defendant had been subject to these delusions, or some of them, and that his wife had had medical advice on the subject. On the other hand it was shewn that the work done was necessary and proper: that the defendant himself ordered it, and that he was present during the time that most of

it was being done, occasionally giving directions with regard to it, and that during this time he did not manifest any symptoms of insanity, or converse with the men employed about the vessel otherwise than rationally. After the work had been completed he went out with the vessel and employed her on the lake. The sailing license was made out in the name of his step-son, as it was said he was unfit to sail her, and the step-son said that he made the contracts for the sale of the stone which she brought in and received the price when sold. The defendant hired one of the men and paid him. Later in the year, about October, symptoms of insanity becoming more evident, the defendant became violent, and was removed to the Hamilton Lunatic Asylum.

*Tilt*, for the plaintiff.
*McCarthy*, Q. C., for the guardian of the lunatic.

February 6th, 1883. OSLER, J.—In *Drew* v. *Nunn*, L. R. 4 Q. B. D., at p. 669, Brett, L. J., says: "that from the mere fact of mental derangement it ought not to be assumed that a person is incompetent to contract. Mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered."

Bramwell, L. J., in the same case, p. 669, doubted whether partial mental derangement would have the effect of revoking the authority of an agent: "I think that, in order to annul the authority of an agent, insanity must amount to dementia. If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting."

In *Jenkins* v. *Morris*, L. R. 14, Chy. D., 674, the question was, whether the grant of lease of a farm was valid, the lessor at the time labouring under delusions that the farm and he and others, and things about him, were impregnated with sulphur, to get rid of and remove which he adopted very extreme measures. He also thought that

devils were always tormenting him, that his life was being sought, &c.

Rational letters, written by the lessee, relating to the lease were put in evidence. The jury were directed that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property, though he believed it to be full of sulphur. The Court of Appeal held that there was no misdirection, and that, to quote from the head note of the case, which I think accurately states the point decided, "the mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject matter of such disposition or contract: it is a question for the jury whether the delusion affected the disposition or contract."

In the case before me I am unable, after reflecting upon the evidence, to come to the conclusion that the delusions to which the defendant was subject so far affected his mind as to render him incapable of contracting for the performance of work and repairs upon his vessel. It was contended that the fact of their existence to the plaintiffs' knowledge was sufficient to disentitle them to recover, but the authorities, as I have shewn, do not go so far. See also *Campbell* v. *Hill*, 23 C. P. 473; *McDonald* v. *McDonald*, 16 Grant 37.

If the parties cannot agree, there must be a reference to the Registrar of the Queen's Bench, as official referee under sec. 47 O. J. A., to enquire and report upon the question of what is due to the plaintiff in respect of the account which is the subject of the action. See, as to the form of his report and what it should contain, *Burrard* v. *Calisher*, 46 L. T. N. S. 341.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## EVANS v. WATT.

*Seduction—Marriage to third party during pregnancy—Cause of action—Evidence of daughter and husband—Admissibility of.*

Where an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete, and cannot be divested by the subsequent marriage of his daughter before birth of a child. The facts of seduction, pregnancy, and illness might be proved by the daughter, but might refuse to answer as to who was the cause of her pregnancy if she asserted that the child she bore was born in wedlock.

But where the daughter was married to a third person during her pregnancy consequent upon her seduction by the defendant, and her child was born in wedlock, and the action was brought at the instigation of the husband, he and his wife being the only witnesses, and no proof of sickness or inability to serve was given: *Held*, ARMOUR, J., dissenting, that a nonsuit was properly entered.

*Per* ARMOUR, J. If loss of service was necessary to be proved, a new trial should be granted for that purpose; and it cannot be said that under such circumstances a father sustains no damages apart from the loss of service.

ACTION by a father for the seduction of his daughter, tried at the last Fall Assizes at Guelph, before Burton, J. A.

The daughter of the plaintiff lived in service many miles away from her father's abode.

She had a child on 17th May last. She said she had connection with defendant several times, the last being in the preceding August, the probable time of conception, nine months before the birth.

She was married on the 23rd December following to J. M. Nickle.

When she married she was probably about four months with child.

She was continuously away from the plaintiff and his protection. No attempt was made to prove any sickness from pregnancy, or anything to shew that her ability to work or serve was in any way affected by the illicit intercourse with defendant.

The facts in the evidence are further stated in the judgment of the learned Chief Justice. The learned Judge at the trial nonsuited the plaintiff.

In Michaelmas Sittings last *Dunbar* obtained an order *nisi* to set aside the nonsuit.

December 5, 1882. *Falconbridge* shewed cause. The woman was married before the birth of the child and before action. There is no complaint of improper rejection of evidence. She cannot be called as a witness, because her evidence would bastardize her child: *Roll's Ab.* 358, "Bastard;" *Vin.* Ab. 216, 217, 220, "Bastard;" *Goodright* v. *Moss*, 2 Cowp. 594. Then, if her evidence was inadmissible, there was no other for the jury, and therefore the nonsuit was right.

*Dunbar*, contra. It is a mere question of weight of evidence to overcome the presumption of legitimacy. *Ryan* v. *Miller*, 21 U. C. R. 202, *S. C.* 22 U. C. R. 87, is distinguishable. The evidence of the wife is admissible, not to shew that her husband is not the father of her child, but that the defendant had intercourse with her at a certain time. He cited *Rex* v. *Luffe*, 8 East 193; *Taylor* on Evidence, 6th ed., 845.

February 6th, 1883. HAGARTY, C. J.—Any birth of issue after marriage cannot, I think, help the plaintiff's action. The law will assume the child to be legitimate as born in wedlock, and the more especially, as pointed out in *Ryan* v. *Miller*, in Sir J. Robinson's judgment, 21 U. C. R. 204, when the husband had visited her, and was acquainted with her before, at, and after the time the child was begotten. The Court said: "We must admit the legal presumption to hold that he is the father of the child." The same point is noticed in the report of the case after the second trial, 22 U. C. 91: "The non-access of Corbett" (the husband) "before marriage, so far from being disproved, may readily be assumed."

I am of opinion that if an unmarried female be seduced, or what is a more generally correct term, commit fornication with a man, and pregnancy follow, or sickness therefrom, which weakens or renders her less able to work or serve, that the father's cause of action is complete, and can

not be divested by the subsequent marriage of his daughter before the birth of a child.

I am not discussing the amount of damage recoverable, but the mere right of action.

*Westacott* v. *Powell*, 2 Err. & Ap. R. 525, is in point. I there said, at p. 533: "I think the action is maintainable before the birth of a child, if proof be given of a pregnancy, proved to have caused illness or weakness in any sensible degree affecting the ability of the servant to work for or serve the master, (*i. e.* in nearly every case the parent.) If any injury or sickness followed the act of intercourse, creating the same disability, the cause of action would be equally complete."

Richards, C. J., says at p. 528, that what our Legislature meant was, "simply to make the service, to whomsoever rendered, in law be considered service to the parent, and to place the law in this country in all cases just where it is in England. * * I think in the case before us, if the jury were satisfied that the plaintiff's daughter was with child by the defendant, and that she had been pregnant for several months, they might assume some slight illness or inability to serve as effectually as she did before the wrongful act of the defendant; and if so, the legal right of the plaintiff to maintain the action would be established."

Spragge, V. C., and Wilson, J., differed from the majority of the Court, the latter learned Judge holding (p. 538) that the Act gave the parent a remedy against the seducer of a daughter for the act of seduction alone.

It was suggested (p. 534), if a daughter has connection with a person, and four or six weeks afterwards she is accidentally killed, her body is examined, and it is found pregnancy has commenced, would an action lie from that fact, although it had never affected her ability to serve her master or parent, and although she herself may have been unconscious of its existence?

It must be remembered that, neither in the case of *Westacott* v. *Powell*, nor in *L'Esperance* v. *Duchene*, 7 U. C. R. 146, was there any marriage with another person prior to the

birth of the child, and the only substantial question was the right to maintain the action, without waiting for the birth as the result of the wrong done.

If a parent can maintain the action as soon as pregnancy occur so as to raise the presumption of inability to serve as before (suggested by Richards, C. J.,) I do not, at present, clearly see how his action is necessarily defeated by her marrying. Nor do I clearly see how the parent may not put her in the witness box, and prove by her a connection with defendant, and that she was then pregnant, and prove either directly by her testimony or ask it to be assumed or considered as proved that her ability to serve was affected or diminished, and this even if living away from her father. I think if she chose she might refuse to answer as to who was the cause of her pregnancy, if she asserted that the child she bore was born in wedlock. It would then be reputed legitimate in law.

The plaintiff, in such a case, might urge that there was no legal objection—unless taken by her—to her stating the illicit connection with the defendant, and consequent pregnancy and illness, &c., and plaintiff might rest there, asking no questions as to subsequent birth of child, and stating that his cause of action was complete.

If this were the course taken I do not, at present, see that her subsequent answers in cross-examination as to her marriage could bar right to recover.

It is her father's suit for damages against a wrong-doer. It is not a question of inheritance of or right to property. I think if she chose she could decline to answer as to the origin of a child born in wedlock.

In the case before us there is a different state of things. The father's name is merely to support the action. It is brought by the husband of the woman.

He says that it was he that was damaged, and that he went to have the action brought, and found it must be in the father's name. The woman swears that it was her husband brought the suit; "it was not my father at all." They said they got the father's consent to his name being used.

The only witnesses examined were the woman and her husband. There is no mention or suggestion of any sickness or inability to serve either her father or any other person, or to provide for herself.

Where, as here, the pregnancy has resulted in a birth in wedlock, thereby becoming legitimate, and the husband being *primâ facie* assumed to be the father of the child, I think we must require a clear and distinct cause of action to be proved on the father's part.

He waits till after the marriage of his daughter and subsequent birth of issue, and he then brings his action, giving in evidence a pregnancy which resulted in a legitimatized birth. He has shewn nothing whatever to establish damage to himself either express or what under any legal implication could have arisen.

I think we ought not to disturb this nonsuit. I do not uphold it simply on the narrow ground that a woman cannot bastardize her issue. This rule is by no means of universal application, and cannot, merely by itself, decide the case before us.

The subject is discussed in some of the bastardy cases, such as *Regina* v. *Collingwood*, 12 Q. B. 681; *Regina* v. *Pilkington*, 2 E. & B 552; *Stacey* v. *Lintell*, L. R. 4 Q. B. D. 291.

Apart from bastardy cases the general law is very fully discussed and stated by the late C. J. Macaulay, with his usual fulness and thoroughness, in *Doe Marr* v. *Marr*, 3 C. P. 36. I especially refer to his language at pp. 44, 45, and 46.

On the general law I do not hold that there must be proof of loss of service, but I think there ought to be shewn a state of facts from which loss of service or lessened ability to serve might be assumed in favour of the father.

The conduct of the defendant seems to have been so utterly abominable that I wish the entering of nonsuit to be without costs and without prejudice to any other action. We also refuse him the costs of this argument.

ARMOUR, J.—In an action like the present brought by the father of an unmarried female for her seduction, it is

only necessary to allege and prove the relationship of father and daughter, her seduction by the defendant, that pregnacy resulted from such seduction, and that the defendant is the father of the child of which she is so pregnant, or of which she has been delivered, as the case may be.

It is not at all necessary to allege or prove that the relationship of master and servant subsisted between the father and the daughter, or to allege or prove any service whatever, or any loss of service. It may be maintained by the father although his daughter was of full age at the time of the seduction, and was living with the seducer as his hired servant at the time of her seduction, and continued so to live with her seducer until after the birth of the child.

In such a case the father could not recover damages for loss of service, but he could recover damages, which are nearly always the real damages suffered by the father, for the injury to his feelings, the disgrace brought upon him and his family, and for the mortification and blighted hopes which have been caused by the act of the seducer. See *Bigge* v. *Burnham*, 1 U. C. R. 106; *McLeod* v. *McLeod*, 9 U. C. R. 331; *Lake* v. *Bemis*, 1 P. R. 359; *Lake* v. *Bemis*, 4 C. P. 430.

The seduction followed by pregnancy gives the father the right of action, which may be brought as soon as pregnancy has resulted from the seduction. See *L'Esperance* v. *Duchene*, 7 U. C. R. 146; *Smart* v. *Hay*, 12 C. P. 528; *Westacott* v. *Powell*, 2 E. & A. Rep. 525.

What happened in this case, the marriage of the daughter after pregnancy and before the birth of the child to a person other than the seducer, is no answer to the action, because the right of action which accrued to the father upon the pregnancy was already vested in him at the time of such marriage. See *Ryan* v. *Miller*, 21 U. C R. 202. And I cannot agree that in this case the plaintiff, the father, sustained no damages by the seduction of his daughter by the defendant; for the injury to his feelings and the disgrace to himself and his family would still exist notwithstanding her marriage, and perhaps even to a greater degree

than if she had remained unmarried; for the disgrace would be enhanced by the fact that his daughter, while with child to the defendant, had still further disgraced him and his family by imposing herself, through the procurement of the defendant, upon her husband as a virtuous woman.

None of these questions which I have been discussing was raised either at *nisi prius* or before us in argument, and if loss of service was necessary to be proved in order to the maintenance of this action, it may be that if the objection had been raised at *nisi prius* the plaintiff could have proved loss of service, for it seems by the evidence that his daughter was at home from October to her marriage in December, and her pregnancy may have occasioned some loss of service during that time to the plaintiff; and I think if this Court should hold that loss of service was necessary to be proved the plaintiff should have an opportunity of proving it, and that a new trial ought to be granted for that purpose.

The main question, however, to be determined is, could the daughter, now the wife of James M. Nickle, be admitted to prove that the defendant was the father of the child of which she had been delivered, and could either she or her husband be admitted to prove non-access prior to their marriage, she and her husband being both willing that such evidence should be given.

In my opinion such evidence was admissible in a case like the present.

The most of the cases on the subject which I have met with are cases in which the child was a party to the litigation and its status was directly in question, and the residue of the cases are bastardy cases in which the status of the child was directly affected. But in this case the status of the child cannot be at all affected by this litigation. I think therefore that the cases I have referred to cannot be held to govern this case, nor can *Ryan* v. *Miller* be held to govern it, for that case was decided in my opinion on the erroneous supposition that the cases to which I have referred governed a case like it, and was therefore erroneously decided.

The plaintiff has clearly a right of action, and one that

can only be established by the evidence of his daughter, she being the only person who can prove that the defendant is the father of the child; and I think that she is a competent and admissible witness to prove that fact, if on no other ground, at all events on the ground of necessity.

In *Rex* v. *Luffe*, 8 East 193, Lord Ellenborough, C. J., said, at p. 203: "This objection, (that is, to the wife proving non-access by her husband) 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 is probably 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."

When Nickle married the plaintiff's daughter he was not aware of her pregnancy, and cannot, therefore, be said to have recognized her pregnancy in such a way as to prevent his proving non-access. The defendant, by fraud, prevailed upon him to marry the plaintiff's daughter when she was already pregnant by the defendant, and I think it more in the interest of decency, morality, and policy, that this fraud should be exposed by the evidence of Nickle than that his mouth should be closed, and that thus the defendant should escape condemnation.

The rule was not moved on the ground of the improper rejection of evidence. If it had been there must have been a new trial, for many questions were disallowed by the learned Judge which were clearly proper under any view of the case.

I refer the curious to Sir H. Nicolas's Adulterine Bastardy; Le Marchant's Gardner Peerage; *Morris* v. *Davies*, 5 Cl. & Fin. 163; *Cooper* v. *Lloyd*, 6 C. B. N. S. 519; In *re Rideout's Trusts*, L. R. 10 Eq. 41; In *re Yearwood's Trusts*, L. R. 5 Ch. D. 545; *The Guardian's of the Nottingham Union* v. *Tomkinson*, L. R. 4 C. P. D. 343.

In my opinion there should be a new trial, costs to be costs in the cause.

CAMERON, J. concurred with HAGARTY, C. J.

*Judgment accordingly.*

[CHANCERY DIVISION.]

## THE TORONTO BREWING AND MALTING COMPANY V. BLAKE.

*Company—Quorum—Election of officers—Forcible entry—Injunction—Parties—R. S. O. 150.*

Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of the plaintiff must be considered, and the Court will not generally investigate it upon an interlocutory proceeding, such as an application for an interlocutory injunction.

R. S. O. Cap. 150 requires that companies incorporated thereunder shall have not less than three directors, who shall not be appointed directors unless they are shareholders, and it was provided by the by-laws of the plaintiffs' company that a director should not only be qualified when elected, but that he should continue to be so. The plaintiffs' company was managed by three directors, and one of them disposed of his stock.

*Held*, that he thereupon ceased to be a director, and the directorate then became incomplete and incompetent to manage the affairs of the company.

*Semble*, also, even assuming that a quorum (2) of the directors could manage the business, yet, where neither the statute nor the by-laws gave the President a casting vote, resolutions passed by such vote, at a meeting attended only by the President and one other director, were invalid.

An election of officers obtained by a trick or artifice cannot be considered a *bonâ fide* election, but when shares have been actually purchased and paid for, the fact of their being purchased with a view to influence the election is no objection.

The Court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed.

Where there are conflicting claimants to the position of President of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting President, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful President.

THIS was an application for an interim injunction. The action was brought by the Toronto Brewing and Malting Company, plaintiffs, against John Netterville Blake, defendant, under the following circumstances.

The company was one incorporated by Provincial Letters Patent, under 37 Vict. ch. 5, O., with a capital of $100,000, for the purpose of carrying on the business of brewing and malting; and had their head office at Toronto, where they had been, at the time of the present suit, carrying on business for six or seven years. The capital was all subscribed, and on October 29th, 1877, it was all paid up in full,

except 169 shares, representing $16,900, which had reverted to the company by forfeiture on account of default in paying calls. On that day, the affairs of the company being in a depressed state, a resolution was passed offering those 169 shares to any one who would take them at twenty-five cents on the dollar, but none of them were disposed of on those terms. After this the affairs of the company improved and became prosperous. The number of the members of the board was fixed by by-law to be three, and on October 25th, 1880, Mr. Blake, who was the defendant herein, Mr. Hime, and Mr. Osler were elected directors, and Mr. Blake was chosen president. At a meeting of the board on May 5th, 1881, Mr. Blake and Mr. Hime only being present, a resolution was passed that $11,200 of the unissued stock should be issued to Mr. Blake at twenty-five cents in the dollar, in pursuance of the resolution of October 29th, 1877, being his proportion on a rateable allotment of the unissued stock among the existing shareholders. On the same day another resolution was passed to notify all the other shareholders that they might have their proportions of the same unissued 169 shares at par, if accepted by May 12th following, and in default of their taking them by that time they should be issued to a certain Mr. Long at par. Mr. Hime opposed these resolutions, but they were carried by the casting vote of Mr. Blake. Meanwhile, on May 6th, Mr. Osler ceased to be a shareholder by the transfer of all his shares, and his place at the board remained unfilled. Next day, May 7th, Mr. Blake subscribed in the original subscription book of the company for 112 shares, expressed to be in pursuance of the resolution of the board, and on May 9th following, he paid in to the funds of the company $2,800, or a sum equal to twenty-five cents in the dollar of their par value. On May 11th, one of the other shareholders applied for twenty shares, being the proportion he was entitled to, and subscribed for the same and paid for them at par $2,000. On May 12th Mr. Hime subscribed for the proportion he was entitled to, viz., five shares, and on May 13th, after the

time limited by the resolution of May 5th had elapsed, Mr. Long subscribed for thirty-two shares, but he never paid anything thereon, nor was any call or demand made on him for payment. On June 23rd following, a special general meeting of the company was held, expressed in the notice to be, to pass, amend, and confirm by-laws and resolutions of the company and of the directors, and to authorize and confirm the issue of debentures and other purposes. The only persons present were Mr. Blake and Mr. Hime.

At this meeting a by-law was passed forfeiting the stock subscribed for by Mr. Long for non-compliance with the terms of subscription, and authorizing the issue of the same shares (thirty-two) to Mr. Blake at twenty-five cents, and to charge the discount to profit and loss, and confirming everything that had been done by the board and the company with the stock. At the date of this meeting, May 5th, Mr. Blake had a sufficient number of shares standing in his name (twenty) to qualify him as a director, but immediately afterwards he made transfers to a banker sufficient to leave him altogether without any shares, supposing his subscription and acquisition of the 112 shares and the thirty-two shares to be illegal.

It should be stated that in pursuance of the by-law of June 23rd, 1881, Mr. Blake assumed to be the owner of the thirty-two shares subscribed for by Mr. Long, and directed a credit to be entered in the books to himself for $800 on account of expenses on the business of the company in payment of these shares at twenty-five cents in the dollar. Mr. Blake also, about June 1st, purchased the shares of one Allan (120), at not less than par, and had them transferred directly to the banker.

Shortly after this meeting Mr. Blake left for England, having empowered Mr. Hime to perform the duties of president during his absence, and having, as he alleged arranged with Mr. Hime that the annual meeting of the company should not take place till his return.

The annual meeting was to have taken place on October

29th, following, but owing to insufficiency of the notice calling it, it was not held. On November 12th, 1881, however, before Mr. Blake's return, and without his knowlege a meeting was held, at which Mr. Hime was elected president, and Messrs. Tassie and Long directors—the former president, Mr. Blake, being left off the board. Upon Mr. Blake's return from England, finding he had been ousted, he went to the company's premises accompanied by eight or ten men, and, after barring the different doors leading from the portions of the premises where the company's men were employed, he entered the office without resistance from the book-keeper, and installed himself in possession. A meeting was subsequently called, at which Mr. Blake was elected president.

The company now brought the present action, the writ in which was issued December 10th, 1881. In their statement of claim they alleged that Mr. Hime, Mr. Long, and Mr. Tassie were the present directors of the plaintiffs, and the said Hime was the president of the plaintiffs; that on the 8th inst. Mr. Blake made the forcible entry into the plaintiffs' office, above described, and either in person or by a number of men in his employ still occupied the plaintiffs' office, and was preventing the president of the plaintiffs from performing his duties, and the plaintiffs' officers from using the plaintiffs' books of account and other official books without express permission each time, and kept the keys of the plaintiffs safe and other keys in his possession, whereby the plaintiffs were impeded in their business, and were suffering great loss and damage; and the plaintiffs claim $5,000 damages; a perpetual injunction restraining the defendant his servants and agents from continuing or repeating such trespasses and wrongful acts, and from interfering with the business of the plaintiffs in any way; and an order for the defendant to give up peaceable and quiet possession, and deliver up the said books, keys, &c., the property of the plaintiffs.

The plaintiffs now made the present application for an interim injunction to restrain the defendant from continu-

ing his trespasses complained off and to force him to deliver up possession.

The motion was argued before Proudfoot, J. on 14th March, 1882.

*Robinson*, Q.C., *Maclennan*, Q.C., and *Rae*, for plaintiffs. Nothing is more clearly laid down than that a man must exercise his rights in a legal way: *Edwick* v. *Hawkes*, L. R. 18 Chy. D. 199; *Armstrong* v. *Gage*, 25 Gr. 1. There was beyond doubt a *de facto* election of Hime and Tassie, and under such election they entered peacefully into possession of the premises. Even if such election was not strictly valid, we contend that would in no way authorize or excuse a forcible entry on the part of the defendant, and the plaintiffs are entitled to be restored to possession. As to whether there was a forcible entry by the defendant there can be no doubt. He went, accompanied by eight or ten men, to overawe the parties in possession, and in the event of resistance to overcome it. If parties cannot enter peacefully they must proceed by the Courts. Upon principle the law protects those that obey the law, and the plaintiffs, who did not oppose force by force, are entitled to be put back into that position from which they were driven owing to their desire not to trangress the law; otherwise a premium is held out to lawlessness. The plaintiffs are therefore entitled to be reinstated. *Taylor* on Evidence, 7th ed., sec. 125, p. 143.

*McCarthy*, Q. C., and *Moss*, Q. C., for defendant. What we contend is, that the defendant, who was a trustee for others as well as being heavily interested himself, did what he had a right to do, and there is no principle upon which he can be summarily turned out of possession if he had, as we contend, the right to possession. We dispute the proposition laid down by Mr. Robinson, that if Blake used violence to turn Hime out, Hime, although not having the right to possession, can succeed in this motion. The case of *Edwick* v. *Hawkes* decides nothing more than that a tenant has no right to give a license to commit a breach

of the peace. Whether there was actually a forcible entry on the part of Blake is a question for a jury to decide. We do not think the evidence discloses anything of the kind. Blake did no violence; he simply brought a few men with him to protect himself in case of violence being offered him. If there was a forcible entry restitution can be ordered provided the plaintiffs have a title. The question of title must therefore be considered and the legality of Hime's election. The Court must observe that these proceedings are taken not by Hime but by the Company, and if Blake be really the President the Company are in possession and have no cause of complaint. Blake was the duly elected President in 1880, and occupied the position at the time of his departure for England in June, 1881. Previous to his departure it was arranged that there was to be no annual meeting until his return. During Blake's absence a conspiracy is entered into to oust him from his position, and Hime with only twenty-six shares procured himself to be elected. If this election were regular and legal in form the Court would set it aside as being obtained by an artifice: *People* v. *Albany, &c., R. W. Co.*, 7 Abb. Pr. N. S. 265; 1 Lans. 308. But there can be no doubt it was altogether irregular. There appear to be two classes of meetings contemplated by the Act—general and special. A general meeting is one called at stated times; a special meeting is the one referred to in R. S. O., cap. 150, sec. 31, and may be called at any time by one quarter in value of the shareholders. Now, the meeting of 12th November, 1881, was certainly not the general meeting of the company; the ordinary time for the meeting had passed. Nor was it a special meeting called by one quarter in value of shareholders. It was therefore not such a meeting as is provided for by the Act. Under the by-laws of the company the general meeting must be called by the President or Board. The meeting at which Hime's election took place was called in neither one of these ways. It purported to be called by Hime, but surely one shareholder cannot call a meeting;

and moreover the notice purported to call the annual meeting of the company, the time for which had gone by. The cases of *Cannon* v. *The Toronto Corn Exchange*, 5 App. R. 268, and *Marsh* v. *Huron College*, 27 Gr. 605, show that the notice must be precise; and on this ground also the meeting was irregular. The election of Hime being therefore invalid, both on account of its having been obtained by a trick or artifice and also as being made at a meeting improperly called, Blake is now the President of the Company and is rightfully in possession of the company's property. It there be anything in Mr. Robinson's contention that Blake took possession by force and should, although rightfully entitled, be expelled, yet as a matter of discretion this application should be refused. Blake is now managing the business of the company efficiently, and the best guarantee that he will continue to do so is, that he owns more than half of the stock. Upon the point as to Blake's being disqualified by having deposited his stock as security, they cited *Pulbrook* v. *The Richmond Consolidated Mining Co.*, L. R. 9 Chy. D. 610; *South Staffordshire R. W. Co.* v. *Burnside*, 5 Ex. 128; *Phelps* v. *Lyle*, 10 A. & E. 113; *Coningham* v. *Plunkett*, 2 Y. & C. 245.

*Robinson*, Q. C., in reply. According to the arguments on the other side, the law will do nothing to replace a man in the position he has lost through refusing to break it. This upon the ground of public policy, and upon the law as clearly laid down in *Edwick* v. *Hawkes*, is not the case. We have not to go into the question of the title of the parties, but we have the right to be replaced in the position from which we were driven by force. As to the question of forcible entry, he cited *Kent's* Commentaries, 11th ed., vol. 4, p. 130; *Coke* on Lit. 257*b*; *Regina* v. *Cokely*, 13 U. C. R. 521; *Regina* v. *Connor*, 2 P. R. 139. With reference to the election on the 12th November being obtained by deceit, there is no evidence except Blake's that Hime promised to adjourn the meeting. Moreover in *Pender* v. *Lushington*, L. R. 6 Chy. D. 70

it is laid down that so long as a man acts according to his legal rights motives have nothing to do with it. Suppose Blake had remained away a year or two could it be said that there was to be no general meeting whilst he was absent? The case of *People* v. *Albany R. W. Co.*, bears no resemblance to this. It is said that Blake owns half the stock, but he obtained 112 shares of it by passing a resolution at meeting on 5th May, 1881, that he should have it at twenty-five cents on the dollar, whilst at the same time others had to pay in full, and this was clearly illegal and void. As to the question of the proceedings being taken in the name of the company, he cited *MacDougall* v. *Gardiner*, L. R. 1 Chy. D. 13; *Pender* v. *Lushington*, L. R. 6 Chy. D. 70; *Silber Light Co.* v. *Silber*, L. R. 12 Chy. D. 717. These cases also show that if necessary Hime could be added as plaintiff. It has been insisted that the proceedings are irregular on the ground the meeting was not properly called. The right to hold the annual meeting is the right of the company; the holding it on a particular day is merely directory, and if it be not held on the day appointed surely any shareholder could call it. As to the question of convenience, it must be convenience at the time of the election. If we legally elect one President, and afterwards they illegally elect a better man, it could not be said that the last election should on the ground of convenience stand.

March 23, 1882. PROUDFOOT, J.—The plaintiffs claim that they were peaceably and rightfully in possession of the premises in question in this suit through their President, H. L. Hime, when they were forcibly dispossessed by the defendant, and they seek damages for being dispossessed, and an injunction to restore them in effect to the possession.

Upon the evidence there can be no doubt that the mode in which the defendant took possession amounted to a forcible entry. He went accompanied by eight or ten others to overawe the persons in possession, and upon

entering locked the door leading to the malt house to prevent the workmen being called to resist him. He and his men were not armed, it is true, but there were enough of them to render resistance unavailing. The defendant says he took these men to protect himself. To protect him in what? Against anticipated resistance? If resistance had been made it was intended to overcome it, and that is just the sort of high-handed proceeding that the statutes upon this subject were designed to prevent. Provisions of this nature are not confined to English law, but are contained in the laws of every State pretending to any degree of civilization. They are necessary to protect the weak against the strong, and to prevent the reign of anarchy and violence.

These proceedings are taken against such lawless acts to vindicate public authority. It is not necessary that the person dispossessed should have had a title; the prosecution is not instituted to protect the title, but the public peace. And hence generally restitution is awarded as the result of conviction. But it is said to be discretionary with the Court to award restitution. In some instances of this kind it will perhaps be found they are not an infringement of the general rule, as it was plain the interest of the person dispossessed had terminated before the application for restitution.

The right, however, is very different where redress is sought by a civil action. The remedy sought is in damages, and unless the plaintiff had a title he cannot be said to have suffered an injury to be compensated by damages, or any right to be restored to what was never rightfully his. It becomes necessary then to ascertain the title of the plaintiff. That is a question to be decided at the hearing of the cause, not generally upon an interlocutory proceeding.

I think there is no doubt of the general proposition that the Court has the right to interfere by mandatory injunction on an interlocutory application. But where that is done the right must be very clear indeed.

Had I to decide the present case at the hearing upon the materials now before me it it is very probable I should hold the plaintiffs entitled to succeed. The whole question turns on the validity of the election of November 12th, 1881.

When Mr. Osler, who was one of the directors elected in 1880, sold his stock, he ceased to be a director or eligible for one. The by-laws of the company require in a director not only the possession of the requisite qualification when elected, but that the director should continue to possess it. The statute requires the affairs of the company to be managed by a board of three directors. When Mr. Osler ceased to be a director the board was incomplete and was incompetent to manage the affairs of the company. The forfeiture of the Long stock by this truncated directory was therefore ineffectual, and so was the allotment of other stock.

But assuming that a *quorum*, (2) of the directors could manage the business. I do not see that this *quorum* ever passed the impeached resolutions. The defendant was the then president, Mr. Hime was a director. Mr. Hime voted against the president, but the resolutions are said to have been passed by the casting vote of the president. No authority was cited to shew that the president had a casting vote. The statute does not give it to him, nor do the by-laws. It would seem therefore that these resolutions were invalid.

The day for holding the annual meeting was allowed to pass without giving the necessary notice. A new notice was given for a general meeting for the 12th November. Neither the statute nor the by-laws says who shall give the notice. Usually I suppose it would be by direction of the board, or perhaps by the president, the defendant, or by some member of the board. The board as a board could not act, being incomplete. If the president were the proper person, then I think it was called by his authority. Before leaving the country he understood that the meeting was to be held, and authorized it. He seems indeed to have been under the impression that it was to

meet only to adjourn, but if he had that impression it was not derived from anything said or penned by his co-director, Mr. Hime. The defendant then, and Mr. Hime, the only directors, directed the meeting to be called, and on that authority it seems to me to have been properly called.

Then what was the position of the persons entitled to vote at the meeting, and who were capable of being directors?

Mr. Blake had transferred his shares to a banker in trust; and the 112 shares he had procured to be allotted to himself at 25cts. in the $1, and the 32 shares declared forfeited, were invalid acts. Mr. Blake was not therefore at the time of the meeting even a shareholder, much less qualified to be a director. On the other hand, I think Mr. Hime and his friends who were elected directors had qualification for that purpose. And for this purpose I do not think it very material whether the shares were purchased for voting purposes or qualification as directors or not, so long as they were *bonâ fide* the property of those in whose names they stood; and this I think they were.

Of course an election obtained by a trick or artifice cannot be considered a *bona fide* election, such as that in *The People* v. *Albany R. W. Co.*, 7 Abb. Pr. N. S. 265 1 Lans. 308; but it is altogether different where the shares have been actually acquired and paid for, the property purchased, though it may have been with the view of influencing the election. And I see no objection to the action being brought in the name of the company.

I do not admire the conduct of the parties on either side. The contest is in reality between two competing boards of directors, and each seems to me to have endeavoured to take advantage of the other.

In my opinion, Mr. Hime's board has the advantage, but it is not by any means a clear case, and other minds may easily come to a different conclusion. Were I to decide in favour of the plaintiffs it would in reality be deciding the point to be determined at the hearing, upon affidavit evidence, which may be materially affected by the examina-

tion *viva voce*. The time for the hearing of the cause is only a month distant, and there is nothing to shew that irreparable injury to the plaintiffs would happen by the delay.

I must refuse the injunction. This is not a case for costs.

I refer to *Edwick* v. *Hawkes*, 18 Chy. D. 199; *Russell* on Crimes, 5th ed., vol. 1, p. 409; *Taylor* on Evidence, 7th ed., sec. 125, p. 143; *People* v. *Albany R. W. Co.*, *supra*; *Brice* on Ultra Vires, by Green, 2nd ed., 441; *McLaren* v. *Caldwell*, 5 App. R. 363; *Hathaway* v. *Doig*, 6 App. R. 264; *High* on Injunctions, 2nd ed., secs. 2 and 13; *Kerr* on Injunctions, 2nd ed., 27, 28; *Hawkins's* Pleas of the Crown, 495; *Pulbrook* v. *Richmond Consolidated Mining Co.*, L. R. 9 Chy. D. 610; *South Staffordshire R. W. Co.* v. *Burnside*, 5 Ex. 128; *Phelps* v. *Lyle*, 10 A. & E. 113; Co. Lit. 275 *b*; *Regina* v. *Cokely*, 13 U. C. R. 521; *Regina* v. *Connor*, 2 P. R. 139; *Stephen* on Joint Stock Companies, 175-6; *Pender* v. *Lushington*, L. R. 6 Chy. D. 70; *Macdougall* v. *Gardiner*, L. R. 1 Chy. D. 13; *Silber Light Co.* v. *Silber*, L. R. 12 Chy. D. 717; R. S. O. Ch. 150; *Boone* on Corporations, sec. 68; *Gibson* v. *Barton*, L. R. 10 Q. B. 329-339; *Kiely* v. *Kiely*, 3 App. R. 438; *In re European Central Co.*, L. R. 13 Eq. 255; *Lindley* on Partnership, 4th ed., 596, 749, 587; *Kent's* Commentaries, 11th ed., vol. 4, p 130; *People* v. *Russell*, 2 Johns. 147; *Regina* v. *Harland*, 8 A. & E. 826; *Swansea Dock Co.* v. *Levien*, 20 L. J. Ex. 447; *Stevens* v. *Eden Meeting-House Society*, 12 Vermt. 688; *Cannon* v. *Trask*, L. R. 20 Eq. 669.

[CHANCERY DIVISION.]

## LAVIN V. LAVIN.

*Husband to wife—Public policy—Domestic relations.*

A being about to sell a certain property, and in order to induce his wife, B., to bar her dower, entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B. "as she may require it for the maintenance of A. and B. and their family."

*Held*, a valid agreement, and not opposed to public policy.

THIS was an action brought by Margaret M. Lavin, the wife of the defendant, by James McTague, her next friend, and the said James McTague, against Peter Lavin, claiming an order for the payment over of certain moneys by the defendant to the plaintiff James McTague, and for an injunction.

The agreement under which the moneys were claimed was set out in the defendant's answer, as follows:

"Memorandum of agreement made December 8th, 1879, between Peter Lavin, of &c., Inn-keeper, of the first part; Margaret M. Lavin, of the same place, wife of the said Peter Lavin, of the second part, and James McTague, of &c., tinsmith, of the third part.

"Whereas, the said party of the first part is about selling his tavern and buildings connected therewith, situate on the corner of Victoria street and St. Andrew's Square, in Galt, to one Peter Bernhardt for the sum of $6,250, payable as follows, viz: $3,000 in cash and the balance to be secured by a mortgage on the premises sold, and in order to get the said party of the second part to bar her dower in said lands and premises, and to make provision for the family of the said party of first and second parts, it has been and is hereby agreed as follows:

"(1.) That all money now or at any time hereafter received on account of the sale of said hotel and premises, as well as all rents received from the farm of the said party of the

first part, being, &c., shall be deposited or invested in the joint names of the said parties of the first and third parts (after first deducting sufficient to purchase a house and lot for the said parties of the first and second parts and their families to live in) and the interest and income derived from said moneys in the bank or invested, as well as the rent of the said farm, shall be paid over by the said party of the third part (who is hereby authorized to draw all interest, income and rents) to the said party of the second part as she may require it, for the maintenance of the party of the first and second parts and their family.

"(2.) That the said party of the third part shall hold the money for, and shall purchase the said house and lot for the purpose aforesaid.

"(3.) That the above agreement is to continue and be in force until there is a division of the money and property aforesaid amongst the family of the said parties of the first and second parts, and in case of such division it is agreed that the said party of the second part shall share equally with the children of the said party of the first part.

"(4.) That the above agreements and stipulations shall apply to and bind the heirs, executors, administrators, and assigns of the respective parties hereto.

"In witness whereof the said parties have hereunto set their hand and seals, the day and year first above written."

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

The action came on for trial at the Berlin Assizes, on April 3rd, 1882, before Mr. Justice Patterson, who, on the same day, gave judgment to the effect that the plaintiffs were entitled to a decree as prayed unless the defendant could shew on any ground of public policy that the agreement might not be enforced; and in order to give an opportunity to argue this question, he left the plaintiffs to move for judgment, adding that if within one month from that date the defendant should intimate to him that he did not desire to argue that question the plaintiffs were to have judgment with their costs.

On May 17th, 1882, the question was argued before Mr. Justice Proudfoot at Toronto, on motion for judgment.

*J. Bethune, Q. C.*, for the defendant, was first called on. The money is not given for the separate use of the wife; and transferring the control of the funds from the husband to the wife is contrary to public policy. The settlement in effect denudes the husband of all his property, and places the wife at the head of the house. The law does not authorize a husband to part with the control of his children: *Re Agar Ellis*, L. R. 10 Ch. D. 70; *Schouler* on Domestic Relations, 7th Ed., Ch. 2 p. 51 *et seq.*

*W. Cassels*, for the plaintiffs. Recent legislation has, as regards property, practically divorced husband and wife. but there is in this agreement no abrogation of the right of the husband. This is not different from many marriage settlements. He cited *Adams* v. *Loomis*, 22 Gr. 99.

May 31, 1882. PROUDFOOT, J.—The plaintiff, Margaret M. Lavin, is the wife of the defendant, and alleges that the defendant, though a man of considerable means, refused to furnish the plaintiff with sufficient funds to maintain herself and her family. That the defendant being about to sell a valuable hotel property, desired the plaintiff to join in the conveyance to bar her dower, which she refused to do until he made some arrangement to secure to the plaintiff a sufficient and proper maintenance for herself and her family, and that it was thereupon arranged by deed under seal, that all money then or at any time thereafter received on account of the purchase money of the hotel, as well as all rents received from a farm of the defendant, should be deposited or invested in the joint names of the defendant and the co-plaintiff McTague (after first deducting sufficient to purchase a house and lot for the plaintiff, Mrs. Lavin, the defendant, and their family to live in), and the interest and income derived from the money invested, &c., and from the rents of the farm, should be paid over by McTague, who was

authorized to draw all interest, income and rents, to Mrs. Lavin, as she should require it for the maintenance of herself and the defendant and their family, and that McTague should purchase the house and lot for the purpose specified.

The defendant, in violation of his agreement, is collecting the balance of the purchase money and interest, and investments, and the rents of the farm, and applying the same to his own use, and refuses to pay them to the plaintiffs or either of them.

And an order is asked for to make the defendant pay to the plaintiff, McTague, the money he has received in contravention of the agreement, and to restrain him from collecting or receiving any further sums of the said money.

A number of defences were set up in answer to the claim, all of which were at the hearing, before Patterson, J.A., found against the defendant, except the defence that such an arrangement was contrary to public policy, which was reserved for argument before this Division.

For the defendant it was contended that the money was not given for the separate use of the wife; and that transferring the control of the fund for maintenance of the family from the husband to the wife was contrary to public policy: that the husband was the natu al head of house, and the law would not sanction an arrangement by which he should abdicate that position, and become a dependant on the wife.

It is to be noticed that this arrangement did not deprive the defendant of all his property. He still retained the farm, at least, and it may be other property.

Nor does the agreement between the parties interfere with the dominion of the husband. He is still the head of the house, has still the right to control the children, and to require the obedience of the wife.

The writers on the subject of the relation of husband and wife say, "It is for the wife to love, honour, and obey; it is for the husband to love, cherish, and protect. The husband is bound to furnish his wife with a suitable house;

to provide, according to his means and condition of life, for her maintenance and support." And they quote with approval the language of Sir Thomas Smith, "The man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten for the nurture of the children and family; which to maintain God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason of force; and to the woman beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house so long as they remain in one:" *Schouler* on Husband and Wife, sec. 55.

The arrangement in question makes provision for the maintenance and support of the family. And it is only within the wife's sphere "to distribute that which is gotten for the nurture of the children and family." So that it in no wise impairs the husband's authority; it only secures a provision, by his own consent, of a stable and permanent character.

But the conveyance by a husband to his wife even of all his property has never been deemed to infringe any rule of public policy, unless where it offends against the statutes of Elizabeth, or the bankruptcy and insolvency laws. Post nuptial settlements, like all other voluntary transactions, are valid and binding so far as the parties are concerned, and can only be impeached as fraudulent on others: *Schouler*, Husband and Wife, secs. 71, 383, *et seq.*; *Bill* v. *Cureton*, 2 M. & K. 510; *Doe* v. *Rusham*, 17 Q. B. 724. And it cannot be less efficacious, because the wife is to hold for the benefit of herself and the children. It is only another mode of carrying out the husband's duty to maintain and provide.

The judgment will be for the plaintiffs.

[QUEEN'S BENCH DIVISION.]

## IN RE NASMITH AND THE CORPORATION OF THE CITY OF TORONTO.

*Municipal by-law—Regulation as to bread.*

By-law 1128 of the City of Toronto declared what the weight of loaves should be, and enacted that the weight of each loaf sold or offered for sale should be stamped thereon, and that all bread offered for sale of any less weight than the weight fixed by the by-law should be seized and forfeited.

*Held*, that the by-law was *intra vires* and not unreasonable.

December 5, 1882. *Rose*, Q. C., moved to set aside sub-sec. 2 of clause 1 of by-law 1128 of the corporation of the city of Toronto, amending by-law 375 relating to the weight and sale of bread, enacting that the weight of every loaf sold or offered for sale should be stamped thereon, on the grounds:

1. That the by-law was *ultra vires* the corporation.
2. That it was in restraint of trade.
3. That it was unreasonable and unjust.
4. That it was impracticable and impossible to carry out; and on grounds disclosed in affidavits.

The affidavits were, in effect, that it was a difficult and tedious operation to stamp loaves: that the stamp was easily and frequently effaced, and rendered indistinct and illegible; and that the weight to be marked on the unbaked dough would not fully correspond with the actual weight on the baked loaf when offered for sale.

The defendants filed the affidavit of the City Inspector in answer, in which he stated that he saw no practical difficulty in stamping the weight on the loaf, and that bakers had long been in the habit of stamping their names on the bread; and generally defending the utility of the by-law.

The words of the by-law were, after declaring that all bread should be in loaves of one pound, one and one-half pounds, two pounds and four pounds, respectively: "The weight of every loaf of bread sold or offered for sale in the city of Toronto shall be stamped thereon."

It then declared that all bread offered for sale of any less weight than the weight fixed by this by-law, should be seized and forfeited.

*Rose*, Q. C. The by-law is impracticable because the weight cannot be stamped on the loaf. A by-law must be reasonable: *Dillon*, on M. C., 3rd ed., sec. 319, and cases cited in note. It must not be oppressive: *Dillon*, sec. 320. He also referred to *Burn's* Justice, vol. i. p. 472; *Regina* v. *Pipe*, 1 O. R. 43.

*Mc Williams*, contra. This by-law is nothing more than a trade regulation, and the corporation can insist on the weight being stamped on the bread. See cases cited in *Harr.* Mun. Man., 4th ed., sec. 278.

The sections of the Municipal Act cited are referred to in the judgment.

February 12, 1883. HAGARTY, C.J.—It will be observed that the by-law does not say of any less weight than the weight stamped on the loaf, but "of a less *weight than the weight fixed by the by-law*," *i. e.*, one pound, one and one-half, two and four pounds, respectively.

By R. S. O. ch. 174, sec. 454, sub-sec. 18, corporations may pass by-laws "for seizing and forfeiting bread or other articles when of light weight or short measurement."

Sec. 466, sub-sec. 12, "for regulating the assize of bread, and preventing the use of deleterious materials in making bread; and for providing for the seizing and forfeiting of bread made contrary to the by-law."

The apparent meaning of "the assize of bread" seems to be "the power or privilege of assizing or adjusting the weight or measure of bread": *Wharton's* Law Dic., 4th ed., p. 94.

As far back as 51 Henry III the Legislature have made laws as to the price and sale of bread. 8 Anne, ch. 18, repeals the old Act and gives corporations the power "to ascertain and appoint the assize and weight of all

sorts of bread," &c. Sec. 3 directs "that every common baker * * who shall make or bake for sale or any way expose to sale any sort of bread whatsoever, shall * fairly imprint or mark on every loaf so by him made or exposed to sale the sort, price, and weight of such loaf, or any other mark as shall be appointed by the Court of Lord Mayor and Aldermen, or by the said other Chief Magistrates and Justices of the Peace respectively, within the limits of their said several jurisdictions," &c. They may "from time to time appoint how * each sort of bread shall be marked, for knowing the baker or maker, price, weight, or sort thereof; and to make any other reasonable rules and orders for the better regulating the mystery of baking bread, and the sort, assize, price, and weight thereof, and all things concerning the same, as they shall find necessary and convenient," under penalties prescribed.

They are to consider with respect to the price, the grain, &c., may bear in the city, town, &c., and make reasonable allowance to the bakers for their charges, pains and livelihood, which said assize shall be in avoirdupois and not troy weight.

When our Legislature authorized the defendants to pass by-laws for seizing and forfeiting bread of light weight or short measurement, they must undoubtedly have intended that the defendants should have the right to prescribe what such weight or measurement should be, otherwise there would be no means of ascertaining if it were under or of full weight.

It appears to me to be clearly within their powers of regulating the assize of bread, following this provision as to light weight, to direct that the weight should be marked thereon, as well as prescribing what the weight shall be.

We can see nothing unreasonable in this requirement. It would be the most direct and simple information to an intending purchaser of the professed weight and value of the article he was about to purchase.

As to its impracticability or inconvenience, we can see little in the case made by the applicant. That it is imprac-

cable seems contrary to all received notions and information. It may be inconvenient, as most municipal restrictions are, to dealers.

In the Statute of Anne, cited above, we find the stamping directed by Parliament nearly two centuries ago.

The practice of stamping bread is of ancient date. We read of loaves rescued from the buried cities of the first century, with the stamp of the maker's name still legible.

It seems to me to be impossible that we could hold such a direction in the regulation of the assize of bread to be so unreasonable as to call for our intervention.

In *Kelly and The Corporation of the City of Toronto*, 23 U. C. R. 426, Draper, C. J., says; "We think that the section of the by-law moved against is clearly within the powers given to the corporation, and unless in conforming to the letter they have gone beyond the spirit of the Act, and have passed a by-law manifestly unreasonable, and calculated to produce injury to the community, we should not interfere, and even then our interference would not be under the statute, but in the exercise of our common law jurisdiction."

The Act of Queen Anne seems to have governed till 1757, when 31 Geo. II. ch. 29, was passed, which repealed it and provided very elaborately for the size and weight of loaves. It does not require the weight to be marked, but they were to be stamped with letters signifying their quality, such as W., for wheaten bread; H., for household or brown bread, &c.

In 1773, 13 Geo. III. ch. 62, again made fresh provisions as to marking quality in certain cases.

In 1 *Burn's* Justice, 473, the later statutes are set out. The marking as to quality seems to be retained. Bread was to be sold by weight and scales, &c., provided for customers, &c.

In *Jones* v. *Huxtable*, L. R. 2 Q. B. 460, a conviction under 6 & 7 Wm. IV. ch. 37, was supported in appeal. The customer bought and paid for a quartern or four pound loaf, and paid the regular price therefor. He did not require it then to be weighed. It turned out to be two ounces nine drachms short of four pounds.

It was proved that the baker weighed it before going into the oven, not after: that five ounces were allowed in a quarter loaf for shrinkage in the oven: that bread would lose two ounces in twenty-four hours in a dry east wind: that the loaf coming from the oven ought to weigh and does weigh four pounds. The Court held the conviction right, as against the statute requiring the bread to be sold by weight, and that selling in this way (according to Blackburn, J.,) was selling by loaf and not by weight: that the Act compelled him to sell by weight—in other words, to ask and receive so much per pound and ounce: that the Act did not compel him to weigh at the time of sale, but in order to sell by weight it was incumbent on him to ascertain before selling that what was understood to be a four pound loaf was a four pound loaf.

This case is of course on a differently worded state of the law. I refer to it to shew that the alleged difficulty complained of by the Toronto bakers, as to shrinkage in baking and from atmospheric changes, is well understood and has to be provided for.

In the case before us the by-law declares what the weight of loaves shall be—the maker must stamp the weight on the loaf—and declares in effect that the loaf as sold shall not be less than the prescribed, not the stamped weight.

It throws in fact on the baker the burden of selling his bread of the stipulated weight, and he must also incur whatever trouble or precaution may be necessary in the way of allowance for shrinkage, &c.

The only part of the by-law moved against is this short section as to the stamping.

It appears to me clear that we cannot hold such a provision illegal.

If the section as to stamping were omitted from the by-law, the applicant's complaint would be just the same. He would be liable to fine if the loaf was not of the prescribed weight, viz., one pound, one and a half pounds two pounds, or four pounds; and the shrinkage question would remain just where it was.

In the peculiar way in which the by-law is worded, the matter may not be so important as the parties on the argument seem to have supposed.

I think the motion should be dismissed, with costs.

ARMOUR and CAMERON, JJ., concurred.

*Judgment accordingly.*

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## VOGEL v. GRAND TRUNK RAILWAY COMPANY.

*Railway Act* 1879, 42 *Vict. ch.* 9, *sec.* 25, *sub-sec.* 4—*Carriage of live stock—Special contract—Liability for negligence.*

The Railway Act, 1879, 42 Vict. ch. 9. sec. 25, sub-sec. 4, which declares that the party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, conditions, or declarations, if the damage has arisen from any negligence or omission of the company, or of its servants, is applicable to the defendant company, and the words "in the premises" means the premises as set out in the previous sub-sections.

The plaintiff shipped live stock on the defendants' railway, subject to the conditions on a shipping bill, one of which was that live stock was taken entirely at the owner's risk of loss, injury, or damage, whether in loading or unloading conveyances or otherwise, and that all live stock should be carried by special contract only. The animals were killed or lost by the defendants' negligence.

*Held*, that the defendants could not escape liability by their conditions, for their liabilty was expressly provided for by the above clause of the Railway Act.

SPECIAL ACTION for the value of certain horses carried for the plaintiff on the defendants' railway, and killed or lost by an accident arising from negligence. The defence was rested on certain special contracts on which the animals were shipped.

On April 1st, 1882, they were shipped at Belleville on an order or shipping bill, signed by the consignor, "to be sent" to the plaintiff at Prescott, subject to certain terms and conditions therein, "which are agreed to by this shipping note, delivered to said company as the basis on which their receipt is to be given for said property: one car of horses, owner's risk."

On the back it was (amongst other things) declared that live stock "is taken entirely at the owner's risk of loss, injury, or damage, * * whether in loading and unloading, conveyance, or otherwise * * all live stock shall be carried by special contract only," &c. When free passes are given to those in charge it is on the express condition that the company are not responsible for any negligence, default, or misconduct of any kind as to the injury of the person using the pass. A receipt for the animals was given by the defendants in the same form and conditions.

It seemed admitted on the argument that but for these special conditions the company would be liable.

The plaintiff urged that by statute these conditions could not avail where there was actual negligence.

To this the defendants replied that their company was not bound by any such statutable provision; and secondly, that even if so bound the law did not prohibit their making a special contract for the carriage of goods.

The case was tried at Belleville, before Wilson, C. J., and a jury.

The jury found in substance that the horses were not carried under the special contract, and that the plaintiff did not know what the terms on the back of these bills were, but that he supposed the terms were of the like nature as those upon the other papers he had signed for the carriage of horses by the Grand Trunk.

The jury assessed the damages at $725.

The learned Chief Justice entered the verdict for the defendants.

In Michaelmas term last a rule *nisi* was obtained to set aside this verdict and enter it for the plaintiff, because on the facts found by the jury it ought to be so entered, and because the damage having been occasioned by defendants' negligence, they were liable notwithstanding the conditions in the contract under the Consolidated Railway Act 1879.

December 7, 1882.—*Wallbridge*, Q. C., and *Dickson*, Q. C., in support of the rule. The verdict should be entered for the plaintiff for the amount assessed by the jury. The jury found the horses were not carried under the special contract: *Scott* v. *Great Western Railway Co.*, 23 C. P. 185. The special contract did not relieve defendants from loss caused by negligence or omission: *Scarlett* v. *Great Western Railway Co.* 41 U. C. R. 211. Irrespective of the statutes, the special contract only protected the defendants from their common law liability of insurers as common carriers: *Phillips* v. *Clark*, 2 C. B. N. S. 156; *Martin* v. *Great Indian Peninsular Railway Co.*, L. R. 3 Ex 9; *D'Arc* v. *London & Northwestern Railway Co.*, L. R. 9 C. P. 325; *Grand Trunk Railway* v. *Fitzgerald*, 5 S. C. 204; *Czech* v. *The General Steam Navigation Co.*, L. R. 3 C. P. 14.

The statutes cited are referred to in the judgment.

*Bethune*, Q. C., contra All former railway Acts were repealed by 42 Vic. ch. 9, D., which, by sec. 2, is not applicable, from sec. 5 to sec. 34, to the defendants' railway; and sec. 100 made only sub-sec. 4 of sec. 25 applicable. He cited *O'Rourke* v. *Great Western Railway Co.*, 23 U. C. R. 427; *Hood* v. *Grand Trunk Railway Co.*, 20 C. P. 36; *Hamilton* v. *Grand Trunk Railway Co.*, 23 U. C. R. 600; *Spettigue* v. *Great Western Railway*, 15 C. P. 315; *Bates* v. *Grand Trunk Railway Co.*, 54 U. C. R. 444.

*Dickson*, Q. C., in reply. The 102d section of the Consolidated Railway Act of 1879 declares that said Act shall not be construed as a new law, but as a consolidation.

February 12, 1883. HAGARTY, C. J.—The statute law has been in a most unsatisfactory state.

The Consolidated Railway Act of 1868, 31 Vic. ch. 68, sec. 20, sub-sec. 2, directed that trains should run at named hours, and should have sufficient accommodation for the transport of all such passengers and goods as might be offered within a reasonable time before starting, &c.

Sub-sec. 3: "Such passengers and goods shall be taken,

transported, and discharged at, from, and to such places, on the due payment of the toll, freight, or fare legally authorized therefor."

Subsec. 4: "The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company."

This Act is declared (sec. 2, sub-s. 2) to be applicable, as to secs. 5 to 22, to all railways to be thereafter constructed under any Act passed by the Parliament of Canada.

This Act does not apply to defendants' company, but must be referred to to understand subsequent legislation.

By the Act of 1871, 34 Vict. ch. 43, sec. 5: "Sub-sec. 4 of sec. 20 of *The Railway Act* of 1868 is hereby amended by adding thereto, after the word 'company' therein, the following words: 'From which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants.'"

Sec. 7: "The provisions of this Act shall apply to every railway company heretofore, or which may be hereafter incorporated, and to every railway heretofore constructed, or now in course of construction, or hereafter to be constructed, as well as to those railways and railway companies to which the said *The Railway Act*, 1868, is by its provisions declared to be applicable."

*Scott* v. *Great Western R. W. Co.*, 23 C. P. 185, and *Allan* v. *Great Western R. W. Co.*, 33 U. C. R. 489, decided that this last clause had not the effect of applying the amended clause to all railways, but left it merely as a part of the Act of 1868.

By the Act of 1875, 38 Vict. ch 24, amending the General Railway Act, sec. 4: "This Act and sec. 50 of '*The Railway Act*,' as hereby amended, *and sec. 20 of 'The Railway Act, 1868,' as amended by sec. 5 of the Act 34 Vict. ch. 43*, shall apply to every railway company heretofore incorporated, or which may hereafter be incorporated, and which is subject to the jurisdiction of the Parliament of Canada."

The Act of 1879, 42 Vict. ch. 9, professes to be "An Act

to amend and consolidate 'The Railway Act, 1868,' and the Acts amending it."

It declares (sec. 2) that sec. 5 to sec. 34 shall apply to the Intercolonial Railway; and (sub-sec. 2) "to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada."

Sec. 25, under the head of "working of the railway," contains the sub-section in the Act of 1868, as to servants wearing badges, &c. Sec. 20, sub-sec. 1.

Sub-sec. 2 is as to starting trains at regulary notified hours, with accommodation for the transport of passengers and goods, &c.

Sub-sec. 3: "Such passengers and goods shall be taken, transported, and discharged at, from, and to such places, on the due payment of the toll," &c.

Sub-sec. 4: "The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company; from which action the company shall not be relieved by any notice, condition, or declaration if the damage arise from any negligence or omission of the company, or of its servants."

Sec. 100: "The enactments contained in sub-sec. 18 of sec. 7" (as to branch lines) "in sub-sec. 28 of sec. 9" (as to warrant for possession of land), "and in sub-secs. 1 to 8 of sec. 62" (as to by-laws for their officers), "*and sub-sec. 4 of sec. 25 of this Act*, were declared by the Act 38 Vict. ch. 24 (1875), to apply to every railway company theretofore incorporated, or which might thereafter be incorporated, * * and they shall so apply accordingly."

Sec. 102: "Subject to the provisions hereinafter made the Act passed, * * and known as 'The Railway Act, 1868';" then all the succeeding Acts by name (including the Act of 1875, applying sub-sec. 4 to all railways),—"are hereby repealed, and this Act is substituted for them. * * This Act shall not be construed as a new Act, but as a consolidation and continuation of the said repealed Acts, subject to the amendments and new provisions hereby made and incorporated with them."

By 44 Vict. ch. 24 the Act of 1879 is amended.

By sec. 4 sec. 30 of the Railway Act of 1879 (as to making returns), as amended, and sub-sec. 5 of sec. 15, as amended (highways and bridges), are to apply to every railway and railway company subject to the legislative authority of the Parliament of Canada.

In the same Session of 1881 is ch. 25, to amend and consolidate the laws as to Government railways vested in Her Majesty. Under the head, "Working the Railway," beginning at sec. 65, are clauses substantially like those in the Act of 1879, especially secs. 71, 72, 73, 74, corresponding almost *verbatim* to sec. 25 and sub-sec. 2, 3, and 4, already quoted, as to the servants, the receipt and carriage of goods, and especially the provision in sec. 74: "The department shall not be relieved from liability by any notice, condition, or declaration, in case of any damage arising from any negligence, omission, or default of any officer, employee, or servant of the department; nor shall any officer, employee, or servant be relieved from liability by any notice, condition, or declaration, if the damage arise from his negligence or omission."

The case stands in a peculiar position as regards the statute law.

When the Act of 1879 was passed the clauses already cited as to conveyance of passengers and goods, and liabilities, were under the Act of 1875 applicable to all railways under the power of Parliament.

This consolidated Act is clearly not intended for universal application. Railways constructed under any Act of the Parliament of Canada must, I think, not be held to include Acts of the Legislature of the late Province of Canada. The Union Act, 1840, calls it the Legislature of the Province of Canada, and the Acts purport to be passed "with the advice and consent of the Legislative Council and Assembly of the Province of Canada."

The B. N. A. Act, 1867, creates a Parliament for Canada, consisting of the Queen, Senate, and House of Commons: Sec. 17.

I am of opinion that we must read the Act of 1879 as containing this restrictive clause—sub-sec. 4 of sec. 25—and that the apparent omission to declare the two preceding sub-sections to be in like manner applicable to all railways cannot hinder its full effect to the extent it previously had.

When it says, "The party aggrieved by any neglect or refusal *in the premises*," we must hold it to mean in reference to the premises in which it stood, or on which it was based, in the Act from which it was taken.

The Legislature found the law expressed in the whole 20th section, as amended by the Act of 1871, to be declared applicable to all railways, and they, with such knowledge, declare this particular sub-sec. 4, creating the liability, to be of universal application.

They also declare that this Act of 1879 is not to be construed as a new Act, but as a consolidation and continuation of the repealed Acts, which they specially recite.

We must, I think, treat this liability clause to be applicable to these defendants, and that the words "in the premises" are to be considered as meaning the premises set out in the previous sub-sections. They adopt all the sub-sections; the only omission was in not declaring the applicability of the whole to all railroads, as they do to this sub-sec. 4.

We must now discuss its effect.

Mr. Bethune, for the defendants, argued that the words declaring that they could not relieve themselves from the consequences of negligence "by any notice, condition, or declaration," only referred to general notice to the public, and did not prevent their entering into a special contract with the shipper of goods as to their non-liability for negligence.

If we accept this view I fear we would completely neutralize the effect of the clause.

They cannot escape liability by any "condition or declaration." This printed receipt or shipping bill specially declares that they will not be liable, and that the goods are received on the conditions there stated,

which special conditions are headed "General notices and conditions of carriage," and are so repeated in the order they require the shipper to sign.

Can we say that these documents do not very clearly shew a notice, condition, and declaration limiting the liability?

The defendant's view imports that we should read the clause with the added words, "unless such notice or condition be contained in some writing made between or signed by the parties."

I think we must give the words used by the Legislature their full ordinary meaning and significance, and that they meet the case before us. The plaintiff agrees in writing to the conditions as to non-liability.

I see no difference between his doing so and his shipping his goods after being verbally told that they would carry on no other condition.

It may be that this construction presses hardly on railway companies, and that there are many classes of goods of a peculiarly dangerous, delicate, or brittle character, as to which they ought justly to be allowed to make contracts reasonably limiting their liability.

This can be done in England under special railway enactments. See Railway and Canal Traffic Act, 1854, and the very late case of *Brown* v. *Manchester, Sheffield, and Lincolnshire R. W. Co.*, in the Law Times of December 23rd, 1882, at p. 146.

The contention was, that the company took the plaintiff's fish at a less rate than their ordinary rate on a written agreement that the plaintiff would free the company for loss or damage by delivery in transit or from whatever cause arising.

This case shews the strictness with which such conditions are construed. The report says that Brett, L. J., said "that the effect of the condition would be to absolve the company from loss or damage when it arose from the negligence or wilful acts of the company's servants. The company, in fact, refused to accept any legal liability

whatever. * * No condition could be reasonable which sought to reduce the liability of the company below that of a gratuitous bailee, *i.e.*, to take the same care which a reasonable owner of goods would take of them." He refers to *Lewis* v. *Great Western R. W. Co.*, 3 Q. B. Div. 195, where the subject is fully discussed.

The carriage of live stock on our railroads has for some years been a very large branch of traffic, but the law seems to make no distinction as to liability for the different classes of articles carried, and "animals" are often noticed in the statutes as carried by the railroads.

In England the companies sometimes adopt a reduced tariff for goods, and are allowed to limit their liabilities in certain cases as to those who elect to take advantage thereof.

I desire to express no opinion as to their right, when they carry a drover or other person free, to take from him a valid agreement to release them from liability for injuries caused by negligence.

The plaintiff's damage in this case is conceded to have been caused by the defendants' neglect. I think the rule must be absolute to enter the verdict for him for the damages assessed.

ARMOUR and CAMERON, JJ., concurred.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## REGINA v. WALSH.

*Canada Temperance Act*, 1878—*Conviction—Hard labour—Proof of Act being in force—Jurisdiction of magistrate—Certiorari—Several offences.*

The defendant was convicted of selling intoxicating liquor contrary to the Canada Temperance Act, 1878, upon an information charging him with keeping, selling, bartering, and otherwise unlawfully disposing of liquor. He was adjudged to pay a fine of $50, and $5.20 costs, and in default of payment and of sufficient distress, he was adjudged to be imprisoned in the common gaol at *hard* labour. A second record of the conviction, bearing the same date as the first, was filed, differing in some minor points from the first, and omitting the adjudication as to hard labour, and adjudging the payment of $5.27 costs. The proceedings having been removed by *certiorari*,

*Held*, that the first conviction was bad for want of jurisdiction to impose hard labour, which was not authorised by the Act, and that the second was bad in not following the actual adjudication as to costs, which were, as shewn by the magistrate's minute, $5.20, and not $5.27.

The Canada Temperance Act does not *per se* make the selling of intoxicating liquor an offence; it is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part, which proceedings cannot be judicially noticed but must be proved, and in the absence of such proof the magistrate acts without jurisdiction.

*Held*, therefore, that the convictions were bad, for they did not allege that the Act was in force, nor was it proved otherwise, and therefore, as the jurisdiction of the magistrate did not appear, the writ of *certiorari* was not taken away by sec. 111 of the Act.

*Quære*, whether the convictions were not also open to objection on the ground that the information embraced more than one offence, and whether the magistrate having, in this respect, disregarded the express directions of the Act 32-33 Vict. ch. 31, sec. 25, made applicable by the Canada Temperance Act, he might not be said to have acted without jurisdiction.

*Quære*, whether sec. 111 takes away the *certiorari* in all cases, or only in cases coming under sec. 110.

THE defendant was convicted before William Hixon Young, Esquire, Police Magistrate in and for the county of Halton, for that he did, on the 20th day of June, 1882, at the town of Oakville, in the county of Halton, sell intoxicating liquors contrary to the provisions of the Canada Temperance Act of 1878, and the other Acts in relation thereto; and was adjudged for the said offence to forfeit and pay the sum of fifty dollars, to be paid and applied according to law, and also to pay to James A. Fraser the sum of five dollars and twenty cents for his costs; and if the

several sums were not paid on or before the first day of August, 1882, the said Police Magistrate ordered and adjudged the same to be collected by distress and sale of the goods and chattels of the defendant; and should there not be found sufficient goods and chattels to satisfy the said amount on said distress warrant, then the defendant was adjudged to be imprisoned in the Common Gaol of the said county of Halton, at Milton, in the said county of Halton, for the space of two months, *at hard labour*, unless the said several sums, and all costs and charges of the said distress, and the costs attending the arrest and conveying the defendant to the said gaol, should be sooner paid.

The information on which the conviction was had was laid by one James A. Fraser, and charged that the informant had just cause to suspect and believe, and he did suspect and believe that the defendant, within the space of thirty days last past, to wit on or about the twentieth day of June, at the town of Oakville, in the county of Halton, *did keep, sell, barter, and otherwise unlawfully dispose of intoxicating liquors, contrary to the form of statute in such case made and provided.*

On the 8th December, 1882, a writ of *certiorari* was issued, directed to the said Police Magistrate and to the clerk of the peace of the county of Halton, commanding them to send to the High Court of Justice, Queen's Bench Division, at Toronto, all and singular the information, depositions, evidence, conviction, orders and proceedings against the said William Walsh, with all things touching the same, as fully and entirely as they remained in the custody of them or either of them.

On the 6th day of January, 1883, there was returned and filed in the said High Court of Justice, Queen's Bench Division, by John Dewar, Esquire, clerk of the peace of the said county, the said writ of *certiorari*, together with a return thereto, setting forth the said information, the depositions and evidence taken before the said Police Magistrate, the minute of the magistrate's judgment or decision, and the conviction above set forth, all of which appeared to

have been filed in the office of the clerk of the peace on the 20th day of July, 1882. There was also returned with the said writ of *certiorari* another conviction bearing the same date, which was as follows: "Be it remembered that on the 20th day of July, 1882, at Milton, in the county of Halton, William Walsh is convicted before the undersigned, Police Magistrate in and for the county of Halton, for that he the said William Walsh, on the twentieth day of June last past, at the town of Oakvllle, in the county of Halton did *unlawfully* sell intoxicating liquors contrary to the form of the Canada Temperance Act of 1878, *James A. Fraser, License Inspector of the said county, being the complainant.* And I adjudge the said William Walsh for his said offence to forfeit and pay the sum of fifty dollars ($50), to be paid and applied according to law, and also to pay *the said* James A. Fraser the sum of five dollars and twenty-seven cents for his costs in this behalf, and if the several sums be not paid on or before the first day of August next, I order the same to be *levied* by distress and sale of the goods and chattels of the said William Walsh, and *in default of sufficient distress* I adjudge the said William Walsh to be imprisoned in the common gaol of the said county of Halton, at Milton, in the said county of Halton, for the space of two months, unless the said several sums, and all charges of the said distress and the costs attending the arrest and conveying the said William Walsh to the said gaol, shall be sooner paid. Given under my hand and seal this twentieth day of July, 1882, at Milton, in the county of Halton aforesaid.

(Signed) "W. H. YOUNG, P.M." [L.S.]

This second conviction, which was filed in the office of the clerk of the Peace on the 23rd November, A.D. 1882, omitted the imposition of hard labour, and differed from the former conviction in the use of the language italicised, and made a difference of seven cents in the amount of costs adjudged to be paid the informant.

The minute of the conviction made by the Police Magistrate at the time of the conviction of the defendant, was as follows:

"Be it remembered that on the twentieth day of July, in the year of our Lord one thousand eight hundred and eighty two, William Walsh is convicted before me, Police Magistrate in and for the county of Halton, for that on the twentieth day of June last past, he, the said William Walsh, did keep, sell and otherwise unlawfully dispose of intoxicating liquors. I do adjudge that the said William Walsh do forfeit and pay a fine of fifty dollars and $5.20 as his costs, and if the two several sums be not paid I adjudge that the said William Walsh be imprisoned in the common gaol at Milton, in the aforesaid county, for two months at hard labour, unless the said several sums and costs of conveying him to the said goal be not sooner paid.

(Signed) "W. H. YOUNG, P. M.

"Milton, July 20th, 1882."

On the 9th January 1883, *Tizard*, counsel for the defendant, obtained before Osler, J., sitting in Court, a rule *nisi*, calling upon the Police Magistrate, William H. Young, and James A. Fraser, the complainant, to shew cause why the said conviction of the defendant should not be quashed and set aside with costs, upon the grounds:

(1.) That the information as laid was bad inasmuch as it charged two or more offences.

(2.) That there was no evidence to sustain the information or conviction.

(3.) That there was no evidence that the Canada Temperance Act of 1878 was in force in the county of Halton at the time of the committing of the said alleged offence, or at the time of the said information or conviction.

(4.) That the said conviction was bad, inasmuch as the said William H. Young, Police Magistrate in the said conviction, in the event of no sufficient goods and chattels of the said William Walsh being found to satisfy the amount in the distress warrant to be issued by him in said conviction mentioned, imposed the penalty upon the said William Walsh of being imprisoned for the space of two months at hard labour, and there was no provision in the Canada Temperance Act of 1878, or in the other Acts relating thereto.

authorizing or empowering the imposition of imprisonment at hard labour upon any one convicted thereunder.

On the 23rd day of January, 1883, *Fenton*, shewed cause, and contended that the defect in the conviction first returned to and filed in the office of the Clerk of the Peace, by reason of the imposition of imprisonment at hard labour, had been removed by the filing of the second conviction, which was filed before any proceeding had been taken to quash it; and for any cause except the want of jurisdiction in the magistrate over the offence or person of the defendant, by the express provision of section 111 of the Canada Temperance Act, the right to remove a conviction had been taken away, and the writ in the present instance had improvidently issued by reason thereof; and though it did not appear in evidence that the Canada Temperance Act was in force in the county of Halton, it must be assumed that the magistrate would not have acted unless, as the fact was, it was in force in the county, and it rested with the defendant to shew affirmatively the want of jurisdiction, and not having done so, his application to quash the conviction must fail.

*Tizard*, supported the rule, and contended that the amended record of the conviction was not supported by the actual adjudication of the magistrate, and after the return of the first record of the conviction to the clerk of the peace the Police Magistrate was *functus officio* and could not amend the record; but in any event it was necessary to shew upon the face of the proceedings or in evidence that the Canada Temperance Act was in force, and as that had not been done the conviction could not be allowed to stand. He contended further that the right to the writ of *certiorari* was not taken away by section 111 of the Temperance Act except in respect of the cases mentioned in section 110, and the offence in the present case was not one coming under section 110.

February 27, 1883. CAMERON, J.—I am of opinion that neither the conviction first returned to the clerk of the peace, nor the second one in amendment thereof, can be upheld. The first conviction was clearly bad for the want of jurisdiction in the magistrate to impose hard labour upon the defendant; and the second, assuming it was competent for the magistrate to make and file a second conviction, or rather record of his conviction, is defective in not following the actual adjudication of the magistrate as to costs. By the adjudication the amount of costs awarded against the defendant was $5.20. By the second or amended conviction he is adjudged to pay the sum of $5.27, and payment of the unauthorized seven cents may be enforced by the imprisonment of the defendant. The difference is small, but the principle is the same as if it had been for a larger and more important amount. The magistrate's original minute of his adjudication makes the costs $5.20, and the first formal record of the conviction does the same. It is difficult to conjecture how the error in the second record of the conviction arose, when it is clear that record was made with a view to remove all objections to the legality of the conviction, and its framer was alive to the necessity for care in view of an application to quash it.

But were the convictions not bad on the grounds just stated, they are still open to the objection that it does not appear that the Canada Temperance Act is in force in the county of Halton. On the argument I was impressed with the contention of Mr. Fenton, that it would not be intended that the magistrate was usurping jurisdiction if under any circumstances he could have at the time of conviction jurisdiction over the offence charged and the person of the accused; but on further consideration I have come the conclusion that what is essential to give the magistrate jurisdiction must be proved or stated in the conviction. If it had been alleged in the conviction that the Act was in force in Halton, the burden of shewing it was not would be cast upon the defendant, but nothing whatever is brought

before the Court upon the question whether the Act is in force or not.

If a statute absolutely prohibits an act and assigns a penalty for its commission, the accused will be assumed to know and will be responsible for contravening it. But when the statute declares the prohibited act shall only be an offence after some subsequent proceedings are to be taken and promulgated, though a person in ignorance that such subsequent proceedings have been taken may be responsible for committing the prohibited act, it is essential to prove as against him that such proceedings have been taken, whereby his otherwise innocent act has become an offence.

In *Regina* v. *Bennett*, 1 O. R. 445, I considered the question, and held proof by the official *Gazette* or otherwise that the second or prohibitory part of the Temperance Act was in force was essential to warrant a conviction for the unlawful sale of liquor in the county of Halton. The objection was not taken in that case, that the right to the writ of *certiorari* to remove a conviction had been taken away by the Temperance Act, and my judgment was pronounced without reference to or consideration of that question.

The general rule of law respecting jurisdiction in summary procedings before Justices of the Peace is, that the jurisdiction shall be shewn on the face of the proceedings. *Primâ facie* the sale of liquor is not an unlawful act, and if by reason of any local law of which judicial notice is not required to be taken it becomes unlawful, it is essential to shew the local law or the circumstances which gave it its criminal character to give jurisdiction to a Police or other magistrate, so as to justify a conviction for such sale. I think the decision of *Regina* v. *Bennett* is binding upon me, and well or ill decided is law till overruled in Appeal or by a Divisional Court. But further consideration of the subject leads me strongly to the conclusion the law there was correctly laid down and is not open to serious question. Where there is no statutory provision to the contrary,

jurisdiction in an inferior Court should appear on the face of the proceedings. In reference to this, Coleridge, J., in *re Peerless*, 1 Q. B. 154, uses the following language: "By a legal warrant I mean a warrant which upon the face of it shews a right to detain, and that right cannot exist unless there be jurisdiction in the magistrates. To deny that this must appear upon the face of the proceedings is to call in question one of the most important rules of criminal law." And Lord Ellenborough, in *Rex* v. *Hazell*, 13 East 141, said: "We can intend nothing in favour of convictions, and we will intend nothing against them." And Baron Parke, in *Gosset* v. *Howard*, 10 Q. B. 411, at p. 452, thus stated the rule of construction applicable to proceedings in inferior as distinguished from superior jurisdictions: "In the case of special authorities given by statute to justice or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to shew their authority on the face of them by direct averment or reasonable intendment. Not so the process of superior Courts acting by the authority of the common law."

It matters not whether the question of jurisdiction turns upon the territorial authority of the magistrate or his power to investigate the particular offence. The strictness required in shewing the jurisdiction of magistrates in England upon the face of the conviction to deprive a party accused of an offence of his right to the writ of *certiorari* is made very apparent by the decision of the Queen's Bench Divisional Court in *ex parte Bradlaugh*, L. R. 3 Q. B. D. 509. By the Imperial Act, 20 & 21 Vic. ch. 83, a metropolitan police magistrate or other stipendiary magistrate may—upon complaint made before him, that the complainant has reason to believe and does believe that any obscene books, &c., are kept in any house or shop for sale, &c., and upon such magistrate being satisfied that such books are kept for the purpose of sale, and that they are of such a character and description that the publication of them would amount

to a misdemeanor, and proper to be prosecuted as such—issue a warrant to search such house or shop, and seize such books, &c., and carry them before the magistrate issuing the warrant, or some other magistrate exercising the same jurisdiction, and thereupon the magistrate shall issue a summons calling upon the occupier of the house or shop to shew cause why the books, &c., should not be destroyed; and if the magistrate be satisfied that such books, &c., or any of them are of the character stated in the warrant, and have been kept for the purpose of sale, it shall be lawful for him, and he is required to order the books, except such of them as he may consider necessary to be preserved for evidence, to be destroyed. By 2 & 3 Vic. ch. 71, it is enacted that no information, conviction, or other proceeding before a metropolitan police magistrate shall be quashed or set aside or adjudged void or insufficient for want of form, or be removed by *certiorari* into Her Majesty's Court of Queen's Bench. A complaint under the first-mentioned Act before a police magistrate was made, and the magistrate made an order for the destruction of certain books seized. The order in substance was to the following effect—reciting that complaint had been made by one John Green to Mr. Flowers, one of the metropolitan police magistrates, within the metropolitan police district, that he had reason to believe that certain obscene books were kept by Edward Truelove at his shop, within the metropolitan police district, for the purpose of sale, or of being otherwise published for the purpose of gain: that the magistrate being satisfied that the belief of the said John Green was well founded, *and that the publication of the books was a misdemeanor, proper to be prosecuted as such*, thereon issued his warrant pursuant to 20 & 21 Vic. ch. 83, for the seizure of the books under the statute: that certain books * * kept for the purpose of sale, had been seized and brought before Sir J. T. Ingham, one of the metropolitan police magistrates: that he had issued a summons to the said Edward Truelove, as occupier of the said shop, to appear and shew cause why

the books should not be destroyed: that the applicant appeared and claimed to be the owner of the books. The order then went on to state that the magistrate having examined the said books and duly considered the premises, and being satisfied that the said books so seized were obscene, did order their destruction.

On the return of a rule *nisi* to shew cause why a *certiorari* should not be issued to remove the order into the Court of Queen's Bench, it was contended that the *certiorari* was taken away by the Act 2 & 3 Vic. ch. 71, and that under 12 & 13 Vic. ch. 45, the order might be amended; the defect in the order was pure matter of form; the magistrate found the books were obscene, and obviously it was meant by implication that they were the species of obscene books that were the proper subject of a prosecution for misdemeanor: that it was not unreasonable to construe the order as stating inferentially that the magistrate was satisfied of the existence of the requisites of jurisdiction; it stated that the magistrate who issued the warrant of search was satisfied the books were obscene and the fit subject of a prosecution for misdemeanor. But the Court granted the *certiorari*.

Chief Justice Cockburn, said: "The Act of Parliament makes the magistrate's jurisdiction dependent upon two conditions, first, that the publication must be obscene, and secondly, that it must in the magistrate's judgment be such as is a misdemeanor and proper to be prosecuted as such. It is not enough that it should be obscene. * * The order now before us is defective in that it omits an essential element of jurisdiction, viz., the statement that the magistrate was of opinion that these books were the proper subject of a prosecution for misdemeanor. * * The order therefore does not state the existence of matter that is essential to the jurisdiction."

Mellor, J.: "It is well established that the provision taking away the *certiorari* does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."

The Canada Temperance Act does not *per se* make the sale of intoxicating liquor an offence. It is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part of the Act that such sale becomes prohibited, and the subject of a penalty. These proceedings cannot be judicially noticed, they must be proved, and therefore the magistrate, in the absence of any proof of such proceedings having been taken, acted wholly without jurisdiction, and the writ of *certiorari* in the present case was properly and not improvidently issued.

The convictions may be open to question on the ground of objection taken, that the information embraced more than one offence; and it may be said when a police magistrate or justice of the peace disregards the express directions of the statute under which he is authorized to act, he thereby acts outside his jurisdiction. By the Canada Temperance Act, in the absence of special provision in the Act itself, the Act relating to the duties of justices of the peace in summary convictions, ch. 31 of 32–33 Vic. D. governs the proceedings in relation to offences against the Temperance Act; and by sec. 25 of the said Act of 32–33 Vic. ch. 31, it is enacted, "every information shall be for one offence only, and not for two or more offences." It was therefore in direct contravention of the statute, and in violation of his duty, for the police magistrate to have taken and acted upon an information containing more than one offence. In the *Queen* v. *Bennett*, already cited, I was of opinion that an amendment of the information in this respect by the removal of all the alleged offences except one was permissible. In the present case the information has not been amended, and the minute of the magistrate's judgment shews a conviction for all the offences charged in the information, and not for the one offence merely, in respect of which the formal record of the conviction was afterwards drawn. There was no argument of the question in this aspect before me, and I express no opinion upon it, as I have determined the invalidity of the

conviction upon the broad ground that no jurisdiction was shewn in the magistrate, by reason of its not being made to appear that the alleged unlawful act of the defendant was an offence or an unlawful act at all.

Assuming the act was in force, there was that kind of *primâ facie* case made out by the evidence that justified the magistrate in convicting under the express provisions of the Temperance Act, in the absence of any rebuttal on the part of the accused. No matter how weak the evidence may be, if there is any reasonable evidence its weight is for the magistrate and not for the Court to decide upon. The conviction is therefore only quashed on the ground that no jurisdiction was shewn in the magistrate.

I have not thought it necessary to express an opinion as to whether by section 111 of the Temperance Act the right to a *certiorari* has been taken away in all prosecutions under the Act, or whether that section takes the writ away only in cases coming within or under sec. 110, as the decision of the question is not decisive of this case. The matter has been very fully discussed in the Supreme Court of New Brunswick in *ex parte Hacket*, 22 Pugsley, 513.

*Judgment accordingly.*

[CHANCERY DIVISION.]

## PETRIE v. THE GUELPH LUMBER COMPANY ET AL.

## INGLIS v. THE GUELPH LUMBER COMPANY ET AL.

## STEWART v. THE GUELPH LUMBER COMPANY ET AL.

*Action of deceit—Legal and moral fraud—Company—Laches—Attending shareholders' meeting.*

There must be a wilful and fraudulent statement of that which is false to maintain an action of deceit, and the law still distinguishes between legal and moral fraud in this respect.

Therefore, where the plaintiff sued a certain company and its promoters, seeking to have his name removed from the list of shareholders, and to have the money paid for his shares repaid to him by the defendants, on the ground of fraudulent representation and concealment by the said promoters, but failed to prove that the latter had been guilty of any fraudulent intent, or that they had made representations knowing them to be false, or with a reckless disregard as to their truth or falsehood, it being admitted that, as far as the suit related to the said promoters, it was simply an action of deceit.

*Held*, the plaintiffs' case failed as against the latter.

*Held*, also, that as against the company, though the plaintiff, had he come before the Court in good time, might perhaps have had his contract rescinded, yet his having, as the fact was, acted at a meeting of the shareholders after knowledge of what he now charged against them, precluded him from asserting any such right now, and his bill must be dismissed, with costs.

THESE three cases were heard together, leave being reserved to give any additional evidence in either of them. The grounds on which the judgment in *Petrie* v. *The Guelph Lumber Co.* was based, were equally applicable to the other two cases, and the judgment in them was therefore the same.

In *Petrie* v. *The Guelph Lumber Co.*, the plaintiff, Alexander B. Petrie, filed his bill against the Guelph Lumber Company, George McLean, Donald Guthrie, John Hogg and George Douglas Ferguson, setting out the facts as stated in the judgment, and praying a declaration that he was not bound by his subscription for a share of stock in the company; that his name might be removed from the list of shareholders; and that the defendants might be ordered to pay him the sum of $1,000 paid by him for the said

share, and interest from the time the same was paid, and the costs of this suit. The grounds for relief alleged were, as appears more fully from the judgment, fraudulent representations and concealment by the defendants other than the company, whereby the plaintiff was induced to subscribe and pay for the stock.

The defendants the Gue ph Lumber Company, by their answer, submitted that they were not properly made parties: that the plaintiff was not entitled to claim from them the money paid by him, and had never demanded it back, as he alleged in his bill; and that the plaintiff, after knowledge of the alleged frauds and representations, had acted as a shareholder, and had been guilty of such laches and acquiescence as disentitled him to any relief against the company.

The defendants other than the company and McLean, by their answer, admitted the incorporation of the company, and the issuing of the prospectus as alleged in the bill, stated that they did not shew the plaintiff the prospectus, though they believed the defendant McLean did: that the plaintiff subscribed for one share: that the plaintiff was duly notified of the meeting for the formal organization of the company, held on January 31, 1878, and that he paid calls on his stock, and otherwise acted as a shareholder repeatedly long after: that McLean was, from 1875, manager of the affairs of the old partnership and of the company, and the company acted on his advice and relied on his judgment: that the value of the assets of the company was obviously, and in its nature matter of speculation and estimation dependent on many contingencies: that the statements in the prospectus as to this and the other matters were made according to the best of their judgment and belief: that the plaintiff, apart from his earlier knowledge, had knowledge prior to the meeting of July, 1879, that the business was not so successful as had been expected, and knew and assented to the material allegations on which he now based his claim to relief: and that in 1879, the plaintiff attended a meeting of shareholders,

and he then obtained the appointment of a committee of shareholders for investigation into the matter now brought in issue, on which committee the plaintiff was appointed: that the report issued by the said committee, though unfair, partial, and inaccurate, shows the plaintiff had full knowledge of the allegations on which he based his claim to relief: that the plaintiff attended a meeting of shareholders on August 8th, 1879, when the said report was presented, and directors were elected, and other business transacted, in the transaction of which, and the election of directors, the plaintiff voted and participated, and that it was not till September 26, 1879, that the plaintiff claimed to be entitled to be repaid his money: that the plaintiff had been guilty of such laches and acquiescence as disentitled him to relief, that indeed he never had any cause of suit, and they, the defendants, had not been guilty of any fraud, misrepresentation, or other improper dealing; and lastly, that the prospectus, in the form of which they admitted they agreed, was not signed by them; and they claimed the protection of R. S. O. ch. 117, sec. 9.

The evidence given on either side was extremely voluminous, as stated in the judgment, admitting neither of being set out in full, nor of a useful synopsis,

The cause was heard at the sittings at Toronto, on November 4, 7, 8, 9, 1881.

*D. McCarthy*, Q. C. For the plaintiff, as to the points involved in the case, cited in support of his contentions, the following cases: *New Brunswick Company* v. *Muggeridge*, 1 Dr. & Sm. 363, 381, *Venezuela Railway Co.* v. *Kisch*, L. R. 2 H. L. 99, per Lord Chelmsford, at p. 113; *New Sombrero Phosphate Co.* v. *Erlanger*, L. R. 5 Ch. D. 73, 113, 118; S. C. in App. L. R. 3 App. Cas. 1218, 1229, 1236, 1255, 1256; *Henderson* v. *Lacon*, L. R. 5 Eq. 249, 261; *Peek* v. *Gurney*, L. R. 13 Eq. 79, 105-113; S. C. in App. L. R. 6 H. L. 377, 389, 391-2, 403-409; *Arkwright* v. *Newbold*, L. R. 17 Ch. D. 301; *Charlton* v. *Hay*, 23 W. R. 129; *Burrows* v. *Lock*, 10 Ves. 370; *Slim* v. *Croucher*, 1 DeG.

F. & J. 518; *Rawlins* v. *Wickham*, 3 DeG. & J. 304; *Taylor* v. *Ashton*, 11 M. & W. 401; *Reese River Mining Co.* v. *Smith*, L. R. 4 H. L. 64.

*E. Blake*, Q. C., and *W. Cassels*, for the defendants other than McLean and Ferguson, contended that fraud in law was not sufficient, that there must be fraud in fact: that all the cases shewing that there must be full disclosure in such cases, have reference only to cases where the action is to disaffirm the contract, and not to an action for damages such as the present; and that even accepting the *dicta* in *Peek* v. *Gurney*, *supra*, as correct statements of the law, they do not apply here. They cited *Eaglesfield* v. *Marquis of Londonderry*, L. R. 4 Ch. D. 693, 711; *Silverthorn* v. *Hunter*, 26 Gr. 390; *Hallows* v. *Ferney*, L. R. 3 Eq. 520; S. C. in App. 3 Ch. 467.

*C. A. Brough* for the defendant Ferguson, as regards the alleged laches and acquiescence of the plaintiff, cited *Campbell* v. *Fleming*, 1 A. & E. 40, and *Scholey* v. *The Venezuela Railway Co.* L. R. 9 Eq. 266; *Harrison* v. *Heathorn*, 6 M. & G. 84. As to the distinction between legal and moral fraud, he cited *Heymann* v. *European Central Railway Co.* L. R. 7 Eq. 154; *Venezuela Railway Co.* v. *Kisch*, L. R. 2 H. L. 99; *Re Estates Investment Co.*, Ashley's Case, L. R. 9 Eq. 263; *Arkwright* v. *Newbold*, L. R. 17 Ch. D. 301; *Goodman* v. *Hardy*, 4 A. & E. 870; *Uther* v. *Rich*, 10 A. & E. 784; *Cogill* v. *Bower*, L. R. 10 Ch. D. 502; *Fry* on Specific Performance, 2nd ed., 518; *Land Credit Co.* v. *Lord Fermoy*, L. R. 5 Chy. 769; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 157, 162; *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244; *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; *Benjamin* on Sales, sec, 467.

*J. Bethune*, Q. C., for the defendant McLean, cited *Bigelow* on Fraud, pp. 13, 14, 15; *Cooley* on Torts, pp. 483, and 486, note 2; *Mooney* v. *Miller*, 102 Mass. 217; *Sieveking* v. *Litzler*, 31 Ind. 13; *Manning* v. *Albee*, 11 Allen 520; *Gordon* v. *Parmelee*, 2 Allen 212; *Ellis* v. *Andrews*, 56 N. Y. 83; *Houldsworth* v. *The Glasgow Bank*, L. R. 5 App. Ca. 317; *Boyd* v. *Croydon R. W. Co.*, 4 Bing. N. C. 669;

*Addison* on Torts, 5th ed., pp. 680, 832; *Watson* v. *Earl of Charlemont*, 12 Q. B. 856; *Wontner* v. *Shairp*, 4 C. B. 404, at p. 439; *Gerhard* v. *Bates*, 2 E. & B. 476; *Weir* v. *Barnett*, L. R. 3 Ex. D. 32; *Haslock* v. *Fergusson*, 7 A. & E. 89; *Swann* v. *Phillips*, 8 A. & E. 457; *Devaux* v. *Steinteller*, 6 Bing. N. C. 84; *McLean* v. *Dun*, 1 App. 153; *Parker* v. *McQuesten*, 32 U. C. R. 273; *French* v. *Skead*, 24 Gr. 179; *Kimball* v. *Comstock*, 14 Gray 508; *Wells* v. *Prince*, 15 Gray 562; *Mann* v. *Blanchard*, 2 Allen 386; *McKinney* v. *Whiting*, 8 Allen 207.

*D. McCarthy*, Q. C., in reply, cited *Young* v. *Cole*, 3 Bing. N. C. 724; *Gompertz* v. *Bartlett*, 2 E. & B. 849; *Collen* v. *Wright*, 8 E. & B. 647; *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777; S. C. 7 H. L. 102; *Weir* v. *Barnett*, 3 Ex. D. 32, at p. 38; *Cooley* on Torts, 483, 484.

April 8, 1882. FERGUSON, J.—For a short time prior to the application for a charter mentioned hereafter the defendants other than the company had been carrying on business in co-partnership under the name and style of The Guelph Lumber Company, as dealers in and manufacturers of lumber, at and near Parry Harbour, and had expended large sums of money in acquiring timber limits, building mills, &c., and had also incurred large liabilities. These defendants, and another since deceased, applied for and obtained a charter of incorporation, which bears date the 25th of August, 1877, whereby they, that other, and such other persons as might become shareholders, were incorporated by the name of The Guelph Lumber Company, with power to manufacture lumber and to carry on the business of lumbermen. A prospectus was issued which was shewn to be as follows:

"Guelph Lumber Company, (limited liability): capital stock $300,000; in 300 shares of $1000 each. The above company, being desirous of securing additional timber limits, and opportunity for doing so advantageously being afforded by the low state of the timber market, have decided to issue a limited quantity of preference stock. The company's mill property is situated at Parry Harbour, with wholesale and retail lumber yard at Sarnia. The mill is a first-class three gang steam mill, with circu-

lar edgers, trimmers, lath mill, &c., capable of cutting eighty thousand feet per day; and on the property are erected store, offices, wharf, and twenty-five dwelling houses. The water frontage is about half a mile long, with extensive lumber dock from which the largest class of vessels can load and sail direct to Chicago or any other point on the lakes. The company has also a small circular saw-mlll, intended for supplying the settlers, with a block of 400 acres of land.

"The timber limits of the company, inclusive of the recent purchases, consist of 222½ square miles, or 142,400 acres, and are estimated to yield two hundred millions feet of lumber. In addition there are 4,500 acres of pine lumber, purchased from settlers. The company's timber is so situated that the logs can be got out and floated to the mill at a small expense. The company's steam barge Vanderbilt is engaged steadily in conveying the lumber from the mill to the distributing point at Sarnia.

"The interests of the proprietors of the old company in its assets, estimated at $140,000 over liabilities, has been transferred to the new company at $105,000, all taken in paid-up stock, and the whole proceeds of the preferential stock w[illegible] be used f[illegible] the purposes of the new company. No more ordinary stock will be issued. Preference stock not to exceed $75,000 will be issued, the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst the shareholders *pro ratâ*. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with eight per cent. per annum, on receiving six months notice in writing. The preference stock will be payable in calls of ten per cent. per month. Even with present low prices, the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary as well as the preference stock; and when the lumber market improves, as it must soon do, the profits will be correspondingly increased. Subscribers of preference stock paying in advance will be entitled to interest at the rate of eight per cent. per annum on amounts paid."

And then follows the contract of the subscribers, "We, the undersigned," &c.

This prospectus is not signed by any one, but in the view that I have taken of the case this does not make any difference. The defendants other than the company, some personally and some through an appointed agent, were instrumental in exhibiting this prospectus with the view of procuring subscriptions to this preference stock. It was exhibited to the plaintiff by this agent and at least one of these defendants, as an inducement to him to become, and he did become, a subscriber for one share of $1000, which he duly paid. Others as well as the plaintiff subscribed for stock and paid in the same way; but much the largest

part of this preference stock was subscribed for and paid by these defendants themselves. The company at the time this preference stock was subscribed for was largely indebted to their bankers. The business was carried on, but I think it was proved that it was not well managed. The price of lumber did not increase as was manifestly expected, the debt to the bankers increased, and the property was mortgaged to the bank to secure it, and was finally conveyed and transferred to the bank, the company ceasing to carry on the business. The plaintiff charges these defendants other than the company with having concocted the scheme to form the incorporated company with limited liability, with the fraudulent intention and design of inducing the company to assume their business, in order not only to relieve themselves from the personal liability and risk involved in further carrying on the business, but also for the purpose of enabling them more successfully as a company to induce the public to advance moneys to extricate them from the financial difficulties in which they were placed; that they shewed him this prospectus and asked him to become a subscriber for shares, and that he, the plaintiff, relying on the statements contained in the prospectus, and on the faith thereof, subscribed for the said share of preference stock, and thereby became bound to pay the sum of $1,000; and, amongst other charges, many of which are the same things put in different ways, that they, the defendants other than the company, well knew when they issued the prospectus, and when they submitted the same to the plaintiff and induced him to subscribe as aforesaid, that the business was an unsuccessful, unprofitable and a failing business; and asks to have it declared that this prospectus was put forward in pursuance of the alleged fraudulent scheme, and with a view to deceive and mislead the public and the plaintiff as one of the public; and that the plaintiff was thereby misled and deceived, and induced to become a subscriber for shares; and, amongst other things, that these defendants other than the company are, by reason of such *fraud* and deceit, jointly

and severally liable to pay the plaintiff as damages the said sum of $1,000 and interest, and for an order directing payment thereof.

In support of this case the plaintiff gave evidence of a most wearisome length, taking up as subjects some of the minutest details of the business, professing to analyze the company's books in open Court by means of experts, who did not appear to me to be very expert; and the defendants, apparently feeling called upon to meet as far as possible everything charged and sought to be supported by testimony, also gave evidence of great length, and this volume of evidence is so great as to entirely preclude the idea of even a synopsis of it being given here.

After the most careful attention that I have been able to bestow upon this evidence, and endeavouring to analyze it in various ways under the light afforded by the arguments of counsel (which in this case appeared to me to have been unusually able) and the authorities cited, I am of the opinion that, although inaccuracies have been shewn in the statement contained in the prospectus and a degree of negligence whereby some of these inaccuracies arose or crept in, the plaintiff has fallen very far short of proving against the defendants other than the company the concoction of the fraudulent scheme and design alleged in the bill of complaint. There is perhaps enough shewn to have given the right to the plaintiff to have a rescission of his contract had he come to the Court for such purpose in good time. But I cannot see how it can be found upon the evidence that these defendants have been guilty of any fraudulent intent, or, in other words, of *moral fraud*, as distinguished from what has been known as and called *legal fraud*. I am satisfied that the evidence does not shew intended fraud. I think it would not support an action of deceit, and, if not, it will not support the case against the defendants other than the company.

The plaintiff's counsel argued however that there is no distinction between moral fraud and legal fraud as applied to this case, because the effect here has been to benefit

these defendants: that where the party making the representation derives a benefit, or where a duty rests upon him towards the other party, there is no difference between what is called *legal fraud* and moral fraud; and that wherever fraud gives a right to rescind the contract an action of *deceit* can be maintained, adding that a party is bound in equity to make good the injury arising from his fraud, and that this is tantamount to the action of deceit. Those are the words of the learned counsel, or nearly so, I think. He however stated, that up to a recent period the distinction between these two kinds of frauds was plainly and well recognized, but contended that a change had taken place in the law upon this point by force of judicial decision. This was urged with rare skill, but I cannot think successfully. So far as I can see, the law is as stated by Lord Justice James in *Eaglesfield* v. *The Marquis of Londonderry*, L. R. 4 Chy. Div. 711, where he says: "Whether the fraud is supposed to be a fraud in this Court as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit."

I think the language of Cotton, L. J., in *Arkwright* v. *Newbold*, L. R. 17 Chy. Div. at p. 320, very plain indeed. He says: "I think it is in this case essential to consider what the action is, and I say so because a great deal of the argument and a considerable portion of the learned Judge's judgment does not, in my opinion, draw a sufficient distinction between an action of deceit and an action or proceeding to set aside a purchase, or to make the directors of a company answerable for money which they received by reason of their being in a fiduciary position. An action of deceit is a common law action, and must be decided upon the same principles whether it be brought in the Chancery Division or in the Common Law Division, there being, in my opinion, no such thing as an equitable action of deceit. It is a common law action in which it is necessary to prove that a statement has been made which, to the knowledge of the person making it,

was false, or which was made by him with such recklessness as to make him liable just as if he knew it to be false, and that the plaintiff acted on the statement to his prejudice or damage." Further on he says: "But in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." In the same case Lord Justice James, at page 317, says: "There are a number of purely equitable considerations which arise where Courts are dealing with actions to set aside contracts or conveyances which have been obtained by means of misrepresentation of a fact, or by means of concealment or suppression of a fact which in the opinion of the Court ought to have been stated. These cases stand *by themselves* and are entirely distinct from such a case as we have before us." These statements of the law appear to me to coincide with the older cases, and I refer to them particularly because of their recent date.

The Ontario Court of Appeal expressed the same view of the law in the case *Silverthorne* v. *Hunter*, 26 Gr. 390. I cannot see that the change in the law contended for by the plaintiff's counsel has taken place. It is admitted that the suit, so far as it relates to these defendants, is simply an action of deceit. Indeed, it cannot, on the pleadings, be considered any other, and I am of the opinion that the plaintiff's case fails as against the defendants other than the company.

Then, as to the defendants the company. It was stated in the early part of the hearing of the case that practically it was of no consequence whether the plaintiff succeeded against them or not; but counsel for the plaintiff in his argument in reply refused to relieve me of the necessity of deciding this branch of the case. It is very possible that the plaintiff could, had he come before the Court in good time, have succeeded in having the contract for subscription for the stock rescinded; but I do not consider it necessary to decide this, as I am of the opinion that by his delay and

his having acted at a meeting of shareholders after having knowledge of what he charges in his bill, or as much knowledge of them as he had when he commenced the suit, he having been one of the investigating committee spoken of in the evidence, he is precluded from asserting any such right, if any he had.

I am of the opinion that the bill should be dismissed, and I do not see how I can consistently with principle relieve the plaintiff from the payment of costs. The dismissal will be with costs.

There were other two cases, *Inglis* v. *The Guelph Lumber Co.*, and *Stewart* v. *The Guelph Lumber Co.*, which were tried with this case, being the same, as it was said, in every respect but one, namely, that the plaintiff Inglis had an item of knowledge regarding the purchase of the timber limits which the other plaintiffs had not. But, in the view that I take of the whole matter of this purchase, that difference cannot affect the result. So the judgments in these cases will be the same, and the action in each case will be dismissed with costs. (*a*)

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(*a*) This case has been argued in the Court of Appeal and stands for judgment there.

[CHANCERY DIVISION.]

## McCardle v. Moore et al.

*Administration—Executor—Costs—Administrator ad litem.*

The plaintiff being a lunatic, and entitled to maintenance out of the income of a fund in the hands of executors, brought an action for the income, and for administration. The Master reported a balance of income in the hands of the executors, being an amount charged against them for interest upon moneys retained by them and not invested according to the terms of the will; but the conduct of the executors was otherwise proper.

*Held*, that if the question of the liability of the executors for the interest had been the only one in the action, the executors should have been ordered to pay the costs; but inasmuch as a general administration was unnecessarily sought by bill and granted, no costs should be awarded for or against, the executors.

The original plaintiff having died *pendente lite* and an order having been obtained to continue the proceedings in the name of an administrator *ad litem*.

*Held*, that the plaintiff's costs, between solicitor and client, should be paid out of the interest recovered.

*Held*, also, that the administrator *ad litem* was not entitled to be paid the residue of the fund; but as to this liberty to apply was granted.

THE bill in this suit was filed by Henry McCardle, a lunatic, by Rosanna McCardle, his next friend, against Barret G. Moore and William Blackwell, as executors of the last will and testament of the plaintiff's father.

The testator died on the 8th of August, 1875, and by his will he made the following devise and bequest: "The whole of my real estates, personal estates, mortgages, promissory notes, moneys or other securities for moneys of which I may die possessed (and not hereinbefore devised) I give and devise unto my executors, in trust for the benefit of my wife and my son, Henry McCardle, as follows, that is to say, that my executors, as such trustees, shall sell and convey the whole or any part of my said estates, and reinvest the moneys to be derived therefrom, and the interest to be derived from such estates or reinvestments to be directly applied in the maintenance and support of my said wife and my said son Henry during the natural lives of them, or either of them; and after the death of my said wife and my said son Henry the principal sum or sums shall be

equally divided amongst the whole of my other surviving children, and if these should be all dead, then amongst my grandchildren."

The plaintiff's mother died shortly after the testator, intestate, and left property, to which it was alleged the defendants administered and converted into money. The plaintiff was placed in an asylum for the insane, and the bill contained the following charges:

1. The plaintiff charges that, instead of applying the income from said trust fund towards the maintenance of the plaintiff at the said asylum, the defendants have entirely failed in their duty in that regard, and have only contributed the sum of $30 per annum towards his maintenance; in consequence whereof the plaintiff has been deprived of many comforts, and suffered many privations which he otherwise would not, had the defendants discharged their duty towards him honestly.

2. The plaintiff has through his next friend and others, caused application to be made to the defendants for an account of the proceeds of his said father's and mother's estates, and of the incomes thereof respectively applicable to his maintenance; and has addressed remonstrances to the said defendants, reproaching them for their conduct towards him; but said defendants answered they thought it very strange they should be asked for such account, as it was information which, in their position, they were not allowed to give.

The bill prayed "that the defendants may be ordered to give an account of the estate and effects of the said testator and intestate, and their dealings therewith respectively." 2. An account of what was due to the plaintiff, and an order for payment thereof.

The defendants, by their answer, denied that the plaintiff's mother had left any property, and they denied that they had administered to her estate, or taken possession of, or converted it into money. They asserted that the plaintiff had been duly maintained under the regulations of the asylum by the defendants out of the estate. They denied

any application having been made to them for an account by the plaintiff, or any one on his behalf, and that there was any ground for the charge made by the plaintiff of improper conduct on their part.

The suit came on for hearing before Boyd, C., on the 15th December, 1881, when, after the evidence of one of the plaintiff's witnesses had been partly given, the learned Judge suggested that it would be useless to go into further evidence, as the matters in controversy would necessarily have to be enquired into on taking the accounts before the Master. Counsel assenting to this view, a decree referring the cause to the Master in Ordinary was pronounced, directing the usual administration accounts of the estate of the plaintiff's father, Thomas McCardle, to be taken, reserving further directions and the question of costs.

The Master, on the 5th October, 1882, made his report, finding that the defendants had received $4,871.86, and he also charged them "with interest upon moneys retained by them, and not invested according to the terms of the testator's will, amounting to the sum of $405.00," and allowed them as properly paid $2,932.41, thus finding a balance due from them of $2,345.05.

Pending the reference, the plaintiff, Henry McCardle, died, and an order was thus obtained to continue the proceedings in the name of Rosanna McCardle as administratrix *ad litem* of his estate.

On November 15th, 1882, the suit came on for hearing on further directions, and as to the question of costs.

*J. A. Donovan* for the plaintiff. The Master has reported a balance of income in the hands of the defendants, which they did not admit. The suit has been rendered necessary by their resisting the plaintiff's demand, and they should therefore pay the costs.

*Walter Barwick*, for the defendant Moore. The reason any balance of interest is found in the executors' hands is because they have submitted to be charged with moneys which they never actually received. The bill made serious

charges of misconduct against the defendants, which have not been established. The testator died in 1875, and the decree in this cause was not pronounced till December, 1881. The estate has been a long time in the defendants' hands, and no loss or mismanagement has been shown. Even where there has been mismanagement the Court does not always make an executor pay costs: *Simpson* v. *Horne*, 28 Gr. 1. I submit the executors are entitled to their costs out of the estate. Merely retaining money in his hands is not a ground for depriving an executor of his costs: *Gould* v. *Burritt*, 11 Gr. 523; *Sievewright* v. *Leys*, 1 O. R. 375; *Bald* v. *Thompson*, 17 Gr. 154; *Kennedy* v. *Pingle*, 27 Gr. 305; *Inglis* v. *Beaty*, 2 App. R. 453.

The other defendant was not represented.

November 22nd, 1882. BOYD, C.—If nothing else had been in question in the suit than the claim for interest on the moneys of the estate to which the plaintiff was entitled, I think that the costs should go against the executors, but a general administration is sought of the father's and mother's estate, and a bill is filed for that purpose. This was, in the first place, unnecessary, because the ordinary summary proceedings would have been sufficient; and in the next place, as to the principal moneys of the estate the executors appear to have done their duty properly and unexceptionably. I dislike apportioning costs in such a case, and it will be the better way to award no costs for or against the executors, and to let the plaintiff's costs between solicitor and client be paid out of the interest recovered by means of the action. As to the surplus of this, the Master does not report who are entitled to it as next of kin of the deceased lunatic, and it would not be proper to pay it out to the administrator *ad litem*.

[CHANCERY DIVISION.]

## PETRIE V. HUNTER ET AL.

## GUEST ET AL. V. HUNTER ET AL.

*Mechanic's lien—Contracts—Sub-contractor—Novation—Condition precedent Architect's certificate.*

Where a contractor for the building of a house, made default in carrying on the work, and in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed verbally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor would go on and finish the work, he, the owner, would pay him;

*Held*, that the agreement with the sub-contractor was a new and independent contract, and was not a contract to answer for the debt, default, or miscarriage of another, within the fourth section of the Statute of Frauds, and was therefore valid and binding on the owner, although not in writing: *Bond* v. *Treahy*, 37 U. C. R. 360, distinguished.

*Held*, also, that the sub-contractor was entitled to a lien for all work done under such agreement as a "contractor," and as to such work he was no longer in the position of a sub-contractor.

*Held*, also, that the sub-contractor acting under such an agreement, was not bound by clauses contained in the original contract with the dismissed contractor, providing for forfeiture, &c.

*Held*, also, that the non-production of an architect's certificate approving of the work done, though required by the contract with the dismissed contractor, as a condition precedent to payment, did not preclude the sub-contractor from recovering under the verbal agreement, provided the work was so done as to morally entitle him to such certificate, following *Lewis* v. *Hoare*, 44 L. T. N. S. 66.

THESE actions, which were brought to enforce mechanics' liens, came up for trial together at Toronto on the 24th November, 1882. In the first mentioned action William Petrie was plaintiff, and in the second John Henry Guest and George Guest were plaintiffs. James Hunter and John T. Coatsworth were the defendants in both actions. It appeared by the evidence that the defendant Hunter, being the owner of the land upon which the plaintiffs claimed a mechanics' lien, had, on the 9th December, 1881, entered into a contract with his co-defendant Coatsworth, to perform a certain work and furnish estimates for the erection of houses upon the land: that Coatsworth accepted the employment, and subsequently on the 1st May, 1882, employed the plaintiffs, Petrie as a plasterer

and the other plaintiffs as plumbers and gas-fitters, to perform certain work and furnish certain materials for the houses. While the work was being done by the plaintiff the defendant Coatsworth having failed to carry on the work with sufficient expedition, the defendant Hunter, on the 26th June, 1882, pursuant to a provision to that effect in the contract, dismissed Coatsworth from the contract, and undertook the completion of the work himself. Coatsworth then represented to Hunter that he had made an advantageous sub-contract with the plaintiffs, and Hunter then verbally agreed with the plaintiffs that if they would complete the work under their respective contracts with Coatsworth, he, Hunter would see them paid.

The plaintiffs relying on this promise proceeded and finished the work required to be done under their contracts with Coatsworth, and claimed that for all work done by them since the agreement of the 26th June, 1882, Hunter was personally liable to them.

By the terms of the contract between the defendants Hunter and Coatsworth the work and materials were required to be respectively done and furnished according to certain plans and specifications prepared by Hunter's architect and to the satisfaction of the architect, and the production of the architect's certificate was made a condition precedent to the payment of the moneys payable under the contract.

It appeared by the evidence that the architect had not accepted or approved of the work done by the plaintiffs subsequently to the 26th June, 1882, and the architect swore that he did not think that the plaintiffs' work was done according to Hunter's contract with Coatsworth.

*D. Black*, for the plaintiffs in both actions. The stringent conditions as to the production of the architect's certificate were not imported into the new arrangement of the 26th June, 1882: *Hamilton* v. *Raymond*, 2 C. P. 392; *Beckett* v. *Cockburn*, 31 U. C. R. 610. They agreed to do the work for the price agreed on with Coatsworth, there was in

effect a novation, and these conditions in Coatsworth's contract with Hunter were not referred to, nor can they be incorporated into the agreement then made.

*J. Reeve*, for defendant Hunter. The contract between Hunter and Coatsworth was never rescinded, nor were the contracts between the plaintiffs and Coatsworth rescinded. Coatsworth remains liable to the plaintiffs for all work done on their contracts with him whether before or since the 26th June, 1882; the plaintiffs have claimed this in their statement of claim in this action, which shews that they themselves never considered that their contracts with Coatsworth were rescinded. This being the case, the alleged agreement between the plaintiffs and Hunter is in substance a contract by Hunter to answer for the debt, default, or miscarriage of Coatsworth, and not being in writing is void under the Statute of Frauds. This point has actually been decided adversely to the plaintiff: *Merner* v. *Klein*, 17 C. P. 287; *Poucher* v. *Treahey*, 37 U. C. R. 367; *Bond* v. *Treahey*, *Ib.* 360.

*D. Black*, in reply. The plaintiffs did the work after the 26th June on the representation of the defendant Hunter that he would pay them, and he is bound to make good that representation. He cited *Batson* v. *King*, 4 H. & N. 739.

December 1, 1882. BOYD, C.—The result of the defendant Hunter's contention is briefly this: I am not bound to pay for the work done on my buildings after the 26th June. I am not answerable to the contractor Coatsworth because by the terms of our contract he failed to prosecute the work with due diligence, and he was dismissed. Nor am I answerable to the plaintiffs, because, although they did the work on my promise to pay, yet that promise should have been, but was not, in writing. The statement of this defence carries its own refutation. The case cited of *Bond* v. *Treahey*, 37 U. C. R. 360 differs materially in its facts from the present. Here, I have no doubt the contract with Coatsworth was put an end to on the 26th June, and

thereafter the work was prosecuted by the plaintiffs independently of him, under the new bargain made directly with the defendant. This he himself admits in his examination, that if they went on and finished the work he would pay them. The effect of all this is to displace Coatsworth and to substitute the plaintiffs *pro tanto*. The arrangement was that the plaintiffs were to finish the work for the same price and on the same terms as they had agreed to do it for Coatsworth. Coatsworth was privy to this—assented to it—and it was so agreed in the presence of all three parties. The defendant Hunter was practically working out the provisions of the 11th article of his contract with Coatsworth, which enabled him after dismissing Coatsworth to employ other persons "to finish the work in such manner as the architect might direct." The buildings were to be completed according to the existing plans and specifications, but not necessarily according to all the terms of the Coatsworth contract. These should not be imported into the new arrangement as nothing was said of it, and clauses of forfeiture and the like should not be imposed on the plaintiffs by implication. There was no assignment of the Coatsworth contract, but a distinct bargain made with the plaintiffs, which, in my opinion, gives the right to recover from the defendant Hunter, and have a lien for all work done by them after the 26th June substantially in accordance with the plans and specifications and the architect's directions. The pre-requisite of the architect's certificate should not preclude the plaintiff's recovery for this work if the work was so done as to morally entitle them to such a certificate. This is the principle, as I conceive, involved in this class of contracts as expounded by the House of Lords in *Lewis* v. *Hoare*, 44 L. T. N. S. 66, (1881). It is referred to the Master to take the account on this footing. Before the 26th June Coatsworth is liable personally for the work done by the parties, and the plaintiffs can only have a lien *pro ratâ* on the property for any balance due to Coatsworth from the plaintiffs up to that date, having regard to the drawback then in the defendant Hunter's hands.

Beyond this date I see no evidence that Coatsworth is, in law, liable on his contract to the plaintiffs, whatever claim for damages they may have, a point not raised in the pleadings, and which I do not further consider. Further directions and costs reserved.

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[CHANCERY DIVISION.]

## WATSON V. KETCHUM.

*Agreement at trial—Subsequent enforcement thereof—Res judicata—Jurisdiction.*

Where in 1875, in an action of ejectment the parties agreed in writing that a verdict be entered for the plaintiff, but not enforced till defendant be paid $50 for costs and the value of his improvements, said value to be fixed by arbitration; and, though the $50 had not been paid, nor the said value so ascertained, plaintiff entered judgment on the verdict, and ejected the defendant, whose devisee now filed this bill, claiming possession, damages, a reference as to improvements, and an order for payment of the amount found due, and of the $50 for costs.

*Held*, that though the judgment could not be set aside, and possession given to plaintiff, the plaintiff was entitled to a reference as prayed, with costs.

THIS was a suit to recover possession of certain lands in or near the town of Orangeville, and for the payment of certain sums of money and damages alleged to be payable by the defendant to the plaintiff.

The facts of the case are fully set out in the judgment.

The case was heard at the sittings of this Court, at Toronto, on Thursday, December 1, 1881.

*D. B. Read*, Q.C., and *W. Read*, for the plaintiff, submitted that title was proved in the plaintiff, and that she was entitled to a reference as prayed.

*D. L. Scott*, for the defendant. The payment for improvements was not a condition precedent to the defendant taking possession. Moreover, the present bill will not lie;

and there is no jurisdiction, since proceedings for the settlement of the dispute have been commenced and carried on in the Court of Queen's Bench, and this Court cannot now interfere: *Imperial Loan and Investment Co.* v. *Boulton*, 22 Gr. 121. The plaintiff also is barred by *laches*. Besides, the plaintiff cannot go behind the agreement entered into, and under it the making of the award was a condition precedent to the liability of the defendant to pay for the improvements: *Pegg* v. *Nasmith*, 28 C. P. 330. The plaintiff should pay the costs, or, in any event, cannot get them.

*D. B. Read*, Q.C., in reply, cited, as to the effect of the proceedings in the Queen's Bench, *Wightman* v. *Fields*, 19 Gr. 559; *Robinson* v. *Smith*, 17 U. C. R. 218; *Clubine* v. *McMullen*, 11 U. C. R. 250: and as to compensation for improvements, *Gummerson* v. *Banting*, 18 Gr. 516.

December 9, 1882. FERGUSON, J.—The plaintiff is the widow and devisee of the late Robert Watson. The defendant is the widow of the late Jesse Ketchum.

In the year 1873, the plaintiff's husband being in possession of the land in question (being some lots in or near the town of Orangeville), the defendant and her then husband brought an action of ejectment to recover possession of these lands. This action was in the Court of Queen's Bench, and the case was entered for trial at the town of Guelph, at the Spring Assizes in the year 1875.

Before the trial came on, however, an agreement was entered into, endorsed upon the *nisi prius* record, and signed by counsel for each party. That agreement is in these words:—

"It is agreed that a verdict be entered for plaintiff by consent, and verdict not to be enforced until defendant shall have been paid fifty dollars towards his costs, and the value of the improvements he has made and are now on the lands in question herein; the value of such improvements to be determined by the award of Peter McNab, Thomas Knight, and Robert Hewitt, or a majority of them. Award to be made in writing, on or before the first day of June, 1875, or such further time as the arbitrators, or a majority of them, may appoint. Plaintiff agrees to pay said fifty dollars and amount so to be awarded to defendant, and defendant

agrees thereupon to execute a quit claim deed of said lots to plaintiff, and to give up possession. Both parties to release each other from all further claims and demands."

Dated 16th April, 1875, and signed by counsel.

The fifty dollars were not paid, nor was the value of the improvements. There is some evidence that the present plaintiff and her late husband were unwilling that the arbitration should be proceeded with, unless the arbitrators would take into account the value of the land as well as that of the improvements, and it was in a manner contended that the present plaintiff and her then husband had prevented the arbitrators from making an award. I do not, however, see how this last could have been the fact. The evidence before me shews that no two of the arbitrators could agree as to the value of the improvements. On the 30th of June, 1875, the plaintiffs in that suit, without having paid the $50, or anything for or as the value of the improvements, entered judgment upon the verdict, and caused the sheriff to turn the defendants therein out of possession upon a writ of *hab. fac. poss.*

Proceedings were taken, and appear to have been existing as late as the year 1878, for the purpose of setting aside this judgment and writ, and to regain possession of the lands. The defendants in that suit appear to have been uneducated people and poor, and these proceedings seem to have been neglected by their attorney, so that they did not bear fruit.

The present defendant has since continued in possession of the lands, and has not paid either the $50 or for the improvements.

The bill of complaint in this case was filed apparently in the early part of the year 1881, though at what exact date I do not discover from the papers, claiming possession of the lands; an inquiry as to damages by reason of being turned out of possession; an inquiry as to the value of the improvements; an order upon the defendant to pay these and the $50; and asking a declaration that the plaintiff has a lien upon the lands for the amount that may be found in the plaintiff's favour.

The defendant shews that she has paid some $50 or $60 on account of the plaintiff's claim against her, in some garnishee proceedings wherein she was compelled to pay the same. In her answer, she says that she has always been ready and willing to fulfil the conditions of the agreement, and to pay the $50 and the value of the improvements spoken of; but that the late Robert Watson in his life time, and after his death the plaintiff, refused to accept payment of the same.

There is some evidence before me of a tender in gold of the $50.

The examination of the defendant is put in evidence, and in that she says that she never tendered more than the $50: that she never paid either the $50 or the money for the improvements: that she went into possession of the land without having performed the agreement; and that she is willing to pay for the improvements.

The examination of the late Robert Watson in the former suit is put in by the present defendant, and in that he said he was always willing to leave the lands upon being well paid for his improvements.

The defendant has set up *laches* as a bar to the plaintiff obtaining any relief; but I think it plain that I should not, under the circumstances, give effect to this defence.

I think it clear that I am not in a position to set aside the judgment of the Court of Queen's Bench, and that I should not attempt to do so; and without doing this I cannot give effect to the plaintiff's contention that she is entitled to possession of the lands, no matter what the actual merits in the former suit may have been.

The contention of the defendant's counsel, citing *Pegg* v. *Nasmith*, 28 U. C. C. P. 330, and the cases there referred to, that, upon the construction of one part or element of the agreement endorsed upon the *nisi prius* record, the making of the award was a condition precedent to the liability of the defendant to pay for the improvements, if an action were brought upon the agreement for the value of them, and that the sole question, is probably correct;

but another part of the agreement states that the verdict was not to be enforced till the then defendant should have been paid the $50 and the value of the improvements; and the now defendant, without paying for the improvements and, so far as appears, without making any effort to have the account ascertained and paid, did enforce the verdict. I think this conduct was harsh and unreasonable, to say the least of it, and I think it was contrary to the agreement; and the defendant has gained the advantage that she has by reason of it.

From the evidence of the arbitrators themselves, it appears that no two of them could or would agree at the time, and I apprehend the obtaining of an award is now out of the case altogether. But need this stand in the way of at least a measure of justice being done? I think that upon the statements of the parties themselves it need not. The defendant says she is willing to pay for the improvements, and it is plain justice that she should do so. The late husband of the plaintiff, through whom she claims as a devisee, in his examination in the former suit, said that he was always willing to give up possession on being well paid for his improvements. The defendant has and for a long time has had possession, and I do not perceive any sufficient reason why there should not be a reference as to the value of the improvements and interest upon that value, the $50 and interest upon it, unless the defendant can shew upon the reference that she is not liable to pay interest upon this sum, which it is said was tendered; and as to the amount properly paid by the defendant upon the garnishee proceedings, and interest on the same since the date of its payment.

I think I am at liberty, notwithstanding the propositions of law that have been urged against it, to order this reference, and I think it a reasonable, just, and proper way of determining the differences between the parties and putting an end to their litigation. Then, upon payment of what, if anything, may be found due to the plaintiff, the quit claim deed and the releases mentioned in the agreement

can be executed if considered necessary. This reference is ordered. The parties may speak to the minutes of the judgment, if that is desirable.

As to the costs. Notwithstanding what the defendant now says, I think the fact is that the plaintiffs in the former suit, having assumed and taken the principal advantage to them in the agreement, sought to defeat the defendants in that suit in respect of the value of the improvements, relying on the theory that the obtaining of the award was a condition precedent, and the difficulty, or perhaps impossibility, of obtaining it; and I am of the opinion that the defendant in this suit should pay the plaintiff's costs up to and inclusive of the hearing or trial.

Further directions and the costs of the reference are reserved.

[QUEEN'S BENCH DIVISION.]

## MACDONALD ET AL. V. CROMBIE ET AL.

*Interpleader—Judgment on non-appearance—Immediate execution—Irregularity—Preferential judgment—Sheriff's sale—Purchase by judgment creditor—R. S. O. ch. 118.*

An execution issued on the same day that a judgment on default of appearance, contrary to Order 9, Rule 4, is signed, is an irregularity only, and not a nullity.

M., a merchant, who was in insolvent circumstances, and had purchased largely from defendants, stated an account with the defendants as for cash due, in which were included some acceptances maturing, which were then delivered up to him, he receiving a buyer's discount of five per cent. By arrangement the defendants recovered judgment by default of appearance, and under an execution issued on the same day plaintiff's stock in trade was sold by the sheriff, the defendants becoming purchasers. E., the defendant's agent, wrote to the defendants before suit, that he had arranged with M.'s consent to issue a writ for judgment, and take everything, and they would then let M. go on and reduce his stock, and see what the Spring trade would do. The plaintiffs, ten days after, obtained judgment and execution under Rule 324, and the defendants having subsequently purchased the goods under these and other executions, an interpleader was directed.

*Held*, ARMOUR, J., dissenting, reversing the judgment of Armour, J., at the trial, that the defendants' judgment, execution, and purchase at the sheriff's sale were not a gift conveyance, assignment, or transfer of M.'s goods within the meaning of R. S. O. ch. 118, sec. 2.

*Per* CAMERON, J.—The statute, R. S. O. ch. 118, should be construed strictly. It is in derogation of the common law, and does not operate to give all the creditors of a debtor a ratable share in his effects. Before setting aside the debtor's preference for a legislative preference not more honest, it should be clear that the debtor has done something which brings him within the enumerated acts which the statute prohibits.

THIS was an interpleader issue tried at the last Winter Assizes at Toronto, before Armour, J., without a jury, on October 17, 1882, to try whether an execution issued by the plaintiffs on a judgment recovered by them against one Gideon Morrison, and in the hands of the sheriff of the county of York, was entitled to priority over an execution issued by the defendants on a judgment recovered by them against the said Gideon Morrison; and by the order directing the said issue it was provided that it should be open to the plaintiffs to shew on the trial of the said issue that as against the plaintiffs the judgment of the defendants was void for fraud, or as being a preference which rendered the same void as against the plaintiffs'

execution; and that it should be open to the plaintiffs to contend that the execution of the defendants was void as against the plaintiffs by reason of having been issued by the defendants before they were legally entitled to issue the same.

The facts material for the determination of the questions raised may be shortly stated thus. Gideon Morrison was on the 25th of March, 1882, a dry goods merchant in Toronto, and was on that day indebted to the plaintiffs in the amount for which they recovered judgment as hereinafter mentioned. He was at that time in insolvent circumstances, and unable to pay his debts in full by about $12,000. He was in the habit of buying goods from the defendants on the terms of six months' credit, or two and one half per cent. off for cash, and on the said 25th of March he was indebted to the defendants in the amount for which they recovered judgment as hereinafter mentioned. This amount was at that time represented by acceptances not then due, and by an open account of $2,200, as to which Morrison had not yet exercised his option of taking the accustomed credit or paying in cash. On the 27th day of March, 1882, the defendants, by their agent, and Morrison, signed the following memorandum:—

"TORONTO, 27th March, 1882.

"All accounts between us, excluding acceptances, two due 4th March, and two due 4th April next, are hereby stated and settled at the sum of $32,155.38 cash at this date."

And thereupon, in pursuance of an agreement between them, a cablegram was sent by the defendants' agent to the defendants, who carried on business in Scotland, to return the acceptances, which represented the whole of the account stated but $2,200, and they were accordingly returned and given up to Morrison. The defendants were at this time aware of Morrison's insolvency, and the indebtedness represented as aforesaid was turned into an indebtedness payable in cash, in order to enable the defendants to recover judgment therefor against Morrison. On the 28th of March, 1882, the defendants issued a writ of sum-

mons against Morrison, specially endorsed under Order 3, Rule 4, as follows: "$32,155.38 the amount of the account due from the defendant to the plaintiffs for goods sold and delivered by the plaintiffs to the defendant, and on the account stated between the plaintiffs and the defendant, together with interest from the date of this writ And on the 8th day of April, 1882, judgment was signed for non-appearance under Order 9, Rule 4, and execution was thereupon on the same day issued and placed in the hands of the said sheriff.

The plaintiffs issued a writ of summons against Morrison on the 8th of April, 1882, and obtained judgment against him for $1,637.03 on the 14th of April, under Order 36, Rule 10, and issued execution thereon the same day and placed it in the hands of the said sheriff. The said executions were the executions mentioned in the interpleader issue.

On the 20th of March, 1882, the defendants' agent, one Edminson, advised the defendants by letter as follows:

"G. Morrison had his statement made out a few days ago, and I was surprised to find him about twelve thousand dollars short, owing partly to having his old store on his hands and keeping it open at a loss. I think he is now doing very much better, and as he owes about fourteen thousand dollars outside, I saw the only way was to issue a writ against him for all of our account, with his consent, and will get judgment in a day or two, and we take everything, and will then let him go on and reduce his stock, and see what the spring trade does."

The goods were afterwards sold, and purchased by the defendants.

*Rose*, Q. C., was for the plaintiffs.
*W. A. Reeve*, contra.

February 1, 1883. ARMOUR, J.—The points made by the plaintiffs were: (1) That the defendants' execution was a nullity because it was issued on the same day judgment was signed, and before "the expiration of eight days from the last day of appearance." (2) That being a nullity, the plaintiffs could take advantage of its being such. (3) That it was at all events an irregularity, and being such,

the plaintiffs could take advantage of it. (4) That the judgment upon which it was founded was, under the circumstances of its recovery, a fraudulent preference, and was void against the plaintiffs.

The words of Order 9, Rule 4, are:

"In case of non-appearance by the defendant where the writ of summons is specially endorsed under Order 3, Rule 4, the plaintiff may sign final judgment for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, and the plaintiff may, at the expiration of eight days from the last day for appearance, and not before, issue execution upon such judgment," &c.

I cannot regard the issue of the defendants' execution before the expiration of the eight days from the last day for appearance as a nullity, but as an irregularity merely. The issue of the execution was a proceeding authorized by the rule, but it was prematurely and therefore irregularly issued. It is not like a proceeding which could under no circumstances have been taken, or was forbidden by law to be taken under any circumstances. The execution could have been properly issued before the expiration of the eight days by the consent of the defendant therein, and its premature issue could have been waived by him. The same provision existed in the Common Law Procedure Act, allowing final judgment to be signed for want of appearance, when the writ of summons was specially endorsed, and the same words were there used,—"and the plaintiff may, at the expiration of eight days from the last day for appearance, and not before, issue execution upon such judgment;" and in all the reported cases that I have been able to find where motions have been made to set aside an execution issued before the expiration of the eight days such premature issue has always been treated as an irregularity, and not as a nullity.

The effect of Order 55, Rule 1, would also seem to make such premature issue an irregularity merely.

It is well settled that an irregularity can only be taken advantage of by a party to the suit or by his representative.

This brings me to the question whether the judgment upon which the defendants' execution issued was void as against the plaintiffs, as being a fraudulent preference within R. S. O. ch. 118.

Had this question been *res integra*, I would have held that the doing of any act by a defendant to enable a plaintiff to obtain judgment against him sooner than he could otherwise have obtained it by due course of law, would have amounted to a confession of judgment within the meaning of the Act, but I am precluded from so holding by the following authorities: *Young* v. *Christie*, 7 Gr. 317; *McKenna* v. *Smith*, 10 Gr. 40; *Labatt* v. *Bixel*, 28 Gr. 593; *King* v. *Duncan*, 29 Gr. 113, and *Heaman* v. *Seale*, 29 Gr. 278. See, however, *Wilson* v. *Wilson*, 2 P. R. 374.

It may be that those who have put the narrow construction that has been put upon the words "confession of judgment" in this Act, confining it to what was at the time of the passing of the Act technically known as the instrument called a confession of judgment, would put a like narrow construction upon the words "makes or causes to be made any gift, conveyance, assignment or transfer of any of his goods, chattel or effects, or delivers or makes over, or causes to be delivered or made over any bills, bonds, notes, or other securities or property;" but they have not yet done so, and I have to determine whether what was done by and between the defendants and Morrison in and about the recovery of the defendants' judgment, and their purpose in so doing, was or was not in effect a transfer by Morrison of his goods, chattels, effects and property to the defendants within the meaning of these words.

The letter of the defendant of the 29th of March, 1882—"I saw the only way was to issue a writ against him for all of our account with his consent, and will get judgment in a day or two, and we take everything and will then let him go on and reduce his stock, and see what the spring trade does"—satisfies me, and I so find, that the object of the defendants in bringing their action against Morrison, and his object in enabling them to do so, by turning an

account not then payable into one payable instanter, was to enable them to get possession of all his property with intent to give them a preference over his other creditors.

I find that the object of Morrison was to transfer his property to the defendants with intent to give them a preference over his other creditors: that such object was suggested to him by the defendants: that the defendants and Morrison agreed that this object should be effected by the recovery by them of a judgment and an execution against him, under which his property should be sold by the sheriff, and by their becoming the purchasers thereof at the sheriff's sale.

I do not think that I ought to look at the form of the transaction only, but at its substance and object, and so viewing it I think I must hold it to come fairly within the words of the statute, as it certainly does within the mischief aimed at by the statute.

I treat therefore what was done by the defendants and Morrison in and about the recovery by them of their judgment and execution against him, and the sale by the sheriff, and the purchase by them at such sale, coupled with the object with which it was done, as in effect a transfer by him to them of his property.

That Morrison was in insolvent circumstances, and that such transfer was made by him with intent to give the defendants a preference over his other creditors, is undoubted. See *Sharpe* v. *Thomas*, 6 Bing. 416.

I therefore find for the plaintiffs, but if necessary I will stay proceedings to enable the defendants to appeal.

February 12, 1883. *W. A. Reeve* and *D. E. Thomson*, moved to set aside the verdict or judgment, and to enter a verdict or judgment for the defendants, on the grounds following: 1. On the law and evidence; 2. The evidence did not disclose any facts to warrant the learned Judge in holding the judgment or execution of the defendants against Gideon Morrison to be void as against the plaintiffs; 3. The judgment and execution could not properly

be held void as against the plaintiffs, as constituting a preferential assignment or transfer from said Gideon Morrison to defendants within the meaning of R. S. O. ch. 118 sec. 2, nor did the evidence disclose anything which amounted in law to an assignment or transfer by said Morrison; 4. It was not open to plaintiffs to contend, or the learned Judge to decide, upon the trial of said issue, that said judgment and execution were void under said section.

They argued: The learned Judge, following a series of cases, ending with *Turner* v. *Lucas*, decided in this Division last Term, 1 O. R. 623, held defendants' judgment unimpeachable under R. S. O. ch. 118, sec. 1, but declared it void under sec. 2, as a preferential transfer of property. Looking at the substance and effect of the proceedings, rather than the form, he considered they amounted to an assignment; the same object was accomplished indirectly. This was the reasoning by which, in the cases referred to, the judgments were attacked under section 1; but it was rejected by the Courts, and it is submitted that one principle of construction ought not to be applied to section 1 and a contrary principle to section 2. The transfer was not the act of the debtor, but of the Sheriff, and the defendants being the highest bidders had a right to buy. All the debtor did was to sign the statement of account making the debt payable at once. This did not enable defendants to get judgment sooner than they could otherwise have done. Had the action been brought on the consideration of the bills not then due, judgment would have been recovered, if no defence had been made, as speedily as it was, and would not have been open to attack by other creditors: *King* v. *Duncan*, 29 Grant, 278. To constitute a transfer the sheriff's sale must be included; but the plaintiff is not in a position to impeach that sale. It was had in obedience to his own execution as much as to the defendants', and under five prior *fi. fas.* which are not attacked. In fact the plaintiffs do not dispute the validity of the sale, nor defendants'

title to the goods, but adopt the sale, and ask to have their claim paid out of the price. They desired the sheriff's sale as much as the defendants did, and but for the defendants' bid the sale would not have realized enough to pay off prior executions, and there would have been nothing for plaintiffs to claim. The only part of the transaction which injured plaintiffs was the priority of the defendants' writ, and that could not be affected by anything which took place after it was placed in the sheriff's hands. The case of *Sharpe* v. *Thomas*, 6 Bing. 416, relied on by plaintiffs, is clearly distinguishable from this. It was decided under an insolvent Act, and the warrant of attorney was held to be a charge by the debtor on his property within the meaning of the Act. The word "charge" is not found in our Act. Moreover the action was brought by the official assignee, who was at liberty to dispute and did dispute the validity of the sheriff's sale and the creditor's title to the goods. The mere fact of defendants being the purchasers could make no difference; and therefore the judgments in *Turner* v. *Lucas*, and preceding cases, could have been held void under section 2 as well as this one. They all resulted in sheriff's sales and transfers of the debtor's property, and the same intent to prefer existed in all. If the transaction was a transfer, we are entitled to the benefit of the doctrine of pressure: *Croft* v. *Lumley*, 6 H. L. 672. *Avison* v. *Holmes*, 7 Jur. N. S. 722; *Swayne* v. *Ruttan*, 6 C. P. 399, *Snarr* v. *Waddell*, 24 U. C. R. 165; *McKenzie* v. *Harris*, 10 U. C. L. J. 213; *Keays* v. *Brown*, 22 Grant 10; *Brayley* v. *Ellis*, 1 O. R. 119.

*Rose*, Q. C., and *J. H. Macdonald*, contra.

The issue of the execution before the expiration of eight days is a nullity. The statute directs that the execution may be issued after the expiration of eight days, and not before. The Court may entertain the objection at the instance of a third party by virtue of its general jurisdiction: *Holmes* v. *Russell*, 9 Dowl. 487; *Martin* v. *Martin*, 3 B. & Ad. 934; *Harrod* v. *Benton*, 8 B. & C. 217; *Semple* v.

*Nicholson*, 4 H. & N. 298; *Herr* v. *Douglas*, 4 P. R. 102; *Holbird* v. *Anderson*, 5 T. R. 235; *Wilson* v. *Wilson*, 2 P. R. 374; *Klein* v. *Klein*, 7 U. C. L. J. 296; *Mackenzie* v. *Harris*, 10 U. C. L. J. 213; *Armour* v. *Carruthers*, 2 P. R. 217.

If not a nullity, the issuing of the execution contrary to the terms of the statute, and for the purpose of obtaining a preference, is an abuse of the process of the Court: *Randall* v. *Bowman*, 1 U. C. L. J. N. S. 158; *Palmer* v. *Carruthers*, 2 P. R. 217.

The whole scheme was for the purpose of enabling Crombie to obtain possession of the goods of the debtor, Gideon Morrison. The executions in the hands of the sheriff, prior to the one in question in this interpleader suit, were at the suit of the plaintiffs and were under the complete control of the plaintiffs. It was well known to Edminson, the defendants' agent, and Gideon Morrison that owing to the amount of the executions controlled by Edminson no one except Edminson or his principals could obtain the goods; and this scheme was adopted and carried out for the purpose of placing the goods in the hands of Edminson's principals, and such object was obtained by the joint action of these parties, and amounts to a transfer within the meaning of the statute: *Sharpe* v. *Thomas*, 6 Bing. 416; *Doe Mitchinson* v. *Carter*, 8 T. R. 300; *Young* v. *Billiter*, 8 H. L. 682.

*Reeve*, in reply. As to the *fi. fa.* being issued before the expiration of eight days, it was an irregularity merely, and cannot be objected to by other creditors: *Perrin* v. *Bowes*, 5 U. C. L. J., 138. It could be waived by the debtor, and therefore comes within the definition of Coleridge, J., in *Holmes* v. *Russell*, 9 Dowl. 487. If any doubt exists it should be held an irregularity rather than a nullity: *Herr* v. *Douglass*, 4 P. R. 102; O. J. A. Rule 473; Arch. Pr., 3rd ed., 1193; *Farr* v. *Orderly*, 1 U. C. R. 337; *Bank of U. C.* v. *Van Vochis*, 2 P. R. 382; *Weedon* v. *Garcia*, 2 Dowl. N. S. 64; *Blanchenay* v. *Burt*, 4 Q. B. 707; *Jones* v. *Jones*, 1 D. & R. 558.

March 10, 1882. HAGARTY, C. J.—I find great difficulty in holding that the judgment obtained by the defendant against Morrison can be brought within the legitimate meaning of the statute—that it is to be looked upon as a gift, conveyance, assignment or transfer of his goods, chattels, or effects, made by an insolvent with intent to give one or more of his creditors a preference over his other creditors, or any one or more of them.

The first section of the Act provides directly for the case of an insolvent voluntarily or collusively giving a confession of judgment, *cognovit actionem* or warrant of attorney to confess judgment, to defeat or delay creditors, or to give a preference to one creditor over others, and declares any instrument so given to be ineffectual to support a judgment.

We thus find legislation expressly bearing on the subject of judgments that enable one creditor to take priority over another.

It has been already decided that this last clause must be confined to judgments obtained on the instruments therein specified.

I think it a wise rule that when the Legislature make use of words of known significance and meaning we are not at liberty to extend them as applicable to all matters that we may consider to be of cognate character, or capable of effecting a mischief equal to those that are specially prohibited.

The case we have to deal with is that of a debtor unable to meet his engagements, with a large stock of goods on hand chiefly purchased from the present defendants.

The agent presses him for some settlement. A specially endorsed writ is issued on the 28th of March, and on the 8th of April judgment is signed for non-appearance, and execution at once issued without waiting the eight days mentioned in the statute. Leave to issue execution could have been readily obtained, just as the plaintiffs got their execution a few days after.

Most of defendants' claim was on bills not yet matured for the goods sold on credit, or with discount for cash at buyers' option. It was agreed the bills should be given up, and the discount allowed. This was done, and the debtor admits the balance due in writing. Now all this by itself does not strike me as shewing any fraud or improper purpose.

The debt was perfectly just, and it is clear that Morrison was not bound to defend or delay the suit, and that there was nothing unlawful in his waiving the terms of credit and taking the benefit of the discount for cash.

The plaintiffs had not commenced any proceedings, and when they did commence them their debtor does not appear to have delayed or opposed their getting judgment.

We are now asked, in an interpleader issue, to hold the prior judgment and execution void, and to give to the present plaintiffs' subsequent execution payment in full over the rest of the creditors, including these defendants.

I cannot accede to Mr. Rose's argument, that defendants' execution is void and is a nullity because it was issued before the expiration of eight days. The words of the rule are "and the plaintiff may at the expiration of eight days from the last day for appearance, and not before, issue execution upon such judgment."

This provision seems to me to be wholly in ease of defendant, and for his benefit and protection, and that he can properly waive it, or consent to immediate execution, and that no other persons can insist that the time is absolute.

*Randall* v. *Bowman*, 1 U. C. L. J. N. S. 15, where an execution so obtained was set aside, was an application of defendant and his assignee in insolvency, to whom his assignment was made before the expiration of the statutable period for issuing execution. Wilson C. J. refers there to *White* v. *Lord*, 13 C. P. 289. This case was under the provisions of the absconding debtor's Act. See also *Herr* v. *Douglas*, 4 P. R. 106, as to nullities, &c.

As to the letter written by Edminson to the defendants he swears very positively that he made no such arrangement with Morrison as to leaving him to carry on the business, and that nothing passed between them on the subject.

The language in his letter is ambiguous and would not be inconsistent with the suggested explanation, that getting execution for such a very large amount the defendants could afford to buy in the property at sheriff's sale for a larger amount than any one else could give, and then they could wind it up, and employ Morrison to dispose of the stock, &c.

Morrison was not called by either party and Edminson's truthfulness is not in any way impeached.

The authorities do not, I think, warrant us in holding such a case as this to be within the statute.

One specially relied on is *Sharpe, assignee*, v. *Thomas*, 6 Bing. 416.

The debtor gave a warrant of attorney to a creditor, with a view to taking the benefit of the Insolvent Act, and after he had called his creditors together and agreed to a composition. Three days after he gave the warrant of attorney, on which judgment and execution at once issued. The assignee sued for and recovered the proceeds of the execution.

The Statute 7 Geo. IV. ch. 57, sec. 32, declared that any insolvent who voluntarily conveyed, assigned, transferred, charged, delivered or made over any estate, &c., to any creditor, should be deemed fraudulent and void, as against his assignee, and if within three months, or with the view of going into insolvency.

This was found to be done with that intent, and with the express purpose of entering judgment and issuing execution to the detriment of the creditors at large.

Tindal, C. J., said: "A warrant of attorney of itself perhaps would not; but under the circumstances of this case the instrument was given as and constituted a charge on the property of the insolvent." It was pointed out

that in *Doe Mitchinson* v. *Carter*, 8 T. R. 300, where there was a forfeiture for assigning the lease without the landlord's consent, that a warrant of attorney executed by the tenant for the express purpose of getting possession of the lease, which could not otherwise be obtained, was held to operate as an assignment working a forfeiture.

The whole subject is very fully discussed in *Croft* v. *Lumley*, 6 H. L. 672, after the opinion of the Judges had been taken, and *Doe* v. *Carter* is discussed, and the distinctions are very clearly pointed out as to the circumstances under which the giving a warrant of attorney may amount to "charging" the property.

Lord Wensleydale, p. 742, is very clear. He points out the difference between covenanting "not to charge or encumber," and a covenant to "do no act whereby the property should become encumbered."

The same question was also, in *Avison* v. *Holmes*, 7 Jur. N. S. 723, before Wood, V. C.

Both plaintiffs' and defendants' executions were obtained in a very short time, the defendants in ten days, the plaintiffs in a shorter time.

It is certainly a fair deduction from the evidence that Morrison was willing that defendants, his largest creditors should have priority. His only active intervention was to admit the whole of their claim to be due when the bulk of it was included in current bills.

But for that he did nothing. All his faults were of the negative character. He might have raised a defence, which he did not; he might have actively delayed the recovery of judgment; he might have allowed plaintiffs' execution to have obtained priority.

I do not feel warranted on this evidence in holding that that there was any understanding that the seizure and sale by defendants were merely colourable, and to enable him still to carry on the business as his own.

I think the full consequences of a sheriff's seizure and sale were contemplated and intended as real and not pretending transactions.

Unless he has otherwise done something prohibited by law, I do not think that his thinking that he would be better off in having his heaviest creditor ranking the first on his estate is by itself improper.

His waiving, as it were, his right to the extended credit is to me the most serious of the charges against him.

I feel it difficult to persuade myself that where the whole claim was *debitum in præsenti*, that the abandonment of any defence as to the part *solvendum in futuro*, is unlawful.

It was unnecessary for the parties to have made any special arrangement as to this. Morrison had only to allow the recovery of judgment by default.

*Billiter* v. *Young*, in Ex. Ch. 6 E. & B. 1, afterwards in the Lords, 7 Jur. N. S. p. 269, was an action of trover by the assignee in insolvency for conversion of the insolvent's goods, seized by a creditor on a warrant of attorney given by the insolvent with a view of going into insolvency.

The 59th sec. of 1 & 2 Vic. ch. 110, declares "that if any prisoner" (under the insolvency law) "shall before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, * * to any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed and is hereby declared to be fraudulent and void as against the provisional or other assignee of such prisoner" appointed under the Act, "Provided always that no such conveyance, assignment, * * shall be so deemed fraudulent and void unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so * * conveying, assigning, * * of petitioning the said Court for his discharge from custody under this Act."

A judgment prepared by Parke, B., was read by Crowder, J., the former having been raised to the peerage before delivering it. He said that there was abundant evidence as to the warrant of attorney and judgment thereon being

a fraudulent and void "assignment, transfer, charge, delivery, or making over" within the meaning of the statute. He afterwards speaks, at p. 13, of the "goods assigned by the circuitous process of giving a warrant of attorney for the purpose of judgment being entered thereon, and the goods taken thereby." He also holds, p. 11, that "the act of seizure was perfectly lawful and valid against the insolvent * * valid against all the world, except the assignees when they should be appointed. They may then disapprove it * * but they cannot treat the seizure and sale as a *wrong* against the insolvent, or as a wrong to themselves at the time it was made." The case chiefly turned on the right to maintain trover.

Martin, B., p. 19, says: "The giving the warrant of attorney was, I think, clearly a charging within the meaning of the statute;" and Williams, J., speaks of the giving the warrant of attorney by way of fraudulent preference.

When the case was in the Lords, Channell, B., says: "The warrant of attorney must be taken to be given by the insolvent, to enable a creditor, fraudulently preferred by the insolvent, by means of a judgment to seize the goods of the insolvent. The transaction is, I think, in substance the same as a transfer or delivery."

It was agreed that the transaction was voidable, not void, except as to the assignee at his election.

This case is based upon a law providing for a general distribution of an insolvent's estate, and to prevent preferential dealing with creditors with a view to insolvency.

This law strikes at the act of the debtor by such an instrument as a warrant of attorney expressly enabling his creditor to seize and sell his goods. It makes no provision for suffering judgment by default, and the avoidance of the judgment so obtained is in favour of the assignee representing the body of creditors.

We have no Act now for the equal distribution of insolvent estates. We have the two clauses of ch. 118. The first strikes at active steps taken by a debtor in volun-

tarily or collusively giving a confession, cognovit, or warrant of attorney, with intent, &c.

No provision is made as to allowing judgment by default by non-appearance or defence.

Then the next section prohibits the gift, conveyance, assignment or transfer of goods, &c., to defeat or delay creditors.

The Courts have decided that the first section does not apply to judgments obtained for default of appearance. It rests with an appellate jurisdiction to decide if such a construction be too narrow.

I am not prepared to hold that the allowing a judgment to pass by default of appearance, or not resorting to a defence or objection which might have been raised, amounts to a gift, conveyance, or transfer of goods or effects.

I therefore think, on the whole, that the issue should be found for the defendants.

ARMOUR, J.—I desire that no misapprehension shall exist as to my findings of fact. The following letter,—"G. Morrison had his statement made out a few days ago, and I was surprised to find him about $12,000 short, owing partly to his having his old store on his hands, and keeping it open at a loss. I think he is now doing very much better, and as he owes about $14,000 outside, I saw the only way was to issue a writ against him for all of our account, with his consent, and will get judgment in a day or two, and we take everything and will let him go on and reduce his stock and see what the spring trade does"—was written *ante litem motam*; was not intended to be seen by other eyes than the defendants, and was written at the time of the impeached transaction. I saw the writer of this letter in the witness box, and heard his evidence and his attempt to extricate the matter from the difficulty in which this letter had involved it, and I found that the letter was true, and that the evidence of the writer of it, so far as such evidence tended to qualify, modify, contradict, or explain away that letter, or any

part of, or to cast doubt upon the truth of anything contained in it, was untrue.

From this letter and from the evidence I drew the inference, which to my mind was clear and irresistible, that what took place between the defendants by their agent and Morrison was to this effect. They said, "Morrison, you are in insolvent circumstances; you are unable to pay your debts in full; we are your largest creditors; we want you to prefer us to your other creditors; we want you to hand over all your property to us, and we will let you go on and reduce the stock and see what the spring trade will do. You cannot hand over your property to us directly by assignment, because the law forbids it, but the same thing can be effected in this way: you agree that our claim against you, which is not yet payable, shall be payable instanter, and we will issue a writ against you for it, get judgment, issue execution, and place it in the sheriff's hands, and the sheriff will seize and sell your goods, and we will become the purchasers, and will then let you go on and reduce the stock and see what the spring trade will do;" and to all this Morrison assented, and this was the agreement between them and him.

And I found as a fact that the agreement and intention of the defendants and Morrison was that Morrison should transfer all his property to the defendants in order to give them a preference over his other creditors, and my conclusion of law was that this was a transfer within the meaning of the Act, and that the mode adopted of effecting it did not make it the less a transfer.

The principle of law is that whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance, and is founded on the maxims *quando aliquid prohibetur fieri ex directo prohibetur et per obliquum*, and *quando aliquid prohibetur prohibetur et omne per quod devenitur ad illud. Doe Mitchinson* v. *Carter*, 8 T. R. 300; *Flight* v. *Salter*, 1 B. & Ad 673; *Booth* v. *The Bank of England*, 7 Cl. & F. 509; *Hughes* v. *Statham*, 4 B. & C. 187; *Morris* v. *Blackman*,

2 H. & C. 912; *Floyer* v. *Edwards*, Cowp. 114; *Maxwell* on Statutes, 92; *Hardcastle* on Statutes, 24.

In *Philpott* v. *St. George's Hospital*, 6 H. L. 338 the Lord Chancellor, Cranworth, p. 349, said: "Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done is substantially that which is prohibited I think it is perfectly open to the Court to say that that is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing or one of the things actually prohibited." See *Jefferies* v. *Alexander*, 8 H. L. 595.

I do not think that the principle of the decision in *Sharpe* v. *Thomas*, 6 Bing., can be distinguished on the ground that what was done there was a charge, for Crowder, J., who read the judgment of Lord Wensleydale in *Young* v. *Billiter*, 6 El. & Bl. 1, says: "It seems more properly to fall under the designation of an assignment or transfer than a charge."

See *Young* v. *Billiter*, 7 Jur. N. S. 269, 25 L. J. Q. B. 169, 8 H. L. 682; *Croft* v. *Lumley*, 6 H. L. 672; *Hurt* v. *Jennings*, 5 B. & C. 650.

In my opinion the object of the legislature in passing this Act was to prevent a debtor assisting one of his creditors to recover his debt against him in preference to his other creditors. It did not intend to compel a debtor to resist a creditor taking means to recover a just debt, but it did intend to prevent a debtor actively assisting one creditor to recover his debt in preference to his other creditors.

I think the judgment right, and that the motion should be dismissed, with costs.

CAMERON, J.—Unless the decision of this Court in the case of *Turner* v. *Lucas*, 2 O. R. 623 was erroneous in law, the defendants are entitled to judgment. If what was done by the execution debtor was not in that case the same as giving a confessson of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, within the

1st section of ch. 118 R. S. O., what was done in this case was not the same thing as making a gift, conveyance, or transfer by the debtor Gideon Morrison to the defendants or any one else of his goods and chattels within the second section. While that case stands, I do not think it possible to uphold the finding of my learned brother Armour at the trial, notwithstanding the reasons for his conclusion are given with his usual force and clearness. On the facts in the case of *Turner* v. *Lucas* the transaction was one more nearly within the prohibition of the statute than that which is impeached on the issue in the present case, as the debtor there gave his consent in writing by his attorney to immediate judgment, which came very near a confession of judgment. I cannot see how the fact that the defendants became the purchaser of the goods at the sheriff's sale makes any difference. They only bid with others and secured the goods simply because they offered the highest price for them.

The sheriff sold not on the execution of the defendants upon the impeached judgment alone, but upon the executions in his hands generally, and no particular goods could be traced as having been transferred by the defendants' execution. So the execution cannot, as matter of fact or law, be said to have transferred the goods to the defendants.

The execution debtor only did two things that assisted the defendants in gaining priority over the plaintiffs; one was before suit was commenced at all, and the other a mere act of non-interference.

By the first the debtor, solvent or insolvent, secured a benefit to himself, and one that, being insolvent and unable to carry on his business, was probably of more benefit than it would have been if quite solvent; namely, a reduction of five per cent. from the defendants' claim, which on the large amount of that claim was a very considerable sum. That *per se* was a harmless act, certainly not in any way coming within the mischief intended to be provided against and prevented by either section of the Act referred to. It did not amount to a confession of judgment, nor to

an assignment, or transfer, or gift of the debtor's property.

The next thing that was done that could in any way be considered objectionable, was the neglect of the debtor to move to set aside the defendants' execution as having been taken out too soon. The statute under consideration does not require a debtor to do anything to retard his creditor from getting judgment; it only prohibits him from enabling him to do so in certain particular ways; and it is not in fact contended that the acknowledging a present indebtedness to the amount of the judgment, and the omitting to move to set aside the execution, would, without more, come within the mischief intended to be avoided by the statute, or within its expresss prohibition; but being the result of an arrangement or agreement by which the debtor intended to give these defendants a preference over his other creditors, it is brought within the statute.

I have already said it is not in my judgment within the terms of the Act, and unless the Court is at liberty to say that anything a debtor may do whereby one creditor is in effect preferred to another constitutes an illegal preference, I do not see that it can properly extend the application to one case more than another.

If two creditors issue their summons on the same day, and at the expiration for the time for appearance in one case the debtor enters an appearance, and in the other he does not, with intent to give to the latter a preference by allowing him to get judgment first, he has in effect given a preference to one, but not such a preference, upon adjudged cases, as comes within the statute, and the preferred creditor is entitled to hold his position of priority, and get paid in full, when the other creditor may get nothing.

The common law assists, and does not retard the vigilant, and what the common law permits every man has a right to do, unless he comes within the terms of a statute which has curtailed his right under the common law. And in the present case it does not seem to me that the act of the debtor and defendants has brought the latter's judgment and execution within the provision of any statute that makes them invalid.

Were it not for the cases cited upon the argument of *Doe Mitchinson* v. *Carter* 8 T. R. 300, and *Sharpe* v. *Thomas*, 6 Bing. 416, referred to by my brother Armour in *Turner* v. *Lucas*, and *Billiter* v. *Young*, 6 E. & B. 1, I should not have thought there was any room whatever for the plaintiffs' contention. But I think a consideration of the facts in these cases, and the statutes under which the two last were decided, will disclose very clear ground to distinguish them from the present case.

In *Doe Mitchinson* v. *Carter* a warrant of attorney, on which judgment was entered and execution issued, was considered to amount to an assignment of a lease under a covenant by the lessee not to assign, because it was given for the express purpose and object of having the lease assigned contrary to the covenant, and was therefore a breach of the covenant not to assign; and the landlord was held entitled to recover possession of the demised premises; but it was held, when the case came before the Court in the first instance, at page 57 of the same volume, that the giving of the warrant of attorney to confess judgment, without shewing that it was the intention and object of both lessee and creditor that the term granted by the lease should be seized thereunder and sold, did not amount to an assignment. It would seem not to permit of much question that one who contracts not to do a thing cannot contrive a means by which he may do indirectly that thing and avoid the consequence of doing it directly. The thing is done by his procurement intentionally, and is therefore done by him.

In the other cases the decisions were under the insolvent laws, and the result of holding that the warrants of attorney amounted to an assignment or charge upon the property taken in execution was to place the debtor's property in the hands of an assignee for the benefit of all the insolvent creditors, and such acts are to be construed liberally. The assignee, too, in insolvency was deprived of the property of the debtor, which but for the execution would have passed into his possession and con-

trol. The statute now under consideration is on the contrary to be construed strictly. It is in derogation of the general or common law, and does not operate beneficially to give all the creditors of the debtor a ratable share or interest in his effects, but would operate to set aside the just claim of one creditor for the mere purpose of allowing other creditors with executions in the sheriff's hands to take priority according to the order in which the sheriff received them. In other words, it sets aside the debtor's honest preference in favour of a legislative preference not one whit more honest. I think before this is done, it ought to be made clear beyond reasonable doubt that the debtor has in fact taken some active or tangible step, which brings him within the enumerated acts that the statute prohibits him from doing. Acknowledging a just debt, and agreeing not to defend an action brought against him for its recovery, assuming that such agreement were proved, are not such acts. I am of opinion therefore the judgment in favour of the plaintiffs should be set aside, and judgment entered for the defendants, with costs of suit.

I fully agree with my brother Armour that issuing execution within the eight days was only an irregularity, and does not make the execution a mere nullity.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## SCRIBNER V. MCLAREN ET AL.

*Stock in trade—Sale—Vendor employed as clerk—Immediate delivery—Change of possession—Chattel Mortgage Act—R. S. O. ch. 119.*

M. carried on a retail business in a village store, on premises known as the "Star House," from a design over the door, but there was nothing to indicate who was the proprietor. He sold the stock in trade to the plaintiff in August, and formally handed over to him the keys, at the same time telling M., his clerk, that he would not require him any longer. The plaintiff gave one key to M., telling him to open the store next morning, which he did, but the plaintiff next day quarrelled with M. and dismissed him, and he then employed M. until the 1st of October to act as salesman, &c., the plaintiff being at the store a good part of the time. The change of business was advertised, and became well-known in the neighbourhood, and new books were opened by the plaintiff.

The stock was seized on the 2nd October under execution against M. The transaction was found to have been in good faith and for valuable consideration.

*Held*, that the question of change of possession was one of fact to be determined on the circumstances of each case, and (reversing the decision of Osler, J.,) that there was here such an actual and continued change of possession as to dispense with the necessity for a bill of sale. HAGARTY, C. J., dissenting.

*Per* HAGARTY, C. J.—The question being one of fact, and the learned Judge having found as a fact that the change of possession was not actual and continued, his finding should not be disturbed, as it could not be said to be cleary wrong.

INTERPLEADER issue, tried at the last Cobourg Fall Assizes before Osler, J., without a jury.

The facts appear in the judgment.

*Smith*, Q. C., and *Kerr*, Q. C., were for the plaintiff.

*H. Cameron*, Q. C., and *Dougall*, Q. C., contra.

February 3, 1883. OSLER, J.—In this case, which was partly tried at Cobourg, and recently argued before me in Toronto, the first question is, whether the sale to the plaintiff, which was not in writing, and therefore has not been registered, was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property sold, so as to take it out of the operation of the Act respecting mortgages and sales of personal property, R. S. O. ch. 119.

The property in question consisted of the stock of goods in a store in the village of Campbellford, which had been carried on by one Morton, the judgment debtor, for about seven months previous to the sale. He did not reside in the store. His clerk, one McKay, closed and locked it at night and opened it in the morning. It was known as the Star House before and during the time Morton kept it, from the figure or sign over the door. There was no other sign or name to indicate the proprietor.

The agreement between the parties was that the goods should be bought at the invoice price with the freight added. As soon as the stock-taking had been completed, and the securities to be given in payment of the price handed over, the property was delivered. What took place on that occasion is thus described by Scribner, with whose account Morton also substantially agrees: "Morton delivered the stock over to me and gave me the keys of the store. Then he called to McKay (the clerk) and told him he would not require his services any longer. He (McKay) had understood from the conversation that he was going to work for me. Morton got the keys from McKay and handed them to me. There were two locks on the door, and he showed me about the locks on the back door. He said the keys were always left in there. On the front door there were two locks and two keys for each lock. He shewed them to me, and he gave them to me. This was along in the evening. I gave one set of each of the keys to McKay, and told him to come and open the store the next morning. Shortly after that he went home. Morton and I soon went out, and I locked the store up, put the key in my pocket, and went home."

This was in my opinion a delivery of the property sold, in the sense of an actual transfer of its possession from vendor to vendee. It was such an immediate delivery as the Act requires, as it followed at once upon the completion of all that had to be done in connection with the sale; and it was done, as I find, with the intention of transferring the property and its possession to the plaintiff. See *McMartin v. Moore*, 27 C. P. 397.

The more difficult and important part of the question under consideration is, whether this immediate delivery was followed by an *actual* and continued change of possession of the property sold.

This is a question of fact; but it must be disposed of in accordance with principles deducible from the authorities, and with regard to the object and intention of the Act.

I assume, as I in fact find, that the sale was made in good faith.

The vendor did not live on the premises, and it was not intended that the goods should be removed therefrom. On the contrary, the plaintiff intended to carry on the same business there, and a partnership was contemplated and had actually been spoken of between him and McKay, who was, at all events for the present, to remain in the store on Scribner's behalf, acting for him as he had been for Morton.

McKay opened the store in the usual way on the morning after the sale, but about the middle of the day or towards the afternoon a quarrel occurred between him and Scribner, and the latter paid him off, giving him $5, and dismissed him.

Not being able at the moment to procure another clerk, Scribner proposed to Morton to remain in the store and take charge of it for him, in selling the goods, keeping the books, &c., until he could get one. Morton professed himself unwilling to do this, being about to enter into some other employment, but finally yielded to Scribner's solicitation and agreed to remain. He was to be paid at the rate of $1.50 per day, and a sum sufficient to pay for his wife's board.

This was on the 26th of August, 1881, in the afternoon, the sale having been completed on the previous day.

Morton remained in the store on these terms until the 1st of October, when a salesman named Ingersoll, whom Scribner had hired, came in, and he was apparently occasionally there even for a day or two afterwards, explaining the business to Ingersoll, and perhaps assisting, as there is

an entry in the book in his handwriting on the 3rd of October. About the 15th September Scribner had hired a lad named Edward Morton, (not related in any way to the debtor,) to assist him.

Morton was occasionally absent on his own business during this time. Scribner was at the store "a good part of the time."

The rent was settled with Vrooman, the landlord, by Morton on the 1st October. Scribner was present. He and Morton arranged between themselves the proportions they were to bear of the current quarter, but Scribner took no part in settling with the landlord and the latter never recognized him as his tenant.

The seizure was made on the 3rd of October.

The change in the business was advertised on the 1st of September, and there is no doubt it became generally known in the village on the day after it occurred.

Scribner had procured a new book, or set of books, for the business, and entries were regularly made therein.

Briefly stated, the result appears to be that the goods remained on the premises of the vendor: that the day following the sale he was placed in charge of them by the vendee, for the purpose of selling them and managing the business, and that he so continued until within a day or two at least of the seizure.

There must be an actual as opposed to a constructive change of possession: "A change of possession, and afterwards the transferree re-delivering again to the debtor as *agent* for the creditor, though his being agent accords with the deed, is after all nothing but equivalent to a symbolical delivery, and leaving the goods just where they were before:" Per Burns, J., in *Heward* v. *Mitchell*, 10 U. C. R. 342.

Can it be said that in these circumstances there was such an actual and continued change of possession as the statute requires?

In *Harris et al.* v. *Commercial Bank*, 16 U. C. R. 437, the assignment was in trust for creditors, the goods were not removed to other premises, and the trustees employed a

person who had been clerk or book-keeper to the assignor to take charge for them and dispose of the stock and collect the debts. Robinson, C. J., at p. 447, said: "I think under the facts stated there was a sufficient taking of possession, and dealing with the goods under the assignment, to free the assignment from suspicion on the ground of fraud. The not removing them to other premises is accounted for by the fact that there was no sale to the assignees for their own use and benefit, as in a common case between buyer and seller. It was in the natural and usual course of things that the trustees should not remove the goods to other premises. And I think the allowing Mr. Crabbe, who had been clerk or bookkeeper to Macdonell, to continue on the premises in their service, should not of itself lead us to treat the assignment as otherwise than *bonâ fide*, having been made for the purpose for which I have no doubt it was made; that is, to enable the assignees to sell the goods for the benefit of the creditors, and according to the trusts in the instrument, for which purpose his services may have been particularly useful to all concerned."

Burns, J., at p. 452, said: "I do not look upon * * the fact that the person put in possession by the assignees had been previously a clerk of the assignor as of itself furnishing evidence that in truth no transfer binding in law or equity had taken place. * * It does not appear that the assignor after that period," (the date of the assignment) "ever entered the warehouse or had the slightest thing whatever to do with the goods or the warehouse, but the sales of goods made afterwards were made by the clerk placed in charge by the plaintiffs, and on behalf of the plaintiffs."

In *Maulson* v. *Commercial Bank*, 17 U. C. R. 30, the assignment was also for the benefit of creditors. At p. 31 Robinson, C. J., said: "The evidence shewed that, although the goods were not removed to another building after the assignment, they were actually taken possession of by the assignees, who exercised a continual control over them, putting persons of their own in charge, though the former owners of the goods continued to assist in disposing of them."

Everything appeared to have been done in good faith, and the assignees had a verdict. Robinson, C. J., at p. 34, said: "If we were to set the verdict aside * * we should be holding that the statute means in all cases, not merely an actual and continued change of possession, but an *exclusive possession* in the assignee, and that so peremptorily that a jury must be held to have decided against law, if in a case of this kind they find that there has been a change of possession when the former owner of the goods is allowed by the assignees to give his attendance and assistance jointly with their clerk or agent, and under their control and direction, in disposing of the goods. * * We think we cannot construe the statute so strictly."

*Foster* v. *Smith*, 13 U. C. R. 243, is another case of an assignment in trust for creditors. A delivery of the goods to the assignees was proved, but it was shewn that they had employed the assignors' clerk as their agent to keep and sell the goods in the shop. It was held that the jury were warranted in finding that there was an actual and continued change of possession.

In *Carscallen* v. *Moodie*, 15 U. C. R. 92, the assignment was of chattels, together with the land and buildings on which the chattels were. It was proved that after the assignor executed the assignment he continued for three or four weeks in the mill, and the persons employed under him worked the mill under his directions as before; but he swore that this was not done on his own account, but at the request and for the benefit of the assignees, who paid the men employed. It was contended that the assignees being in possession of the land, by virtue of their deed were also in possession of the chattels in the buildings on the land. The Court (Robinson, C. J.,) at p. 101, said: "It appears to me that Carscallen having taken a conveyance of the building in which the chattels were, and the same instrument containing also an assignment of the chattels, he ought either to have gone into actual visible possession of the building—that is, by himself, his tenants, servants or agents—or at least Cadwell, who made the assignment, should have quitted the possession and gone out."

In *McLeod* v. *Hamilton*, 15 U. C. R. 111, the assignment was to secure a particular creditor. The evidence shewed the latter lived at a distance from London, where the goods were, that they were never removed from the store of the assignor, who continued in the shop, residing there as before, and having the same clerk in his employment. The assignee had agreed to take the assignor into his employment and to give him a salary for managing the store on his account.

Robinson, C. J., at p. 113, held that there had been no actual and continued change of possession: "for I take the statute to mean such a change of possession as shall be visible to others, and shall shew that the parties have acted openly and above board. Now, for all that the rest of the world could tell, Fraser was as much the owner of the goods when the sheriff came with the execution as he ever had been."

In *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460, the assignment was to secure the plaintiffs, who were creditors of W. S. Sexton. One A. N. Sexton had been in charge of the property (which consisted of lumber in a lumber yard) on behalf of the assignor before and subsequent to the assignment. The bank placed an agent, one Wharton, in possession, who was to keep an account of the sales made, but not to interfere with them. A daily account was to be given to the bank's agent, and he was to return the proceeds of the sales to the bank. Gwynne, J., by whom the case was tried without a jury, at p. 475, said: "Although I consider both Wharton and A. N. Sexton had control, the latter as well as Wharton under and for the bank, yet A. N. Sexton having been originally in charge for W. S. Sexton, and Wharton's possession not being exclusive, I do not consider the *change of possession*, although sufficient as against W. S. Sexton, to have been such as, in view of the provisions of the Chattel Mortgage Act, would exclude the claims of the execution creditors." Wilson J., who delivered the judgment of the Court on the subsequent motion to enter a verdict for the plaintiff, was also of opinion that there had been no change

of possession sufficient to maintain their title to the property. See also *Wilson* v. *Kerr*, 17 U. C. R. 168; *Burnham* v. *Waddell*, 28 C. P. 263, 3 App. 288; *Ex parte Lewis re Henderson*, L. R. 6 Ch. 626; *Doyle* v. *Lasher*, 16 C. P, 263, where many cases on this point are collected; *Ex parte Hooman*, L. R. 10 Eq. 63.

In the latter case the assignee placed a person in possession, but the assignor, down to the date of his bankruptcy, continued to live in the house and use the furniture as before. It was held that the goods were in the possession or the apparent possession of the bankrupt within the meaning of the Bills of Sales Act. As to the application to this question of cases on the subject of apparent possession under the English Bankrupt Act or Bills of Sales Acts, see the observations of Burns, J., in *McLeod* v. *Hamilton*, 16 U. C. R. p. 114.

From some of these cases, and others which I have looked at, it appears that in the case of an assignment for the benefit of creditors an actual and continued change of possession within the meaning of the Act is consistent with the fact of the goods having been allowed to remain in the store or premises of the assignor, or of the assignee having employed a former clerk of the assignor, or even the assignor himself, to assist in their disposal; in the latter case the assignor not being in charge or having any control of the premises, but being subject to the directions of others who were actually in charge for the assignees. In the one case the assignor is not in any way personally in possession, and in the other he is under the immediate control and direction of other agents of the assignor—in short, is merely their servant or clerk. In both cases the facts are consistent with the object of the sale, and rebut any inference of fraud. But these authorities also shew that the most absolute good faith will not protect a transaction, where, though a different change of possession might have been made, the vendor is allowed to remain for the vendee in the exclusive or even joint possession of the property, retaining or having conferred upon him the power of

managing or disposing of it. Nor will the notoriety of the sale in the immediate neighbourhood avail anything, for it is precisely those persons who have not heard of the sale who are likely to be defrauded by the absence of any change in the possession of the property.

In the case before me I am compelled to the conclusion that under the facts I have stated there was no such actual and continued change of possession as the statute requires, and that the plaintiff must fail on this ground. The language of Wilson, J., in *Doyle* v. *Lasher*, 16 C. P. 263, at p. 270, is much in point: "A far different change of possession might have been made. No one could have told in his dealings with the debtor that he was not just as much the owner after the sale as he was before it; nor was the actual power of disposition of the vendor over the property in any respect altered by reason of the sale; nor could the sheriff be aware that any such prior disposal of it had been made. The very mischiefs intended to have been removed and provided against by the statute have all been permitted to continue here."

The defendant, however, is not entitled to succeed in respect of the whole of the proceeds of the sheriff's sale. I find as a fact that the plaintiff had himself purchased and added to the stock of goods in the store goods to the value of at least $550, and as to this amount he is entitled to succeed. Mr. Dougall contended that these goods might have been bought with the proceeds of the sale of some of the goods bought from the execution debtor. As, however, the execution creditor could have no right to such proceeds, so he could not be interested in any way in property which might be acquired with them: *Davis* v. *Wickson*, 1 O. R. 369.

I find, also, as facts that the sale to the plaintiff was made in good faith on the part of both parties, and for valuable consideration, and that the plaintiff was not aware that any of the securities transferred in payment of the price were defective in character or insufficient in value.

As to costs, although the claimant succeeds in the most

expensive branch of the enquiry—that, namely, as to the *bona fides* of the sale—there are several circumstances connected with it which invited the attack. I therefore direct that, except as to sheriff's costs, each party shall bear his own costs of the issue and trial and incidental proceedings; and that the claimant shall pay the sheriff's costs of the application.

From this judgment the plaintiff appealed to the full Court.

February 16, 1883. *J. K. Kerr*, Q. C., for the appeal referred to *McLeod* v. *Hamilton*, 15 U. C. R. 111, and argued that applying the principle of this and other kindred cases, the evidence shewed that there was a delivery and continued change of possession in this case.

*Dougall*, Q.C., contra. The learned Judge having found that the sale, in the absence of a registered bill of sale, was not accompanied by an immediate delivery and an actual and continued change of possession, or having found that if there was an immediate delivery there was no actual and continued change of possession, the judgment should have been for the defendants: *Ex parte Lewis, Re Henderson*, L. R. 6 Ch. App. 626; *Harris* v. *Commercial Bank*, 16 U. C. R. 437; *McLeod* v. *Hamilton*, 15 U. C. R. 111; *Carscallen* v. *Moodie*, 15 U. C. R. 92; *Burnham* v. *Waddell*, 28 C. P. 263, 3 A. R. 288; *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460, 475; *Doyle* v. *Lasher*, 16 C. P. 263; *Wilson* v. *Kerr*, 17 U. C. R. 168. On the evidence the sale by Morton to the plaintiff was calculated to defeat or delay the creditors: *Wade* v. *Kelly*, 18 C. L. J. 139. The learned Judge had no power to adjudicate upon the question of costs, as the costs were reserved by the interpleader order; but if he had such power then, as the judgment should have been general for the defendants, the defendants are entitled to full costs of the cause, and a deduction of one-third only, the judgment should stand for the $550 for the plaintiff, and for the defendants for the

balance of the $1,700 in Court: *Segsworth* v. *Meriden Silver Plating Co.*, 18 C. L. J. 440. As the sheriff was not made aware of the plaintiff having put $550 worth of goods in the store, and there being no evidence to shew that such goods could be separated from the Morton goods, an equity arises in favour of the defendants getting all their costs: *McDonald* v. *Lane*, 18 C. L. J. 239.

March 10, 1883. HAGARTY, C. J.—My learned brothers have satisfied themselves that the learned Judge, having found the sale by Morton to the plaintiff to have been in good faith and for value, ought to have found the change of possession to have been sufficient under the statute.

I have great difficulty in arriving at that conclusion. Nearly all of the many decisions that we have had on this statute have been after a jury has found a verdict either affirming or negativing the change required by the statute.

I feel very strongly that if a jury properly directed had found either for or against the sufficiency of the change on the evidence before us, the Court would not have disturbed it. The Judge would have explained the law to the jury and have asked them whether the required change had taken place.

Thus, properly instructed, the jurors would have found on the testimony of the various witnesses.

As the law now stands we have this issue to be tried by a Judge without a jury, but having cast on him the same duty with reference to the facts as was formerly cast on the jury.

The learned Judge here reserved his verdict until he had consulted the leading decisions of our Courts on the point, and with a full understanding of the effect of these decisions has declared, as his conclusion from the facts before him, that there was not the required change.

I am not able to say that he has deduced any wrong principle of decision from any of these cases to which he has referred, or apparently misjudged any construction which they have placed on the statute. I have had the

advantage of discussing the general law with him, and I am wholly unable to say that he has been mistaken in his view of the authorities. With that knowledge of the course of the decisions he has drawn a conclusion of fact from the evidence adverse to the sufficiency of the change of possession.

I feel the difficulty, I might almost say the absurdity, of our placing a lower value on the finding of an experienced Judge, with a full knowledge of the course of decisions on a question of this character, than on the decision of an ordinary jury of men who have to take, or ought to take, their view of the requirements of the law from the same or another presiding Judge.

The law has placed in certain cases the decision of issues of fact with the Judge instead of the jury.

Am I to assume that it was designed to attach a less binding authority to the learned than to the unlearned verdict, to the decision of the instructor of the jury than to the decision of the instructed?

We are told that we are, on review, to give the judgment which we think the Judge ought to have given. We are armed with full power to interpose where we feel a jury has clearly erred.

In the latter case we send it to a second jury for fresh consideration. In the former we save the necessity of another trial by giving the judgment which the Judge should have given. In either case we are equally dealing with a finding of fact, and ought, I consider, to deal with both cases on a like principle. Where we would not disturb the finding of a presumedly intelligent jury, are we to disturb it because it is only the finding of an admittedly intelligent Judge?

Approaching the consideration of this case with the views here expressed, I hesitate to hold that my brother Osler has decided wrongly.

I cannot so hold without pointing out some error that he has fallen into. I do not feel warranted in laying it down as the law of this Court that any fact or facts proved

to support the required change of possession are in law sufficient for that purpose. I cannot assert as matter of law that the mode in which this alleged transfer took place—the verbal sale, the delivering of keys, the attornment of the clerk of Morton to the plaintiff, the alleged employment of him from 8 a. m. till noon, and the alleged employment of the assignor Morton after the dismissal of the clerk at noon of the same day to the time when the sheriff entered with the executions—that proceedings like these are *per se* legally sufficient to shew a compliance with the statute.

I see great danger of establishing a vicious precedent if I venture so to do. I must either accept the verdict or hold it to be wrong because the Judge did not accept and hold these facts to be sufficient.

The verdict, whether it be from Judge or jury, is a conclusion of fact from evidence offered on either side—a result arrived at, as to the sufficiency or insufficiency of the alleged actual and continuous change of possession.

I am unable to view this case as if it came before us with power to draw inferences of fact as to the possession, assuming the bargain and sale to be *bonâ fide*, as was the course taken in *Gough* v. *Everard*, 2 H. & C. 1.

I have here to hold the verdict wrong, and if I do I must point out in what it is wrong, and in substance decide that the facts proved shew a legally sufficient change of possession.

Aware, as I must be, of the frequent occurrence of this question of statutable possession, I hesitate before laying down any rule that such and such facts constitute the required change. We are, of course, at full liberty to differ from any conclusion of fact drawn by a Judge, and wherever we see that in our judgment he is wrong we exercise our right to reverse his finding.

It is sufficient for me to say that I cannot see clearly that his conclusion was wrong or contrary to the doctrine laid down by our Courts. I cannot so hold without laying down that he ought to have viewed these facts differently,

and that what was proved in the case before him was legally sufficient to satisfy the statute.

I think the motion should be dismissed, with costs. If the verdict for the defendants had stood, I should have held that they should not be allowed to tax against the plaintiff the very large amount of costs incurred in attempting to prove that his purchase was not for value.

CAMERON, J.—The finding of the learned Judge at the trial, that the sale of the goods made by the execution debtor, William Morton, to the plaintiff was *bonâ fide*, and that there was an immediate delivery thereof to the plaintiff, seems to be fully warranted by the evidence, and this would entitle the plaintiff to a decision of the interpleader issue in his favour were it not for the further finding of facts by the learned Judge, that there was not such an actual and continued change of possession of the goods as required by the Act respecting mortgages and sales of personal property—R. S. O. ch. 119, sec. 5; and it becomes necessary on this motion to determine whether this latter finding is supported by the evidence. The learned Judge has very fully stated the facts in the judgment he delivered, and has made a very clear review of the authorities upon the question. He appears to have thought, upon these authorities, that there was no actual and continued change of possession upon the facts disclosed by the evidence, though fully impressed with the honesty of the plaintiff's claim. I have not been able to arrive at the same conclusion. Assuming that the transaction was what it appeared to be, and not a sham, there was, I think, an immediate delivery of the goods, and an actual and continued change of possession, unless under no circumstances can the purchaser of goods, although he has taken possession, and continues such possession, employ the former owner of the goods as his clerk or servant to assist him in the sale of the goods or the care and preservation thereof. The statute does not in terms prohibit such employment. All it requires is that there shall be an actual and continued

change of possession of the goods. The plaintiff took delivery of the goods in this case. He locked the store containing them at night, and retained one key in his own possession, and entrusted the other to the person that he had employed as his clerk, the latter having been the clerk of the former owner of the goods, who opened the store next morning.

Thus there was an actual change of possession. Between twelve and one o'clock the next day the plaintiff quarrelled with his clerk and dismissed him. Then, being himself unacquainted with the business, he made a temporary arrangement with Morton, the former owner, to act as clerk for him, at the wages of $1.50 per day. The change of proprietorship was made generally known in the village, and advertisements were inserted in the public newspapers indicating it. As matter of law, apart from any question under the statute, the possession of the clerk or servant is the possession of the master, not that of the servant or clerk. Then, unless the statute has the effect of re-vesting the possession in the former owner, and divesting from the purchaser the actual possession which he had taken, and which he would continue to have by his clerk, though himself absent, if he had employed any other person than the former owner, the plaintiff continued the actual possession he had acquired. The statute was not passed to invalidate a transaction such as this, which in my view is not at all within the mischief intended to be remedied and prevented. The statute was directed against those secret and covinous transfers of property without change of possession which enabled a person as the apparent possessor of goods or chattels to acquire credit, and when the creditor resorted to the goods so possessed the secret owner stepped forward and claimed them, and thus a door to much fraud was opened. For the prevention thereof, when it was intended that the former owner should retain the possession, publicity was to be given to the transaction by means of a bill of sale in writing, filed with an affidavit of *bona fides*. But surely announcing an actual change of proprie-

torship, so that it was made patent to any one interested in the matter residing in the neighbourhood, and the daily or frequent presence of the new proprietor exercising dominion over the property transferred, would be quite as effectual as the filing of the bill of sale to prevent the former owner of the property acquiring credit by reason of his apparent posssesion of the goods.

The *bona fides* of the sale, and the question whether there has been an immediate delivery and an actual and continued change of possession, are questions of fact, and must be determined by the circumstances given in evidence in each case. In *Maulson* v. *The Commercial Bank*, 17 U. C. R. 30, it was held that allowing the former owner of the goods to give his attendance and assistance in the business jointly with the clerk or agent of the assignee did not, as matter of law, render the transfer void.

In *Carscallen* v. *Moodie et al*, 15 U. C. R. 92, it does not appear that there was any actual delivery of the goods to the assignee. There appears to have been nothing more than the execution of the deed which embraced both lands and chattels, and the case is of no further importance than shewing that upon the facts there, which are totally unlike those in the present case, there was not sufficient evidence to warrant the jury in finding there was an actual change of possession.

*McLeod* v. *Hamilton*, 15 U. C. R. 111, is also quite unlike this case in its facts, and the judgment only supports the position that when the jury find against the possession on reasonable evidence, the Court will not interfere to uphold a transfer made in apparent good faith. The opinion of the Chief Justice that the statute meant such a change of possession as shall be visible to others, and shall shew that the parties have acted openly and above board, does not militate against the plaintiff in this case on the facts here proved.

Nor is the language of Gwynne, J., in the *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460, necessarily opposed to the conclusion I have arrived at in this case. There was no

immediate change of possession of the goods mortgaged in that case, and the assignees of the mortgage did not assume to take possession for several months after it was executed, and the mortgage for defects in it was in itself void against creditors.

If that case can be taken to decide that the employment of a clerk of the former owner of the goods by an assignee or purchaser, while such purchaser or assignee is in the immediate exercise of a control over the goods, either by himself or by his other servants or agents, it would be inconsistent with *Harris* v. *The Commercial Bank*, 16 U. U. R. 437; *Maulson* v. *The Commercial Bank*, already referred to, and *Foster* v. *Smith*, 13 U. C. R. 243. I do not think it does go that far, and in the reasons for the conclusion reached the authority of these cases is not questioned.

The case of *Doyle* v. *Lasher*, 16 C. P. 263, at first impression, would appear to be against the plaintiff, but it is very distinguishable on the facts, and were it otherwise it was not essential to the decision of the case to determine what would or would not amount to a sufficient actual and continued change of possession. The learned Judge of the County Court had exercised his discretion in granting a new trial, and on appeal the Court of Common Pleas affirmed on the facts of that case it was a proper exercise of discretion. That judgment in effect decides no more than that, and that the mere act of marking goods by a purchaser, and placing them in a different part of the seller's premises, does not amount to an actual and continued change of possession, the seller still having care and control over them.

But the whole current of authority goes to show that the question, whether there has been an actual and continued change of possession or not is one of fact. Many of the cases that have been decided have worked much hardship, and done as much mischief as might have been done had the act never existed, in disregarding the *bona fides* of the transaction in particular cases. In very few of the cases that come before the Courts has it appeared that any

one has been induced to give credit to the owner after the change of ownership by reason of his appearing to have possession of the goods; and that, in my opinion, was the mischief the statute was intended to remedy. The contest is usually between fraudulent assignees or honest purchasers of the goods and creditors of the assignor before the assignment in dispute took place; and it would seem to me more in accordance with strict justice and sound common sense that an honest transfer of property not contrary to the common law should be upheld rather than destroyed, if there has been a reasonable though not a perfect compliance with the requirements of an Act limiting the free common law right of disposition of property. In the present case, if the plaintiff instead of assigning mortgages to Morton had paid him in actual cash the full price of the goods, and Morton had honestly made a distribution of the same among his creditors, as he did in fact of part of the mortgage moneys, if the defendants are entitled to succeed now, they would be equally entitled to avoid the sale and take the plaintiff's property to pay another's debt to them. This would be an injustice, that, while it would not justify the Court in disregarding the plain language of a statute leading thereto, renders it all important that a different character should not be given to the presence of the former owner in the place the goods were while he owned them than he had in truth, and the presence and character of another controlling the goods should not be ignored altogether. *Gough* v. *Everard*, 2 H. & C. 1, a case under the Imperial Act, has a strong bearing on the present case in favour of the plaintiff, and in which, at page 8, Chief Baron Pollock said: "If any class of Acts ought to be construed strictly it should be those which, having for their object the prevention of fraud, have in certain cases a tendency to invalidate *bonâ fide* contracts. Where fraud does not exist this Act should at all events receive no more than its true construction."

On the whole, when my learned brother Osler found the *bona fides* of the sale upon the facts in evidence

there was no valid reason for holding that the plaintiff's possession was not an actual possession, and continued from the time of purchase down to the time of seizure by the sheriff. I think, therefore, his finding in favour of the defendants in respect of the goods bought from Morton, should be set aside, and judgment on the whole case be entered for the plaintiff, with costs.

ARMOUR, J., concurred with CAMERON, J.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## HENEBERY v. TURNER.

*Foreign judgment, action on—Rule 322—Motion for judgment—Evidence.*

The defendant in an action on a judgment obtained in Iowa, U. S. A., pleaded denying the recovery of the judgment. Upon a motion for judgment under Rule 322, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment.

*Held*, affirming the opinion of the Master, that judgment could not be ordered on these materials under Rule 322, the defendant having put the judgment distinctly in issue.

In proceeding under this Rule 322 it is not sufficient to produce a document on which the plaintiff relies, without any proof to connect the defendant with it or to support its genuineness.

THIS was an action brought on a judgment recovered in the State of Iowa, U. S., against the defendant.

He pleaded, denying the recovery of the judgment.

The plaintiff applied to the Master in Chambers for judgment on an affidavit of a clerk in the plaintiff's attorney's office, verifying the statement of claim and of defence in the action. On the application an exemplification of the judgment was produced in the ordinary form.

The defendant's counsel appeared and objected, insisting on his plea, and urging deficiency in the plaintiff's materials on which he moved.

The learned Master gave the following judgment:—

DALTON, Q. C., M. C.—I make the order for judgment in this case. Were I to follow the opinion I myself should form on Rule 322 I should discharge this motion.

There are pleadings, and the defendant in his defence has specifically denied the recovery of judgment against him as in the statement of claim mentioned. It is sought by the plaintiff to prove that judgment before me on this motion by an exemplification under the seal of the foreign Court. I should have thought that that could not be done under Rule 322, but for the case I mention below.

That part of Rule 322 which refers to the proof of documents, &c., is taken from the old Chancery Rule 270; and it was never held applicable to proof of a fact specifically put in issue by the pleadings of a defendant. And it would seem to me that it should not be now in Rule 322.

I put a case to Mr. Aylesworth on the argument. Suppose a man sued

upon a promissory note, and defendant pleads *non-fecit* merely. I think that under Rule 322 I could not listen to an affidavit that he *did* make the note. On my own view of the rule I should still be of that opinion. But Mr. Aylesworth has produced me the papers in a suit in which in November, 1881, a judgment was given for the plaintiff on papers quite similar to this case, where the recovery of the judgment was specifically denied by the plea, and where further the assignment of the judgment, for that action was brought by an assignee, was also in issue on the pleadings.

So I follow that case. If this can prevail the scope of Rule 322 is pretty large. See *Wilson* v. *Cossey*, 14 Grant 80; *Edinburgh Life Assurance Co.* v. *Allan*, 23 Gr. at p. 239.

The defendant appealed to a Judge, who referred the matter to the Court.

February 21, 1883. *J. B. Black* for the appeal. The question is, whether the putting in an exemplification of a foreign judgment entitles the plaintiff to judgment under Rule 322. It is submitted that it does not. See *Jones* v. *Jones*, 9 M. & W. 75; *Whitelocke* v. *Musgrove*, 1 C. & M. 511.

*Aylesworth*, contra. The evidence of identity is to be presumed.

March 10, 1883. HAGARTY, C. J.—We agree with Mr. Dalton's view.

He considered himself bound by the decision of Wilson, C. J., in a case of *Hart* v. *Pew*, made in November, 1881, in a somewhat similar case (*a*). The papers in that case were produced. There was much more there to verify the proceedings on the plaintiff's part than there is here. It is not even sworn here that any such judgment was ever recovered against the defendant.

But the objection lies deeper. There is a defence put in, and without trying or falsifying that defence by examination of the defendant or otherwise judgment is ordered.

As the Master puts it, a note is sued on and a plea denying defendant's signature; can he on an affidavit that the plea is false order judgment? We think not.

(*a*) Not reported.

It is said here that the exemplification of the foreign judgment is conclusive under our statute. It is good evidence without proof of seal, &c.; but it cannot conclude defendant from shewing that it is a forgery, or other reason to rebut the *primâ facie* sufficiency of it.

The Rule 322 relied on does not seem to us to warrant this proceeding, "or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination; or he may so apply where infants are concerned and evidence is necessary, so far only as they are concerned, for the purpose of proving facts which are not disputed."

This portion of the order is not in the English Act, but taken from our Chancery Orders.

Even in proceeding under this order it seems to us that much more would be required of a plaintiff than merely handing in a document on which he relies, without any proof to connect defendant with it or to support its genuineness.

But even in such a case the defendant has put the document distinctly in issue, and no attempt is made to shew that his defence is false, even if it were competent for the Master to try its suggested falsity. So that in any view of the proceeding it appears to us to be wholly unwarranted by authority.

The learned Chief Justice, who made the order in *Hart* v. *Pew*, gave no written judgment, and we understand he is now satisfied it should not have been made

If the Legislature intend that the defence pleaded to an action is to be tried by affidavit in Chambers, we think we are right in requiring such a determination to be expressed in language of clear import.

We must allow the appeal, and discharge the order, with costs.

ARMOUR and CAMERON, JJ., concurred.

*Appeal allowed.*

[QUEEN'S BENCH DIVISION.]

## WHITE V. CORPORATION OF THE TOWNSHIP OF GOSFIELD.

*Municipal works—Drains—Non-repair—Action for damage—Mandamus.*

The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear.

*Held*, affirming the judgment of Hagarty, C. J., (CAMERON, J., dissenting) that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair under R. S. O. ch. 174, sec. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs.

*Per* CAMERON, J.—An action is expressly given by sec. 542 for injury done by such neglect, where the drain serves two municipalities; but in a case like the present, though under sec. 543 the municipality may be compelled by mandamus to repair the drain at the expense of the lands benefited, no action lies for injury caused by non-repair.

TRIAL before Hagarty, C. J., at the last fall assizes, at Sandwich, without a jury.

The plaintiff was owner of the west halves of lots 2 and 3, on the north side of the Talbot Road, West, in the township of Gosfield, and complained that defendants made a drain called the Upcott drain under the municipal law, and about eight years ago enlarged it to drain certain lands, including his own land: that they then led other drains and more water into it, and more than it was constructed to carry off, and caused his lands to be overflowed: that they allowed it to become blocked and filled up, and insufficient to carry off the water, which spread over his land, to his damage: that he notified them to clean it out, but they neglected, &c.

The plaintiff claimed damages, and a mandamus.

The defendants denied their liability, and relied on the statutes cited in the judgment.

On the 10th October, 1865, defendants passed a by-law for the making of this drain, and assessing certain specified lands, including the land of plaintiff, therefor.

The drain was begun in 1866, and completed. It ran through the plaintiff's land, and was intended to benefit a large tract of territory.

In 1873, after obtaining the report and estimates, the council on 27th September passed another by-law for widening and deepening this municipal drain, and for raising the necessary funds on a special assessment of the lands benefited.

The work was done, and the plaintiff stated that at first it drained his land well, but that after a while it was allowed to fall into bad repair: that the earth fell in and it became blocked with sticks, clay, grass, and rubbish; and that every spring and fall when heavy rains fell his place was overflowed; and moreover, that defendants brought other water into the drain below his land, which interfered with the water running off.

It further appeared that about the spring of 1881 defendants completed another drain called the Loyse drain, running into the municipal drain, below plaintiff's land, which he said, if properly constructed, ought to have relieved him.

He gave very strong evidence of large damage done to him in several seasons, by the neglect to keep the drain cleaned, &c.

He said he would have been satisfied if they had made the Loyse drain competent to carry off the water; he did not care which drain did it.

A great deal of evidence was offered on each side, the defendants insisting first that they were not liable for the non-cleansing or maintaining of this drain; also, that if liable it was not out of repair to the plaintiff's damage, and that the Loyse drain had effected the same object, of carrying off the water, as the municipal drain was intended to effect.

Surveyors were examined on each side, and profiles of the levels and depths produced.

The learned Chief Justice reserved judgment.

November 3, 1882. HAGARTY, C. J.—My impression at the trial, confirmed by subsequent consideration, was that the weight of evidence was much in favour of the plaintiff's contention, that the drain was left for a long time out of repair from defendants' neglect, and that if properly cleaned out it would relieve the plaintiff's land.

The defendants relied much on the Loyse drain as answering the same purpose, but whether from faulty construction or neglect to maintain it properly, I do not think it does effect the object.

The plaintiff and others interested have paid largely on the special assessment for these drains. His farm is said to be worth $6,000, and I think he has proved his damage to be considerable.

Special notice in writing from plaintiff to defendant to do this cleaning, &c., was served 23rd July, 1880, and this action was commenced 8th March, 1882.

The first by-law appears to have been passed under the then existing law (Consol. Stat. U. C. ch. 54, sec. 278 *et seq.*) No special provision as to maintenance or damages to parties injured by neglect to maintain, is contained in it.

The Municipal Act of 1866, ch. 51, sec. 281 *et seq.*, contains much fuller provisions. Some of the work under the by-law must probably have been done after this Act became law, 1st January, 1867.

Section 282, from sub-sec. 6 to 15, provides for the case of drains going through more than one municipality. Sub-sec. 9 directs the engineer to report to the council employing him "whether the deepening or drainage shall be constructed and maintained solely at the expense of such township, or whether it shall be constructed and maintained at the expense of both municipalities, and in what proportion."

Sub-sec. 16: "After such deepening or drainage is fully made and completed it shall be the duty of each municipality to preserve, maintain and keep the same within its own limits; and any such municipality neglecting or refusing so to do, upon reasonable notice in writing being

given by any party interested therein, shall be liable to an indictment for such neglect or refusal, as well as to pecuniary damages to any person who, or whose property, shall be injuriously affected thereby."

When the by-law of 1873 was passed the Act in force was 36 Vict. ch. 39, passed 29th March, 1873. Sec. 8 is to the same effect as to constructing and maintaining, and being liable for damages, as already cited in sub-sec. 9, sec. 282, of the Act of 1866.

Section 17 contains a provision like that in sub-sec. 16 just cited from the Act of 1866, and enacts that in any case where the deepening or draining has not been continued into another municipality, or when no other is benefited, it shall be the duty of the municipality doing the work to preserve, maintain and keep it in repair at the expense of the lots benefited, &c., &c.

37 Vict. ch. 20, sec. 6, repeals the first 18 sections of the Act just cited of 1873, and also sections 27 and 28, and the proceedings authorized thereby shall hereafter be taken under sections from 447 to 463 of the Municipal Act of 1873.

Turning to that Act, 36 Vict. ch. 48, sec. 453, makes a like provision as to constructing and maintaining as the Act of 1866.

Section 459 provides as in sub-sec. 16, sec. 282, of the Act of 1866, as to damage to individuals, &c.

Section 460 is the same as to preserving and maintaining as in the repealed sec. 17 of the Act of 1873.

39 Vict. ch. 34 allows municipalities, where drainage has been constructed out of the general funds of the municipality, to pass by-laws for preserving and keeping in repair the same at the expense of the lots benefited.

R. S. O. ch. 174 repeats the existing provisions, especially section 542, as to the duty of each municipality to preserve and keep in repair the works in its own limits, &c., and on neglect to be liable to mandamus and to pecuniary damages sustained by individuals; and sec. 543, specially referring to the case where the work has not gone into or benefited any other municipality, to maintain and keep in repair at the expense of the lots benefited.

The last of the numerous Acts on the subject of drainage is 45 Vict. ch. 26, declaring that the provisions of sec. 529 of the Revised Statutes, ch. 174 (being the general section, with numerous sub-divisions for the deepening of streams and draining property), "shall be deemed to extend to the re-execution or completion of any works which have been executed or have been partly or insufficiently executed under such section, or under any other provision of any Act of this Legislature, or of the Parliament of the Province of Canada, and to the straightening of any stream, or the removing of any obstruction," &c.

My opinion is that the defendants in this case are liable to maintain and keep in repair this drain, and that an action lies against them at plaintiff's suit for damages sustained by their failing so to do.

The by-law of 1873, and the deepening, &c., done under it, must at all events fall under the provisions of the Act passed in the spring of that year, which is clear as to the duty to maintain and keep in repair even if the section expressly giving damages to individuals has to be read as applicable to the case where two municipalities are liable.

I do not decide that this clause is necessarily limited to such cases.

I think that whenever a work is to be carried through a man's property, to convey water from other places through such property, and a duty cast to maintain such work in proper repair, that damages resulting to the property from neglect to observe that duty can be recovered by the owner.

The defendants choose to bring quantities of water on to plaintiff's land, which otherwise would not have reached it. Their right to do so is based upon a statutable power to make a drain or watercourse for general purposes.

If they allow the drain to become ruinous, so that it ceases to act as such, then they bring the water to his land simply to his detriment, and not in the reasonable exercise of their statutable power.

I do not enter into the discussion as to an individual's general right to seek damages arising from the breach of a statutable duty.

The reversal by the Court of Appeal of the decision of *Atkinson* v. *Newcastle, &c., Waterworks Co.*, L. R. 2 Ex. D. 441, and the strong doubt there thrown upon *Couch* v. *Steel*, 3 E. & Bl. 403, do not, I think, touch this case. See *Brown* v. *Great Western R. W. Co.*, 2 App. 70, and the note thereto, at p. 74.

In the case before us the statutable duty refers to maintenance and repair of a work carried through plaintiff's property, the well-being of which depended on that duty being duly performed.

At the trial I endeavoured to induce the parties to compromise, by defendants paying a moderate amount to the plaintiff as damages, and undertaking to cleanse, &c., this Upcott drain. I could not succeed. Defendants urged that in any event they should only be liable for damage accruing for neglect to repair after notice. I was willing to adopt that view as not unreasonable, and I named $200 as my assessment of the damages. The plaintiff was willing to compromise on these terms.

Without expressly holding that the damages must be confined to the period after notice, I adhere to that sum as a reasonable estimate, and the evidence will, I think, support it as accruing since notice.

I find, therefore, that defendants are liable to maintain the drain, and that they have not done so, to the plaintiff's damage of $200.

I direct judgment therefor with full costs of suit, and that a mandamus do issue as prayed in the pleadings.

Stay to 5th day of November sittings.

December 1, 1882. *Falconbridge* moved, on notice, against the judgment and findings of the learned Chief Justice, as erroneous, and to dismiss the action, and argued: The Act respecting Municipal Institutions, R. S. O. ch. 174, sec. 545, provides a special mode of determining such matters as this, viz., by arbitration, and that mode and no other is the one to be followed: *Vestry of St. Pancras* v. *Battersbury*, 2 C. B. N. S. 477. [HAGARTY, C. J.—I do

not think that objection was taken at the trial.] It does not seem to be noted, but appears in counsel's brief. Section 542 of the Act, under which plaintiff brings this action, applies only to cases where the deepening or drainage extends beyond the limits of the municipality in which they are commenced, or where it benefits lands in an adjoining municipality. Section 542 must be read in connection with sections 534 to 541, and the expression "it shall be the duty of each municipality" shews clearly that this view is correct. There is no liability at common law. The condition of plaintiff's land has been much improved by what has been done, and his only complaint is that more has not been done for him. The by-laws of 1865 and 1873 did not provide for the preservation and maintenance and reparation of the drain, and in order to cast on the defendants the necessity and liability of doing so, it would be necessary that a by-law to that effect should be passed. As the case stands now it is purely a matter of discretion, and no action will lie against defendants for mere nonfeasance. He cited *Patterson* v. *Corporation of Peterborough*, 28 U. C. R. 505; *Darby* v. *The Corporation of the Township of Crowland*, 38 U. C. R. 338; *Danard* v. *Corporation of the Township of Chatham*, 24 C. P. 590; *Bateman* v. *The City of Hamilton*, 33 U. C. R. 249; *Atkinson* v. *Newcastle and Gateshead Water Works Co.*, L. R. 2 Ex. D. 441, which practically overrules *Couch* v. *Steel*, 3 E. & B. 402; C. S. U. C. ch. 54, sec. 27 *et seq.*; Municipal Act of 1866, sec. 281, *et seq.*: 45 Vic. ch. 26, O., secs. 1, 4, & 14

*Douglas*, contra. The law is in a lamentable state. Sections 542, 543 were in the Act 36 Vict. ch. 48. The objection is to the mode of proceeding was not taken at the trial, and cannot now, therefore, be listened to. The defendants were guilty of a misfeasance as well as mere nonfeasance, for they led other drains into the original drain, which caused it to overflow and do the damage complained of.

March 10, 1883. ARMOUR, J.—I agree in the result arrived at by the learned Chief Justice, on the ground that the plaintiff was entitled to maintain this action and to recover damages against the defendants for their breach of duty in not preserving, maintaining and keeping in repair the drains in question, as by sec. 543 of R. S. O. ch. 174, they were bound to do.

I think, therefore, that the motion should be dismissed, with costs.

CAMERON, J.—The legal question presented by the motion on behalf of the defendants to set aside the judgment in favour of the plaintiff, with damages amounting to $200, directed by the learned Chief Justice of this Court to be entered at the trial of this action at Chatham, is, are the defendants liable to the plaintiff to make good to him the damage he has sustained caused by the alleged non-repair of a drain called the Upcott or Tap drain number 2, constructed or made by the defendants under the following circumstances, assuming them to have been proved in evidence at the trial? The defendants, upon petition by the requisite number of resident property owners, on the 10th day of October, 1865, passed a by-law for the draining of the locality therein described, such drain passing through and benefiting the plaintiff's land, *being the westerly halves of lots Nos. 2 and* 3, north of the Talbot road, in the township of Gosfield. The defendants, in accordance with the by-law, constructed the drain. The plaintiff, among others whose lands were benefited, was specially assessed for the cost of such drain under section 279 of ch. 54 Con. Stat. U. C., the Act then in force relating to such by-laws. On the 27th September, 1873, the defendants, upon a petition of the requisite number of residents on the property benefited, including the plaintiff, passed a second by-law, entitled a by-law to provide for the deepening of Tap drain No. 2, in the township of Gosfield, and for the borrowing on the credit of the municipality the sum of $2,558 for completing the same. At the time this last by-law was

passed the Acts in force under which the same could be legally passed were the 36 Vic. ch. 39, an Act specially relating to drainage works by municipalities, and 36 Vic. ch. 48, the Act relating to municipal institutions generally. The latter of these Acts contains the following provisions: 452—"When 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, or agreed upon by the arbitrators, shall be paid out of the general funds of such municipality or company."

459: "After such deepening or drainage is fully made and completed, it shall be the duty of each municipality, in the proportion determined by the engineer or arbitrators, (as the case may be), or until otherwise determined by the engineer or arbitrators, under the same formalities as nearly as may be, as provided in the preceding sections, to preserve, maintain and keep in repair the same within its own limits, either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council, upon the report of the engineer or surveyor, may seem just; and any such municipality neglecting or refusing so to do, upon reasonable notice in writing being given by any party interested therein, shall be compelled by *mandamus*, to be issued by any Court of competent jurisdiction, to make from time to time the necessary repairs to preserve and maintain the same, and shall be liable to pecuniary damage to any person who, or whose property, shall be injuriously affected by reason of such neglect or refusal."

460: "In any case wherein, after such deepening or drainage is fully made and completed, the same has not

been continued into any other municipality than that in which the same was commenced, or wherein the lands or roads of any such other municipality are not benefited by such deepening or drainage, it shall be the duty of the municipality making such deepening and drainage to preserve, maintain and keep in repair the same *at the expense of the lots, parts of lots and roads, as the case may be, as agreed upon and shown* in the by-law when finally passed: provided always that the council may, from time to time, change such assessment on the report of an engineer or surveyor appointed by them to examine and report on such drain, deepening and repairs, subject to the like rights of appeal as the persons charged would have in the case of an original assessment." The Act 36 Vic. ch. 39, sec. 17, contains provisions identical with the above secs. 459 and 460.

Assuming the evidence of the plaintiff, for the purpose of the present question, to be true, it would appear that the drain as deepened has become partially filled up, so that its capacity is not greater, if it be not less, than it was before the deepening took place. The plaintiff's alleged injury is, that more water is brought to his land than formerly, and in the wet season the water remains longer to the injury of his crops, and he contends that he is within the express provision of sec. 459 of the Municipal Institusions Act above set out, or if that provision is confined to the case where the drain is extended to another municipality, he is clearly within section 460, which imposes the duty upon the municipality of keeping a drain constructed as the one in question was in repair, and for breach of such duty the defendants are, without express provision to that effect in the clause itself, made liable by the common law. It would seem to be clear that the framer of the two clauses intended them to be applicable to two different kinds of work, that is to say, those in which two or more municipalities were interested, and those wholly within one, or section 460 would be quite unnecessary, as would also the latter part of sec. 17 of 36 Vic. ch. 39. If there-

fore the defendants are liable, it must be without the assistance of sec. 459.

It may well be conceded that neither a corporation nor an individual can, without liability to the person who or whose property is injured thereby, bring water or other matter of an injurious character to a man's land against his will. The authorities are too numerous and too clear to admit of the least doubt on that head. But that concession is not decisive of the present question. The plaintiff here asked that the work executed by the defendants should be done for his benefit and the benefit of those persons specially named in the petition and by-law, and specially benefited. The work was not one in which the ratepayers of the municipality generally were interested, or in respect of which special burdens or obligations should be imposed upon or be incurred by the municipality to their detriment. If in the doing of the work injury was caused to any one, the statute provides a means of adjustment, namely, by arbitration under the Act, and not by action. The provision, sec. 462, would not seem to cover or extend to an injury like the present, but only such injuries as result from the construction of the works, or such as are consequent thereon, which I understand to mean caused by the construction of the works, or consequent, that is, following as the result of such construction, and not such as arise from their neglect or improper use after they have been constructed.

The duty imposed upon the municipality is to repair, not generally, but at the expense of the lots, parts of lots and roads, as agreed *upon and shewn in the by-law when finally passed*; and I do not think, in addition to this duty, is to be superadded that of making good at the expense of the rate-payers generally a loss such as that claimed in this action. If the defendants on request refuse to repair the drain, the remedy to compel them is by mandamus, and one who has asked to have the drain constructed cannot seek redress by action. If the duty had been imposed upon the municipality generally it might be otherwise.

In *Atkinson* v. *Newcastle Water Works Co.*, L. R. 2 Ex. D. 441, the principle laid down in *Couch* v. *Steel*, 3 E. & B. 403, that where there is a statutory duty imposed an action lies by any person injured or aggrieved by neglect of such duty, is very strongly questioned, and the contrary held in respect to the breach of duty complained of in that case. The case is not in its circumstances like the present, and may well have been decided on the ground that the injury complained of was not the proximate result of the neglect of duty; and the damages might well have been deemed too remote. But the language of the learned Judges who took part in the decision shew a broad dissent from the correctness of the above principle. Lord Cairns, L. C., at p. 448, thus alludes to the decision in *Couch* v. *Steel*: "But I must venture, with great respect to the learned Judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down—that wherever a statutory duty is created, any person who can shew that he has sustained injuries from the nonperformance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview of the Legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the act with which the Court have to deal is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works."

The other Judges, consisting of Cockburn, C. J., and Brett, L. J., were equally pronounced with Lord Cairns in their view that the principle laid down in *Couch* v. *Steel* was too broadly stated.

There is no doubt the Municipal Institutions Act, as a whole, is one of public and general policy, but in some of its provisions, and in that relating to local drainage, it has

special application to individuals, and creates a quasi bargain between the owners of property affected and the council of the municipality, in which the municipality as a whole is not interested to a greater extent than that they become liable as sureties, as it were, for the owners of the property for the due payment of the cost of the works, that for their benefit and in their interest have been undertaken, and are indirectly benefited by the increased value of the property which in consequence contributes more to the general taxation.

It seems to me therefore where in one section and for one purpose express provision is made that an action will lie for breach of the specified duty, and in another section no such right of action is in terms given, though a similar duty is indicated, it was the intention of the Legislature in the latter case not to confer a right of action for neglect of such duty.

In the fact that the ratepayers in one municipality may have no moral influence, such as may be supposed to exist in the right to vote, over the members of the council in another municipality may possibly be found the reason why in the one case a right of action is given and in the other not.

For the mere non-repair then of the drain, and any injury the plaintiff's crops may have suffered by reason of water which might and would have been drained off if the drain had not become out of repair by filling up, if such water would have been on the plaintiff's land if the drain had not been constructed, I am of opinion the plaintiff's action is not maintainable; and this brings up the question of the defendants' liability for the alleged wrong of bringing a larger quantity of water to the plaintiff's lands and allowing it to remain there, by means of the drain in question, than would have been brought there if the drain had not been constructed. The consideration of this question may be divided conveniently into two heads. First, can the plaintiff, at whose instance and in whose behalf, in common with the other owners of property benefited by the construction of the drain, the drain was

constructed, complain of that which would be the natural result of the work if the drain became obstructed? If the defendants are not liable to an action for non-repair of the drain it would seem impossible on principle to hold them liable for damage done by water poured upon the plaintiff's land not by reason of the drain itself—which would and was designed, if unobstructed, to take the water away from the land—but by reason of an obstruction in the drain. Bringing water improperly to a man's land is an act of misfeasance, and bringing it by a general drain lawfully constructed to the land, and there pouring it over the land, would be such act of misfeasance. But where the drain is lawfully constructed through a man's land, at his request, for his benefit, and it becomes obstructed, and by reason of the obstruction, and not otherwise, the water floods the land, such flooding is not the result of a misfeasance, but a nonfeasance, and if the nonfeasance is not an actionable nonfeasance the defendants are not liable for the consequences of the obstruction in the drain.

I cannot therefore concur, as applied to this case, in the following view of the learned Chief Justice in his judgment: "If they allow the drain to become ruinous, so that it ceases to act as such, then they bring the water to his land simply to his detriment, and not in reasonable exercise of their statutable power."

The second head of the question is, assuming the law to be in the plaintiff's favour, has he established by evidence that the drain, in its defective condition, brings more water upon the plaintiff's land than was brought there by the original drain, or than would be there if the drain had not been constructed?

In the plaintiff's own evidence, in answer to the question, "Is your land any better to-day than it was at first?" he swore, "Well, there are portions of it that would not be as wet now as it was before there was any drain constructed there. But where the surface of the land is lower back from the drain than it is at the drain, there the water would lay on it now, just as bad as it would before the drain was constructed at all, *only not so deep.*"

If this evidence be true, it is difficult to see how the drain brings more water than used to be on the land, and yet the water not be as deep as formerly. There is no doubt there is evidence, as far as positive assertion goes, that more water is brought to the land than formerly; but take the above declaration of the plaintiff in connection with the evidence of Laird, the Surveyor called by the defendants, whose evidence shews the capacity of the drain is greater to carry off water from the plaintiff than to bring it to his land, and also the other testimony for the defence, including that in relation to the manner which the plaintiff ran his furrows and drained his land, the weight of evidence strongly preponderates in favour of the view that the drain is exceedingly beneficial, and not injurious. The plaintiff's evidence shews he only paid one dollar an acre for the land before the drain was constructed, and other witnesses speak of it as being worthless before this; while now it is worth $60 an acre. Even the very poor crops raised on the alleged wet land, as compared with those on other portions of the farm, would on many farms in less favoured localities be deemed good average crops.

It is, I presume, self-evident that if the water in the drain rises above the bottom of the plaintiff's cross drain, it would retard the flow of the water from the plaintiff's land; but it would have to rise to the height of between two and three feet before it could get over the surface, as that is the depth of the drain on plaintiff's lot. It may in very heavy freshets get over the banks, but according to the evidence the water does not remain, which it would do if the drain were not of service in carrying it off.

I am therefore of opinion, on the facts and law, the plaintiff is not entitled to recover, unless he is entitled to recover on the simple ground of non-repair, by reason whereof his land is less perfectly drained than it would be if by cleaning out the drain were restored to its original capacity, and for the reasons already given, I am of opinion he is not entitled to recover on that ground.

HAGARTY, C.J., remained of the opinion already expressed by him.

*Judgment accordingly.*

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[QUEEN'S BENCH DIVISION.]

## HESSIN v. BAINE.

*Married woman—Separate estate—Separate trader.*

B. told the plaintiff that having failed he was unable to carry on business in his own name, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a grocer, either on her or his order, the account to be opened in her name. Goods were shipped accordingly upon orders of the husband, and on one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate.

*Held*, HAGARTY, C. J., dissenting, that the plaintiff was entitled to recover.

*Per* CAMERON, J.—The defendant was liable, being possessed of separate estate, whether the goods were bought by her or by her husband. In the latter case she would be surety for her husband as acceptor of bills drawn upon her for the price of the goods.

*Per* HAGARTY, C. J.—The goods were bought by the husband, and the liability was his and not the wife's, her name being used merely to shield him from his creditors, and the plaintiff being aware of this; and therefore the defendant was not liable to him.

DECLARATION. For goods bargained and sold; goods sold and delivered; money lent; money paid; money had and received; work done and materials provided; interest, and account stated. There were nine other counts on various bills of exchange, all drawn by the plaintiffs upon and accepted by the defendant.

The defendant, among other pleas, pleaded for a further plea, coverture.

Replication to the fourth plea, on equitable grounds, that defendant at the time of incurring the debt and accepting the bills in the declaration, and at and since the commencement of the suit, was the sole and absolute owner in her own right of valuable real and personal separate estate of hers, then and still situate and being in the city of Hamilton, all of which she held for her own sole and separate

use, free and clear of all control of her said husband; and that the plaintiff trusted the defendant, and she became indebted to and contracted with the plaintiff with reference to her said separate estate, and upon the understanding and terms that he should be paid his said claims out of her separate estate.

Second replication to fourth plea, on equitable grounds, that after the 2nd day of March, 1872, and until and at each and every of the times of the defendant contracting and becoming liable to the plaintiff, she carried on separately from her husband the occupation, trade, and business of a grocer in the city of Hamilton, and all personal earnings, and acquisitions and profits of her in and from her said occupation, trade, and business, were always to be, and in fact always were her own separate sole personal earnings, profits, and acquisitions, as if she were a *feme sole*, and she became liable to the plaintiff and contracted with him, and became indebted to him in respect of her said occupation, trade, and business, and her personal earnings, proceeds, and profits therefrom, and upon the terms and understanding between her and the plaintiff that she would therewith or thereout pay and satisfy the defendant all his claims against her.

Issue.

The case was tried at the Hamilton Assizes in the fall of 1881, before Morrison, J., without a jury.

The facts were as follow. The plaintiff was a wholesale confectioner in Toronto; the defendant was the wife of one T. H. Baine, and lived in Hamilton where she carried on the business of a grocery and liquor merchant. Her husband was in insolvent circumstances, but the defendant was the owner of some real estate comprising her dwelling-house and the store in which she carried on her business, and some personal estate, including the goods in her store.

In June, 1880, T. H. Baine got a pair of horses and waggon with a view of carrying on a biscuit peddling business, and came to the plaintiff's establishment and arranged to purchase goods from the plaintiff, telling the plaintiff

that he could not do business in his own name, on account of his having previously failed: that the business was carried on by the defendant, and in the event of his ordering goods that they would be shipped to the defendant, and that the account would be opened in her name.

From June 18, 1880, to October 16, 1880, the plaintiff shipped to the defendant from time to time goods to the amount of $2,729.78. These goods were all consigned and addressed to the defendant at her store in Hamilton, and all the orders sent for the goods were signed by T. H. Baine, except one which purported to have been signed by the defendant. Some of the goods so shipped by the plaintiff to the defendant were for her business, and some that were for his business were sold by her in her shop. Upon each shipment of goods the plaintiff would mail an invoice to the defendant and draw a bill on her for the amount of the invoice through the Merchants' Bank; the messenger of the bank would take this bill to her for acceptance, and would leave it with her till the next day, when he would call for it, and get it back, purporting to be accepted by her. Some of the bills so accepted were paid and some of them were not; but the whole of the goods shipped were covered by bills so drawn. The bills so purporting to have been accepted by the defendant were some of them handed back to the bank messenger by the defendant; some of them by T. H. Baine, and some of them by a girl in the defendant's employment. The defendant, it was alleged, could not write her name.

The learned Judge reserved judgment, and found for the defendant, but why or on what ground he did not say.

February 16, 1883. *Carscallen* moved to enter a verdict for the plaintiff, or for a new trial, as the nonsuit was wrong, and against law and evidence. He argued: The evidence established that the defendant was a separate trader carrying on business separately from her husband, and she must therefore be considered a *feme sole*, and the case disposed of upon that assumption; and as the debt in

question was contracted by the defendant in respect of a business carried on by her separately from her husband, the defendant is liable for the same without regard to any separate estate such as Courts of Equity recognize as that particular class of property: *Berry et al.* v. *Zeiss et al.*, 32 U. C. C. P. 231, and cases cited in the judgment of Wilson, C. J. All the correspondence between the plaintiff and the defendant's husband, put in by the defendant at the trial, must be read as having been with the defendant's husband acting as the agent of the defendant: *Story* on Agency, 9th ed., 104, 107, 508. From the course of dealing which took place between plaintiff and defendant, and the circumstances surrounding the transactions between them, the defendant was estopped from denying her liability. In any event the defendant is liable upon the acceptances sued upon, the evidence shewing clearly that they were given by her, and that she was carrying on a separate business, and that under the circumstances she would be liable, even if the acceptance has been given for a debt of her husband: *Cooper* v. *Blacklock*, 5 A. R. 535; *Lawson* v. *Laidlaw*, 3 A. R. 77. The cases of *Meakin* v. *Sampson*, 28 C. P. 355; *Harrison* v. *Douglas*, 40 U. C. R. 410; *In re Gearing*, 4 A. R. 173, are not authorities applicable to the present case, as those cases were decisions upon interpleader issues, which involved the question of ownership of chattel property, while the present case is one involving a liability upon a contract expressed or implied.

*Osler*, Q. C., contra. The plaintiff was well aware of the facts of the case, viz., that the husband was in reality the purchaser from him, and that he was only putting his wife forward to protect him against creditors. This being so, he cannot now turn round upon the wife and seek to fasten a liability upon her which he himself never intended she should assume, and which she had no intention of incurring.

The defendant is not at present engaged in a contest

with the bank; when she is it will be time enough to consider her liability as to them.

March 10, 1883. HAGARTY, C. J.—I draw the following conclusions of fact from the evidence:—

1. That the plaintiff's goods were bought by the husband for a business carried on by him in peddling biscuits candies, &c.

2. That the plaintiff had full notice of the true state of the case, and that the wife's name was used as the person purchasing, on the avowed ground of the husband's insolvency.

3. That the wife had full notice of all this, and allowed her name to be used to enable her husband to get goods to carry on his own business, and that she was aware that he accepted drafts in her name therefor.

4. That she carried on a separate trading in the grocery business distinct from her husband, and professing to get her supplies from Mr. Reid's firm, and giving them to understand she had no liability to any others.

5. That she had separate estate.

6. That the whole dealing with the plaintiff was in reality by and with the husband, and had nothing to do with her separate business, and that the use of her name was an arrangement with the plaintiff to prevent the husband's creditors taking the goods in consequence of his embarrassments.

In this view of the case I do not feel warranted in disturbing the verdict found for the defendant.

I see no liability fixed on the wife. As far as the bank was concerned she might have made herself liable by her conduct as to the drafts; but as to the plaintiff, I consider he was cognizant of the true state of the case: that he was selling his goods to the husband, and that the wife's name was used merely to cover up the true nature of the dealing, and that there was no real liability to be fastened on her.

Taking this view of the facts it is unnecessary to discuss any of the legal questions suggested.

ARMOUR, J.—I find as a fact that the goods were shipped to the defendant by the plaintiff, and were charged to her by the plaintiff: that the defendant knew that the goods were so shipped and charged, and that the bills drawn by the plaintiff on the defendant were accepted by her or in her name by her authority.

Under these circumstances I must hold, under the views I have heretofore expressed in *Clarke* v. *Creighton*, 46 U. C. R. 514; and *Griffin* v. *Patterson*, 46 U. C. R. 536, which have since been fortified by *Berry* v. *Zeiss*, 32 C. P. 231, that the plaintiff is entitled to judgment for the amount unpaid in respect of these bills against the defendant, as if she were a *feme* sole.

It was admitted before me on a former trial (*a*) that the amount which the plaintiff was entitled to recover, if at all, was $555, and interest from November 4th, 1880, and unless something has occured to change this the judgment will be for that amount and interest, and costs of suit.

CAMERON, J.—It appears to me clear that the defendant is liable to the plaintiff for the balance of amount claimed by him, whether the sale of the goods was made to her or to her husband. From the evidence it is clear that she authorized the putting of her name as acceptor to the drafts drawn by the plaintiff for the amount of the invoices of the goods sent to her address. If therefore the goods were not in truth hers she became surety for the payment of the price to the plaintiff, and apart from any question presented by the fact of her trading and carrying on business on her own account, having separate estate she will be liable as such surety. *Frazee* v. *McFarland*, 43 U. C. R. 281; *Kerr* v. *Stripp*, 40 U. C. R. 125; *Lawson* v. *Laidlaw*, 3 A. R. 77, and *Cooper* v. *Blacklock*, 5 A. R. 535, are authorities, at least the first three, for this, while the last would shew the defendant might be well held on the acceptances signed by her husband in her name, as it is too clear

(*a*) The case was before the Court on a former occasion, when a new trial was granted, costs to abide the event.

to by leave room for doubt that she must have recognized the authority of her husband to sign. I do not, however, agree in the opinion that the goods were sold by the plaintiff to and on the credit of the husband. It may well be that the sale was negotiated in the first instance by the husband, and that he intended to peddle the goods was a fact known to the plaintiff. It does not follow from that the sale was made to him. It is not probable that the plaintiff would have sold goods to a very considerable value to a man avowedly insolvent and unable to pay for them. It is much more likely the plaintiff coming with a statement of his inability to do business in his own name, and representing that his wife was carrying on business on her own account, that any order given by him for goods would be taken as given by him as agent for his wife, and that the purchase was made on her responsibility. The plaintiff's clerks certainly say they dealt with the defendant, and not with the husband, as the purchaser. If the sale was to her and she carried on business separately, and that she did so carry on a grocery business was not questioned on her behalf, there would be no doubt as to her liability.

I am therefore of opinion in either aspect of the case the plaintiff is entitled to recover. The learned Judge who tried the case simply found for the defendant, without giving any reason for such finding, and I am inclined to regard it more as a *pro formâ* finding than as the result of a consideration of the law and facts presented by the evidence.

*Judgment accordingly.*

[CHANCERY DIVISION.]

## O'GRADY v. MCCAFFRAY.

*Crown Lands—Locatees—Inoperative Patent—Lands erroneously returned as patented—Tax sales—Compensation for improvements—Mistake of title.*

Where the Crown-land Commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantee, B., who had paid only a part of the purchase-money, and the lands were afterwards sold for taxes;

*Held*, the tax sales were of no validity as against M., to whom a patent was subsequently issued.

*Held*, also, *per* FERGUSON, J.—B. having assigned his interest, and the assignee having surrendered his interest to the Crown, before the issue of the patent to M., it could not be said that at the time of the issue of the patent to M., there was any "adverse claim" to the lands in question within 23 Vict. ch. 2, sec. 22, so as to debar the commissioner from cancelling the patent to B. under that section.

Since 16 Vict. ch. 182, sec. 56, a tax sale of unpatented lands conveys to a purchaser only such rights in respect of the land as the original locatee enjoyed.

Where a claimant of certain lands commenced an action of ejectment, in which he afterwards entered a *nolle pros.*, and then, subsequently, commenced a suit in this Court for the recovery of the said lands, and the defendant claimed compensation for improvements made under *bonâ fide* mistake of title;

*Held*, the defendant was entitled to compensation for improvements made before the ejectment action, and for those made between the *nolle pros.* and the commencement of the second suit, but not for those made during the pendency of the ejectment, or since the commencement of the second suit.

In this case the plaintiff, Catharine O'Grady, filed her bill of complaint against Thomas H. McCaffray to make good her title to and recover possession of the west half of lot 28, in the 6th concession of the township of Goulbourne in the county of Carleton, as against the said defendant.

In her bill as amended, the plaintiff alleged that prior to October, 1854, one Abraham Bradley became and was the locatee of the Crown of the land in question, and as such was entitled on payment of the purchase money to the Commissioner of Crown Lands to have a patent granted to him; that about October 5th, 1854, the said Bradley being so entitled and in possession of the said land, assigned it and all his right, title, and interest in it, for valuable consideration, to one William Byers, who thereupon entered into possession thereof, and became entitled to a patent as afore-

said: that about October 20th, 1856 an instrument in the form of a patent for the said land purporting to grant the same to the said Bradley was prepared by the officers of the Crown Lands Department, but was prepared by error and mistake, inasmuch as no one had paid the purchase money, and the lot had been previously assigned to the said Byers as aforesaid, and was in his possession: that the said instrument was never delivered to Bradley, but remained in the possession of the Crown: that up to 1872 the purchase money of the said land was wholly in arrear and unpaid, but in that year, one Charles McKenna applying to purchase the same, the Commissioner of Crown Lands, after notice to all parties interested, and with full knowledge of all the material facts, duly cancelled the sale to Bradley, and the said instrument in the form of a patent, prepared as aforesaid by mistake and error, and also forfeited the right of the said W. Byers, and agreed to sell the same to the said McKenna for $200: that on December 16th, 1873, the said McKenna paid the commissioner $200 in pursuance of the said agreement for sale, in consideration whereof letters patent were granted to him of the said lands in fee simple for his own use: that on October 22nd, 1873, the said McKenna, for valuable consideration, conveyed the said lands to the plaintiff in fee simple, for her own use: that the plaintiff afterwards entered into possession of the said lands, and made valuable and lasting improvements thereon, but the defendant took forcible possession of it, and ejected her, and afterwards, well knowing the above circumstances, procured a pretended conveyance of the said lands from Bradley, bearing date October 19th, 1875, and was then pretending to be the owner: that the defendant was then and had been for many years in possession of the said lands, and receiving the rents and profits thereof, and refused to deliver up possession thereof to the plaintiff; that the defendant had registered the said pretended conveyance in the Carleton County Registry office, and it and the said pretended patent were a cloud on her, the plaintiff's, title: that the defendant pretended that as

early as October 23rd, 1862, seventeen acres of the said lands were sold for taxes, and that on September 15th, 1869, fifty other acres of the said land were sold for taxes, and that he was entitled by conveyances from the tax purchasers, but the said sales were illegal and void, and not duly carried out, and not binding on the Crown: that before the said sale to McKenna the parties entitled to claim under the said alleged tax sales were notified by the commissioner to file and make good their claims before him, and pay their respective proportions of what was due the Crown for unpaid purchase money, otherwise their claims would be considered abandoned, but the said parties so notified did not do so, but made default, whereupon the said commissioner decided that they did not desire to make any claim, and thereupon cancelled the said original sale, and afterwards sold the said land to the said C. McKenna: that the defendant had notice of the above circumstances before purchasing the claim of the tax purchasers. And the plaintiff prayed that the pretended patent to Bradley, and the pretended conveyance from him to the defendant might be declared to be void and of no effect, and the same and the registration thereof might be cancelled: that she might be declared lawful owner, and possession of the lands in question be delivered up to her by the defendant: that the defendant might be charged with the rents and profits, and with an occupation rent, and be ordered to pay the same to her with the costs of this suit; for an account, and for general relief.

By his answer to the original bill, the defendant alleged that after strict search in the Crown Lands office he had learned, and believed that the lands in question were by letters patent, dated October 20th, 1856, granted to one Abraham Bradley, and the Commissioner of Crown Lands thereupon returned the same in his next list of lands sold and patented both to the Treasurer and Registrar of Carleton County as having been so sold and patented by the Crown: that before the alleged cancellation of the said patent in the bill of complaint mentioned, viz: on or about October

23, 1861, the said lands were duly offered for sale for arrears of taxes, and seventeen acres thereof were sold to one Agar Yielding, and not having been redeemed, the same were by Sheriff's deed, dated October 25th, 1862, and duly registered in November, 1862, conveyed to the said Agar Yielding, who, by deed dated December 31st, 1864, and duly registered, conveyed them for value to one Fanny Yielding, who by deed dated October 19th, 1875, and duly registered, sold and conveyed them to the defendant: that about September 15th, 1869, the residue of the said lands were duly offered for sale for further arrears of taxes, and the north-westerly fifty acres were then sold to one Thomas McCaffray, and not being redeemed, were by deed of the Warden and Treasurer, dated September 17th, 1870, and duly registered on October, 16th, 1871, conveyed to him, and he by deed dated June 5th, 1878, and registered the next day, conveyed them to the defendant: that the residue of the lands in question were sold to him, the defendant, by the said Bradley, who conveyed them to him by deed dated October 19th, 1875, and duly registered on December 1st, 1875, before any other conveyance of the same land from Bradley had been registered, and no other documents affecting the title of the lands so patented to Bradley had at any time been registered in the registry office of the county of Carleton: that he was informed and believed the alleged grant of the land to C. McKenna, who was the plaintiff's father, was, if made at all, made at the plaintiff's request, for the purpose of being conveyed to her, and the said McKenna, with the consent of the plaintiff, who had full knowledge of the defendant's claim, agreed with the commissioner to take such grant subject to all risks of such claim, and the commissioner when he proceeded to cancel Bradley's patent, had full knowledge of the tax sales, and of the defendant's claim thereunder, and assumed to act as he did at the risk of the said McKenna, and the said McKenna and the plaintiff accepted such risk: that on November 10th, 1875, an action of ejectment was commenced by the plaintiff against him

the defendant, to obtain possession of the lands now in question, and the title set up on either side was substantially the same as in the present suit, and the said action was tried by His Lordship Vice-Chancellor Proudfoot, at Ottawa, in June, 1876, and a verdict given for the plaintiff: that in the following term this verdict was set aside and a new trial ordered, but the plaintiff did not again bring the said action to trial, but on May 16th, 1878, sued out a side bar rule to discontinue it, and about May 8th, 1879, final judgment of *non pros.* was entered in the said action, which still remains in force and unappealed against: that from the time of the suing out of the said side bar rule till served with the present bill, he, the defendant, believed the plaintiff had abandoned her claim and that the lands were his own, and in such belief made lasting improvements thereon; and the defendant urged that under the above circumstances the said Commissioner of Crown Lands had no power or authority to cancel the said patent to Abraham Bradley, nor the titles of the said purchasers at tax sale, or his, the defendant's, title acquired thereunder, and that such cancellation was void and of no effect, and that his, the defendant's title, and that of those through whom he claimed remained good, valid, and unimpeachable, notwithstanding such alleged cancellation; and even if the cancellation of the patent was valid, yet the tax titles aforesaid remained good and valid, and unaffected thereby, and the plaintiff never acquired any right or title to the lands in question; and the defendant also submitted that as the plaintiff admitted the first grant of the land was by patent to Bradley, without claiming through him, but relying on a cancellation which the circumstances set out in the bill would not warrant, the bill was bad for want of equity, and he claimed the same benefit as if he had demurred on this ground. And he further submitted that if the plaintiff should succeed in establishing title to the lands in question, yet he, the defendant, was entitled to a lien thereon for the increased value produced by the lasting improvements made under the belief that the land was his own, or to re-

tain the said land as the Court might direct, and he asked that he might be repaid the money expended in the purchase of the said land, and he claimed the benefit of the registry laws; and he further submitted that the bill was bad for want of the joinder of the Commissioner of Crown Lands and the Attorney-General of Ontario as parties, or of one of them, and claimed the same benefit as if he had demurred on this ground. And by his answer to the amended bill he alleged that he was informed and believed that the parcels of land so sold for arrears of taxes were advertised and sold as patented lands, and not as unpatented, or lands under lease of occupation from the Crown, and were at the times of such sales respectively patented lands, and submitted that under the circumstances the commissioner had no power or authority to impose any conditions on the tax purchasers or their assigns, or to cancel or affect their titles; and that the said deeds of land so sold for taxes not having been questioned before some Court of competent jurisdiction by some person interested in the land so sold within two years from the time of such sales, were now to all intents valid and binding as against the plaintiff; and that in the event of the Court deciding in favour of the plaintiff, he was entitled to damages for the amount of the purchase money at such sales and interest, and of all taxes, paid by him and those under whom he claimed in respect of the said lands since such sales, and of loss to be sustained in consequence of any improvements made before the commencement of this suit by him or those under whom he claimed, less all just allowances to the plaintiff, and that no writ of possession should issue till the plaintiff had paid such damages into Court; and that he was entitled to have the value of the land to be recovered assessed, and, if he so desired, to retain the said land upon paying into Court such value; and he raised the same objection as before in regard to the non-joinder of parties.

The result of the evidence taken sufficiently appears in the judgments of the Divisional Court.

The case was heard and witnesses examined before

Blake, V. C., at the sittings of this Court at Ottawa on November 20th, 1879, when the case stood over for the production of further evidence from the Crown Lands Department.

On April 13th, 1881, the case again came up before Blake, V. C., at Toronto, when some further evidence was taken and the case argued.

On the same day the learned Vice-Chancellor gave judgment as follows:

"I think, in this case, the commissioner could cancel, and did do so. There was no adverse claim. I, therefore, declare the plaintiff entitled to the lands in question, with the costs of the suit, but I allow the payment of all taxes paid on the land, and any improvements made prior to the action of ejectment, and between the period of entering the judgment of *non pros.*, and the filing of this bill. Against this should be allowed the rents and profits. The defendant to have possession. Reference to be to Ottawa."

On May 16th, 1881, the case was set down by the defendant for rehearing before the full Court, but did not come up for judgment until January 9th, 1882, when it came up before the Divisional Court of the Chancery Division.

*J. Maclennan*, Q. C., for the plaintiff, thereupon took the preliminary objection that the Court had no jurisdiction to hear the cause, the decree having been made before the Judicature Act came into operation, so that the Divisional Court had no power to deal with it.

The Court, however, held that all causes set down to be reheared before August 22nd, when the Judicature Act came into operation, could be disposed of by it.

On the next day the case was accordingly argued.

*J. Beatty*, Q. C., and *H. Lees*, Q. C., for the defendant (appellant.) The commissioner should not have cancelled the patent in the face of the above tax sales; the tax sales were regularly carried out, and took place before the cancellation of the first patent, and the land was described as patented; the patent acknowledged the payment, and the return to the municipal officials confirmed it. The patent

was in force for sixteen years; after so long a lapse of time the matter should not be disturbed. The plaintiff must fail because before his patent another had issued, and notice was given by the Crown of the patent having issued; the plaintiff had no *locus standi* to require the commissioner to cancel the former patent. Section 20 of 23 Vict. ch. 2, the Act under which the commissioner presumed to cancel, only applies to a sale before patent has issued. So far as the tax sales are concerned, the subsisting patent should have issued to the tax purchasers. The Crown is estopped from saying the land was not patented: *Ryckman* v. *Van Voltenburg*, 6 C. P. 385, 388. We should be allowed for improvement made during the pending of the action of ejectment, for that action is the same in result as though it had never commenced. Further, we ask that the land may be valued, and defendants may have the option of purchasing: R. S. O. C. 95, sect. 4. Taxes would be assessable on the location before patent issued: *Mutchmore* v. *Davis*, 14 Gr. 346; *Cosgrove* v. *Corbett*, 14 Gr. 617.

They also cited *Stevens* v. *Cook*, 10 Gr. 410, 415; *Henderson* v. *Seymour*, 9 U. C. R. 47; *Martyn* v. *Kennedy*, 4 Gr. 61; *Simpson* v. *Grant*, 5 Gr. 267; *Charles* v. *Dulmage*, 14 U. C. R. 585; C. S. U. C. ch. 55, secs. 108, 123, 124; 32 Vict. ch. 36, O. secs. 108, 109; R. S. O. ch. 23, secs. 23, 25, 29; and as to the improvements, *Smith* v. *Gibson*, 25 C. P. 248; *O'Connor* v. *Dunn*, 37 U. C. R. 430; *Carroll* v. *Robertson*, 15 Gr. 173; *Attorney-General* v. *McNulty*, 11 Gr. 281, 581; *McLaren* v. *Fraser*, 17 Gr. 567; *Gummerson* v. *Banting*, 18 Gr. 516.

*J. Maclennan*, Q. C., for the plaintiff. The patent of 1856 gives the land to Bradley, not to the real owner, Byers. There was no grant at all; the patent was a mere escrow, or less. *Ryckman* v. *Van Voltenburg*, is under the old statutes, which are different. As to the tax sales, there were not sufficient taxes in arrear. There is no evidence of any tax being imposed; *McKay* v. *Crysler*, 3 S. C. R. 436; *Grant* v. *Gilmour*, 21 C. P. 18; nor is there evidence of the sale being had: *Proudfoot* v. *Austin*, 21 Gr.

566; besides the first sale for taxes was before patent issued, and Acts curing tax sales are not binding on the Crown, *Ford* v. *Proudfoot*, 9 Gr. 478; *Bell* v. *McLean*, 18 C. P. 416. As to the improvements he referred to *Russell* v. *Romanes*, 3 App. R. 635. He also cited C. S. U. C. ch. 55, sec. 22, 138; *Wyoming* v. *Bell*, 24 Gr. 564; *Carrick* v. *Smith*, 34 U. C. R. 389; *Stewart* v. *Lees*, 23 Vict. ch. 2; 33 Vict. ch. 23.

March 11, 1882. BOYD, C.—The cases relied on by the defendant do not warrant a reversal of the decree, and are distinguishable from this case. In *Ryckman* v. *Van Voltenburg*, 6 C. P. 385, the lands being held under promise of the fee simple, were actually as well as rightfully returned by the Surveyor-General to the Municipal officers as described for a patent, and were thus properly subject to taxation. The original nominee of the Crown delayed taking out the patent, and it issued several years afterwards to a person claiming under him by descent. In the interval the land was sold for taxes, and it was held that the tax deed prevailed against the patent. But the Court abstained from deciding several matters which are involved in the appellant's contention that the decree is wrong. First, it was not decided what the effect of the tax sale would be if such a return had not in fact been made, or the effect of such return, if made, being incorrect: Second, it was not decided that the Crown might not disregard the tax sale and grant the lands to a person who did not derive any right from, or shew any privity with the original nominee. As to the latter position an opinion is expressed adverse to the present appellant at the foot of page 386. There was a contemporaneous decision in the Queen's Bench, *Charles* v. *Dulmage*, 14 U. C. R. 585, to the same effect as the above case in the Pleas. In both the lands were correctly returned as described for patent though no patent had yet been issued. The effect of both decisions is, that the Crown by issuing the patent to the person who had neglected to pay the taxes for which the land was sold, could not give him a title as against the tax

purchaser. Besides, the provisions of the statutes then in force—59 Geo. III. ch. 7, sec. 13; 6 Geo. IV. ch. 7, sec. 18—are very different from those under which the sales now in question took place. By the statute in those cases the sheriff was empowered to give a deed in fee simple to the purchaser, which McLean, J., said, must have the effect of superseding any other title, whether in the Crown or an individual, otherwise the statute must be inoperative.

It may be shewn, however, that the return of the Crown officer was erroneous, and if so that would remove the foundation on which the assessment and tax sale rests. This is the conclusion suggested by the late Chief Justice Harrison (and I think correctly), in his Municipal Manual from the cases of *Perry* v. *Powell*, 8 U. C. R. 251, and *Street* v. *Kent*, 11 C. P. 255; see *Harrison's* Municipal Manual, 4th ed, p. 709, note (*d*).

This last consideration is in my view sufficient to dispose of the case. There is no sufficient evidence that the alleged patent to Bradley was, or ever was intended to be, an operative instrument. If not, then the return to the municipal officers of the land as patented was erroneous: and the tax sales become of no validity, so far as the fee simple of the land is concerned.

In any view the decree is right as to the thirty-three acres, because before the patent issued to Bradley he had assigned all his right in the land to Byers. Then Byers, the beneficial owner of such of the land as was not sold for taxes, surrenders to the Crown, and the Crown grants to the plaintiff. The defendant fails to prove that he is a purchaser for value from Bradley, so as to invoke the protection of the Registry Acts.

The authorities do not warrant a more liberal allowance for improvements than was made herein: *Russell* v. *Romanes*, 3 App. R. 635.

Upon all questions argued, I think the decree right, and my judgment is for its affirmance with costs.

FERGUSON, J.—The cases *Charles* v. *Dulmage*, 14 U. C. R. 585, and *Ryckman* v. *Van Voltenburg*, 6 U. C. C. P. 385, much relied on by the defendant, were decided under the Statutes 59 Geo. III. ch. 7, sec. 13, and 6 Geo. IV. ch. 7, sec. 18, and do not seem to me to apply to this case.

By sec. 12 of the former Act, the Surveyor-general furnished the treasurer of every district with a list or schedule of lots described as granted by Her Majesty, stating whether the same or any, and what part thereof, were yet ungranted, &c. By sec. 13, it was enacted that all lands described in this schedule as having been granted, &c., should, from the time they were returned in the schedule, be assessed and charged with the payment of the rates and taxes imposed by the Act; and the 18th section of the latter Act enacted that the sheriff should execute a conveyance to the purchaser, his heirs and assigns, in fee simple of the lands sold, the effect of which seems plainly to be that if the lands were described in the schedule as having been granted, and were regularly sold for taxes by the sheriff, not redeemed, and a conveyance such as is mentioned in the latter Act executed to the purchaser, this conveyance had, *by force of the statute*, the effect of vesting in him a title in fee simple, and such title was, in these cases, held to be good as against even a subsequent grant by the Crown.

A change in this respect took place by the passing of 16 Vict. ch. 182, sec. 56, and its providing, amongst other things, that the conveyance should give the purchaser the same rights in respect of the land as the original locatee enjoyed; and the rights of the Crown have, so far as I am aware, been, in such cases saved by every Act that has since been passed upon the subject.

The sale of the seventeen acres in this case took place in the year 1861, and the sale of the fifty acres in 1869, after the change above alluded to; and if the fact was that the land had not been patented, the rights of the Crown did not pass by the conveyance to the tax purchaser as was contended for on behalf of the defendant.

It was contended that the lands had been patented, but

I do not think this was shewn by the evidence. A patent was drawn up and sent to the local office of the Crown Land Department at Ottawa, where it must have remained for some time, but eventually found its way back to the principal office. There is not any evidence of the delivery of it to Bradley, the alleged patentee. Bradley had paid only a part of the purchase money, and there seems a probability that the patent was sent to be delivered on payment of the balance, which never was paid, but it is not shown how this in fact was. It was contended that it should be assumed that the Crown had applied certain moneys that had been paid upon other land to the payment of the price of this land, but I cannot perceive any sufficient ground for such contention.

Before the date of the alleged patent to Bradley he had assigned his right to one Byers, and before the issue of the patent now in question Byers had surrendered all his interest to the Crown.

The patent alleged to have been issued to Bradley, has been marked "cancelled" by the department, and it was contended that there was not power to cancel it. If it was never delivered, and consequently never took effect, the cancellation would be a mere mark or matter of form in the office of the department; but the contention was upon the assumption that this was otherwise, and in the argument reference was made to 23 Vict. cap. 2, sec. 22, counsel contending that there was an "adverse claim," within the meaning of the enactment. The learned Judge before whom the cause was heard held, it appears, that there was no adverse claim, and this invites, I think, a consideration as to how the case stood in the department at the time of the issue of the patent in question or of the cancellation. The position was shortly, and, so far as I have been able to see, correctly pointed out by Mr. Maclennan for the plaintiff, and was simply this: There had been a sale of the land to Bradley, and an assignment by him to Byers, which was filed in the office of the department. The purchase money remained unpaid, and there was a surrender by

Byers of all his interest to the Crown. Now, such being the state of the case, it cannot, I think, be fairly said that there was an "adverse claim," within the meaning of the enactment, of which the Crown was bound to take notice, but even if the other view were adopted on this point, it appears to me that the provisions of section 20 of the same Act were applicable under the circumstances to enable the commissioner to cancel the grant to Bradley even supposing it to have been a grant, which, for reasons I have stated, I think it was not.

In the view that I take of the case, it is not necessary to consider the question as to the regularity or not of the sales for taxes, and I do not perceive any good foundation for the argument based on the fact of the entry of the *nolle pros.* in the ejectment suit that was mentioned.

As to the improvements, a reference was ordered as to such and so much of them as took place before the commencement of the ejectment suit, and as to such of them as were made after the entry of the *nolle pros.* in that suit and before the commencement of this suit. These are all that I think the defendant entitled to, for I fail to see how any one can say that he made improvements under a *bonâ fide* mistake of title, when at the time he was making them active litigation was being carried on against him as to the same title, or why the real owner of land should be called upon to pay for improvements made upon it wilfully by another, while he was actively contesting the title to the same lands with that other

I am of the opinion that the decree should be affirmed.

PROUDFOOT, J., concurred.

*Decree affirmed, with costs.*

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[CHANCERY DIVISION.]

## ARNOLDI v. O'DONOHOE.

*Costs—Taxation—Soticitor and client—Delivery of bill—"Special circumstances"—R. S. O. ch. 140, sec. 35.*

On July 20, 1877, A. and B., a firm of solicitors, rendered their bill to C., also a solicitor, for professional services. On May 30, 1878, C. wrote to A. and B., claiming a reduction of the bill, and alleging over-charge, and an agreement to do the work for half fees. No notice was taken of this letter, nor did C. take steps to have the bill taxed. On July 8, 1882, A. and B. sued in the County Court on this bill, and judgment was entered therein on July 19, 1882, for default of appearance, which judgment was, by consent, subsequently waived. On July 27, 1872, a bill for services rendered subsequently to July, 1877, was delivered to C. by A. and B. In this bill was included the following item: "To amount of judgment entered July 19, 1882, $268.67 for previous accounts rendered." An action was then commenced in the Chancery Division for the amount of the two bills.

On the trial of the action, judgment was given for the amount of the first bill, as rendered, and also for the amount of the second bill, subject to taxation.

*Held*, on appeal to the Divisional Court, that neither the existence of a controversy as to the terms on which the business was done, nor the continuance of the employment after the delivery of the first bill, were "special circumstances" within R. S. O. 140, sec. 35, entitling C. to tax the first bill after the lapse of a year.

*Held*, also, that the reference in the second bill to the amount claimed in respect of the first bill, did not amount to a rerendering of the first bill so as to entitle the client to a taxation.

This was a motion before the Divisional Court to vary the judgment in the above action.

The action was brought by Frank Arnoldi, the plaintiff, as the surviving partner of the firm of Fitzgerald & Arnoldi, and also as the assignee of the executors of his deceased partner, Edward Fitzgerald, against John O'Donohoe, the defendant, to recover a certain sum as due for professional services rendered by the firm of Fitzgerald & Arnoldi to the defendant. The plaintiff also claimed interest on a portion of the amount claimed, from the date at which bills thereof were delivered. The defendant in his statement of defence denied the retainer, the delivery of the bills, and that anything was due to the plaintiff.

The action came on for trial at Toronto, on 20th November, 1882, before Proudfoot, J.

Mr. *Moss*, Q.C., for the plaintiff.
Mr. *N. Murphy*, for the defendant.

It appeared by the evidence that the defendant had employed the firm of Fitzgerald & Arnoldi professionally, and that up to the 20th July, 1877, they had from time to time rendered to the defendant bills of costs for such services, amounting in all to $172. Frequent demands were subsequently made by the firm of Fitzgerald & Arnoldi for payment of the bills as rendered. On the 30th May, 1878, the defendant wrote the following letter to the firm of Fitzgerald & Arnoldi :—

"TORONTO, May 30th, 1878.

"*Re Acct.*

"DEAR SIRS,—Your accounts against the late firm of O'Donohoe & Meek, and since the dissolution of that firm against myself, have been carefully considered and examined. I must confess I am greatly surprised at the excessive charges made. I enclose you a duplicate of your account against myself, with a note opposite each item indicating the sum taxable to you on the most liberal tariff, though as between myself and clients I am satisfied that the sum thus allowed will be still reduced. The result of my consideration of the account against myself as per the aforesaid statement reduced your bill to $65, making me, as per my agreement with your Mr. Fitzgerald, indebted to you in the sum of $32.50. The charges in the account against O'Donohoe & Meek, although very high, I should for settlement allow $15 to, the whole of which sum you would be entitled to, said agreement not having been entered into when these charges were incurred. The sum however should be reduced by $15 overpaid in *St. Michael's College* v. *Merrick*, the full counsel fee having been paid. On your concurrence with the above I will enclose my cheque.

"Yours truly,

"J. O'DONOHOE.

"Messrs. FITZGERALD & ARNOLDI,
"Barristers, &c."

The firm of Firzgerald & Arnoldi made no reply to this letter, but it was proved that the account was put away for suit, but in consequence of the dissolution of the firm, in September, 1878, and the failure of the partners to agree on any mode of collecting the assets no proceedings were taken in the lifetime of Mr. Fitzgerald.

On the 30th December, 1881, Mr. Fitzgerald died. On

the 8th July, 1882, the plaintiff, as surviving member of the firm of Fitzgerald & Arnoldi, commenced an action in the County Court of the County of York, to recover the amount of the bills which had been rendered up to the 20th of July, 1877, and judgment was signed therein in default of appearance for $268.67. This included the bills for $172 and $84.71, and interest thereon from the date they were rendered, and $11.96, the costs of that action.

This judgment was subsequently, by consent of the parties, waived, and the action in the County Court was then discontinued. On the 5th April, 1882, the plaintiff procured an assignment to himself of the interest of the executors of the estate of his deceased partner in the debt due by the defendant to the firm of Fitzgerald & Arnoldi, and on the 27th July, 1882, rendered a bill for $61 for services rendered by that firm subsequent to the 20th July, 1877, and in the bill included the following item: "To amount of a judgment entered 19th July, 1882, $268.67. for previous accounts rendered," and it was to recover the amount of the account so rendered that the present action was brought.

At the trial the defendant was permitted to amend his defence by setting up the alleged agreement referred to in the letter of the 30th May, 1878, and the defendant was called as a witness on his own behalf. On being questioned as to the alleged agreement he stated in his examination in chief that the agreement between him and Mr. Fitzgerald as to the terms on which the business in question was to be done "was exactly stated in the letter of the 30th May, 1878;" but on cross-examination he said that the agreement was "that any business of mine that he would be called upon to do for me, he would do it on *agency terms*;" and on being asked whether that was the expression used, he replied: "I think that was the expression, or *half fees*."

At the conclusion of the case, judgment was given as follows:

PROUDFOOT, J.—I am not quite sure that the evidence of Mr. O'Donohoe requires any corroboration if it is consistent with itself; but I think, upon the evidence given by Mr. O'Donohoe, that I must come to the conclusion that there has been no positive agreement proved by him with Mr. Fitzgerald as to the mode in which the costs were to be divided. He told us that they were to be divided either upon agency terms or upon half fees. Now the two are well known modes of dividing solicitors' fees, but they are certainly different from one another. Mr. O'Donohoe does not tell us which agreement it was, and how can I say it was either?

[Mr. *Murphy*.—It is shewn by the letter.]

PROUDFOOT, J.—The letter does not shew it, and I suppose I must take Mr. O'Donohoe's evidence now as being the correct statement of the understanding between them, and yet he cannot tell me which it was; he was asked two or three times whether it was agency terms or whether it was half fees, and he could not say. Then the retainer is proved by Mr. O'Donohoe; he proves that Mr. Fitzgerald was engaged in all these matters, and he proves taxing the bill according to his own idea of the scale of remuneration, so that all the elements entitling the plaintiff to recover seem to be present here: and I think, upon the evidence given, the plaintiff is entitled to recover upon the bills that have been rendered more than a year, and as to the last bill, that will have to be referred for taxation, I suppose, if the defendant desire it. If he do not desire a taxation the judgment must be for the whole amount claimed, with costs.

Judgment was accordingly entered for the amount of the bills rendered up to 20th July, 1877, as rendered, and for the subsequent bill as taxed, with costs. From this judgment the defendant now appealed to the Divisional Court.*

*J. O'Donohoe*, Q.C., defendant in person. The whole of

* BOYD, C. and FERGUSON, J.

the bills should have been referred to taxation. The bill rendered on 27th July, 1882, referred to the former bills, and that constituted a fresh delivery of those bills which entitled me to have them taxed. The agreement that the firm of Fitzgerald & Arnoldi were to do the work on half fees was proved, and there is no evidence to the contrary. There should be a taxation, and the plaintiff should get judgment only for half of the amount as taxed. It is objected that my evidence needed corroboration, but the statute relied on by the other side, R. S. O. ch. 62, sec. 10, has no application to the plaintiff, who is an assignee of his deceased partner's executors, and who now sues entirely on his own behalf: *Dutton* v. *Woodman*, 9 Cush. 255; *Taylor* on Evidence, sec. 736. There was no reply made to the letter of 30th May, 1878. I was justified in assuming that the firm of Fitzgerald & Arnoldi assented to what I then claimed. Though a year passed after the delivery, yet the fact that there was this controversy as to the terms on which the work was done, and a continuance of the employment, constitute "special circumstances" entitling me to a taxation of the whole bill: *Re Bagshawe*, 2 Dr. & Sm. 205; *Re Nicholson*, 3 D. F. & J. 102; *Re Peach*, 2 D. & L. 33.

*O. Howland*, for the plaintiff. The Court must take notice of the fact that the defendant in this case is a solicitor, who must therefore be presumed to have had full knowledge of his rights. The letter of 30th May, 1878, was not written until nearly a year had elapsed from the delivery of the first series of bills. The agreement alleged in that letter was never admitted by Fitzgerald & Arnoldi, and the defendant shows no reason why he did not get the bills taxed in the usual way. The circumstances shewn in this case are not "special circumstances" within the meaning of the Statute R. S. O. ch. 140, sec. 35; *Re Strother*, 3 K. & J. 518; *Re* C. K. & C., 6 P. R. 226; *Re Gildersleeve* & *Walkem*, Ib. 117. The existence of a controversy as to the terms of the retainer did not preclude the defendant from getting a taxation: *Re Thurgood*, 19 Beav. 541. The defendant could have

made a special application for taxation with a direction to the Master to enquire as to this alleged agreement: *Taylor's* Orders, 3rd ed., pp. 50, 51; *Re McCay*, 15 L. T. N. S. 101; *Re Raynard* 2 D. M. & G. 539.

December 16, 1882. BOYD, C.—The only point on which I had any doubt at the close of the argument was whether it might not still be open to direct a taxation of the first bill of costs. But upon consideration and examination of the authorities, I do not see my way to vary the judgment in this respect. The bill in question was delivered according to the statute in July, 1877, and it was not included in any bill afterwards so as to render applicable the cases cited of *Re Peach*, 2 D. & L. 3, and others. What was included in the bill delivered in July 1882, (besides the detailed account of $91,) was the amount of judgment of $268, which no doubt was composed of the first bill, but not so introduced into this last bill as to constitute a re-rendering of the whole bill within the year. The earlier bill was included in the amount of the judgment, and the mentioning of it by that designation would preclude the idea that any taxation of it was contemplated. Again, the contention as to the special agreement was not of such a nature as to require that it should be first disposed of before a taxation was proper. Some earlier cases go in this direction, but the most recent authorities are very decided that the proper course is to tax the bill, having regard to the special agreement: *Morgan* on Costs, 2nd ed., 439, 440; *Re Gedge*, 23 Beav. 347; *Re Bacon*, 3 Ch. Ch. R. 79.

There was not here strictly the relationship of solicitor and client. It was an arrangement between solicitors, or between solicitors and counsel for the transaction on agency terms of professsonal work. Where the interests of clients are concerned as against solicitors, the Courts have sometimes held the continuance of the relationship after the delivery of the bills to be a "a special circumstance" within the meaning of the Act: *Re* F. ——, 16 W. R. 749; *Re*

*Nicholson*, 3 DeG. F. & J. 93. But the later authorities shew that this is not to be acted on as a general rule: *Re Elmslie*, L. R. 16 Eq. 326.

Here the one solicitor had as full knowledge of his rights and of the manner of protecting himself by taxation as the other. Indeed this is very clearly indicated by Mr. O'Donohoe in his letter of the 30th May. So that I cannot find any satisfactory ground for holding that the Judge below erred in not directing a taxation of the first bill.

FERGUSON, J.—The evidence seems to me to shew that there was not the agreement contended for by the defendant. I think it shews that he understood that there was to be a division of the fees throughout, but that the late Mr. Fitzgerald did not understand the matter in this way, and the parties were not at one on the subject. The words "agency terms" would seem not to have been correctly understood by the defendant, but were understood by the late Mr. Fitzgerald, no doubt. The question is, were there special circumstances to take the bill for $172 out of the provision of the statute as to the year. I think this is really the only question; and after examining the cases referred to, and others, I have come to the conclusion that such special circumstances did not exist. I am therefore of the opinion that the judgment should be affirmed.

*Motion dismissed with costs.*

[CHANCERY DIVISION.]

## HARDING V. CORPORATION OF THE TOWNSHIP OF CARDIFF.

*Municipal by-law—By-law opening road—Entry before compensation—Quashing by-law—Non-registration of by-law—Estoppel—Pleading—Approbating and reprobating—R. S. O. ch.* 174, *sec.* 325.

Where the plaintiff filed his bill seeking to quash a certain municipal by-law passed to open a road, and also an award made thereunder;

*Held*, that there was nothing inconsistent in this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award.

Where, however, under such circumstances, the plaintiff, being called on by the Court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor;

*Held*, he could not afterwards complain of having been forced to elect at the hearing.

*Held*, further, the by-law in question not being void on its face, nor *ultra vires*, and the plaintiff not having attacked it for more than a year after its passing, but having on the contrary appointed an arbitrator to assess compensation thereunder, it had now become absolute and incontrovertible.

*Held*, also, although such a by-law may not become effectual in law till registration thereof, nevertheless non-registration does not prolong the time allowed by R. S. O. ch. 174, sec. 323, within which it may be quashed, and such time does not count from the registration.

*Held*, also, where a by-law has been passed for opening a road over certain land, the municipality is not bound under R. S. O. ch. 174, sec. 456 to make compensation to the owner before entering on the land.

THIS suit was brought by the Rev. Philip Harding of the township of Burleigh, in the county of Peterborough, against the corporation of the township of Cardiff. In his bill of complaint, which was filed November 20th, 1880, as amended, the plaintiff alleged that he was the owner of certain lots of land in the township of Cardiff in the Provisional county of Haliburton, and was a ratepayer in respect thereof to the defendants: that about June 26th, 1878, he was served with a paper writing, purporting to be a by-law of the Municipal Council of the township of Cardiff, dated June 22nd, 1878, entitled "A by-law to open a certain new road to be called the Deer Lake Road," and enacting that a road should be opened through certain lands in the township of Cardiff, amongst which was the land of the plaintiff, which paper-writing was as follows: "Whereas it becomes necessary to open a

road through lots 19 and 20, concession 14, in the township of Cardiff, (the plaintiff's land). Be it therefore enacted by the Municipal Council of the township of Cardiff, and it is hereby enacted by the authority of the same, that a road be opened through the above lots as surveyed by Alexander Niven, Provincial Land Surveyor, and described as follows: Commencing, &c. Passed this 22nd day of June, 1878."

That shortly after the date of this by-law, the defendants appointed by by-law one Ritchie to act as their arbitrator in settling the compensation to which the plaintiff would be entitled by reason of the carrying out of the said alleged by-law of June 22nd, 1878, and that on July the 20th, 1878, he, the plaintiff, "although believing that the said alleged by-law was invalid, yet being unwilling to incur the trouble and expense of moving to quash the same, gave notice to the defendants that he appointed one James Golborne to act as his arbitrator in respect of the said compensation:" that he had never revoked or annulled the appointment of the said Golborne, who had always been ready and willing to act; but no third arbitrator had ever been appointed to act with the said Ritchie and Golborne: that notwithstanding the above, on or about the August 7th, 1880, he was again served with a copy of the said alleged by-law of June 22nd, 1878; and also, at the same time, with a notice, on behalf of the said municipal council, inviting him to provide an arbitrator within twenty-one days, and giving notice that at the times therein mentioned, the said council would take possession of the line of the said road; to which notice he replied by threatening proceedings should the defendants take possession of his lots: that he did not appoint an arbitrator as required by this notice, but that shortly after the service of it he was served with what purported to be a by-law passed on August 31st, 1880, whereby the defendants appointed one Ritchie to act as their arbitrator, and about November 15th, 1880, he was served with an appointment by the County Court Judge of one Austin to act as arbitrator for him,

an appointment by the said Ritchie and Austin of one Buchanan as third arbitrator, and an appointment by these three of a time at which they intended proceeding with their arbitration; but that he, relying on the invalidity of the defendants' proceedings, did not attend at the time and place appointed, nor in any way acquiesce in the illegal procuring of this pretended arbitration, but that he was informed and believed the said pretended arbitrators proceeded with their illegal arbitration, and assumed to make an award thereunder, with a copy of which he was served on December 15th, 1880, and which recited amongst other things that he, the plaintiff, appeared in person before the arbitrators, but declined to give any evidence of the amount of compensation to which he would be entitled by reason of the opening of the said road, and by which there was awarded to him $45.80 as compensation, subject to arbitration fees and costs to be deducted therefrom. And the plaintiff submitted that under the said alleged by-law of June 22nd, 1878, the defendants were not entitled to take possession of his land until after a valid award had been made fixing the compensation to which he was entitled, but no such award had been made; yet he alleged that the defendants, claiming authority under the said alleged by-law, had, long before the making of the said pretended award, removed fences from his land, and taken forcible possession, which they still held, of a portion thereof, and had opened a road through and were greatly injuring the same: that the necessary notice required by the statute of the intention to pass the alleged by-law had never been given: that the notice given and the by-law itself were uncertain and indefinite; that the by-law was not under seal as required by the statute, and was not duly registered, and that the defendants themselves had abandoned the said by-law as null and void, and could not now set it up: that the alleged by-law was not passed to benefit the public, but to injure the plaintiff, and in the interests of the members of the defendants' council: that about May, 1880, the said council believing the alleged

by-law could not be enforced, passed another by-law in substance the same, which was quashed by consent of the defendants on application to the Court of Queen's Bench. And the plaintiff submitted the former by-law was repealed by the passing of the latter; and the plaintiff alleged that the award made as aforesaid was not an impartial determination of the matters of difference, and submitted that should the award be held binding, the matter should be referred back to the said arbitrators, and he should be allowed to produce evidence before them. And the plaintiff prayed that the said alleged by-law and all subsequent proceedings taken thereunder, and the pretended award, might be declared of no effect in law; an injunction restraining the defendants from proceeding further to enforce the alleged by-law, and an order commanding them to quit possession of the plaintiffs's lands; an injunction restraining them from further trespassing on his lands; an order against them for payment of damages sustained by him by reason of their wrongful entry; and for costs and general relief.

By their answer the corporation alleged that the by-law of Juue 22nd, 1878, was duly passed and sealed, and was, about July 17th, 1880, duly registered in the registry office: that notice of the intention of passing it was duly given: that the charges of sinister motives in passing it were wholly untrue: that the by-law was passed in the interest of the rate-payers, pursuant to a petition presented by a great number of them: that they had never abandoned the said by-law, but submitted it was a valid and subsisting one, and that they were entitled to take possession of the line of road by the said by-law laid out and opened: that before they took possession of any part of the plaintiff's land they served him with a copy of a resolution of the council, dated August 31st, 1880, offering the plaintiff $60 as compensation, and requesting him in default of his accepting this to name his arbitrator within seven days, and notifying him that otherwise they would apply to the County Judge to name one for him: that the plain-

tiff neglecting to appoint an arbitrator, they proceeded as directed by the statute, and the three arbitrators being appointed made their award on December 7th, 1880, after hearing the evidence, awarding the plaintiff $45.86, less fees and costs: that they had paid the plaintiff the balance due to him; and they submitted that the plaintiff's bill was demurrable for want of equity, and sought the same advantage from the objection as if they had specially demurred.

The cause was heard at the Spring Sittings at Peterborough, on May 5th, 1881, before Proudfoot, J.

After the examination in chief of the plaintiff, who was first called, had been completed, counsel for the defendants called upon the plaintiff to elect whether he would proceed under the by-law or against it, whether he would attack the by-law or the award made thereunder. His Lordship held that the plaintiff was bound to elect, and in deference to his Lordship's ruling, though not acquiescing, the plaintiff elected to go on under the by-law.

The examination of witnesses was then proceeded with, but the parties finally agreed to waive the award, and that a new arbitration should be had. A direction was therefore given to arbitrate anew, and the question of costs was reserved until the result of the arbitration should be known. A fresh award was then made, by which a sum of $26 was fixed as the plaintiff's compensation, instead of $45.86, as by the former award. And on October 12th, 1881, the cause again came before Proudfoot, J., and the fresh award being unimpeached, the only question remaining for argument was, the question of costs, as to which his Lordship determined that the plaintiff must pay all the costs, both those incurred prior to the making of the first award and those incurred subsequently, for that the municipal authorities had rightly exercised the powers vested in them. This decision is reported 29 Gr. 309.

The cause was set down to be heard by way of rehearing before the Divisional Court, but on January 13th, 1882, was

struck out, though without costs, on the ground that as to suits in which a decree had been given before the Judicature Act, and which had not been set down for rehearing before the coming into operation of the said Act, no right to rehear was preserved; and, therefore, the Court had no jurisdiction to entertain the motion (*a*).

On June 8th, 1882, the plaintiff again moved before the Divisional Court of the Chancery Division for an order setting aside the above judgment of Proudfoot, J., and ordering a judgment to be entered for the plaintiff, in accordance with the prayer of his bill of complaint, on the ground that the said judgment was wrong and contrary to law, and the evidence, and on the ground that the learned Judge was wrong in putting the plaintiff to his election as above mentioned, and in ruling that he was not at liberty to impeach both; and the Court having reconsidered their former decision agreed to hear the motion, on the ground that under sec. 11, sub-sec. 2, of the Judicature Act, pending business could be continued before the High Court, and a suit standing for rehearing was pending in the sense of the Judicature Act, though not actually set down for rehearing before August 22nd, 1881, the date of coming into operation of the said Act.

*W. Cassels*, for the defendant, raised the preliminary objection, that there was no right of appeal now. If, having elected to attack the award, the plaintiff had failed or succeeded, he might then have come, and said he was forced to elect; but, as it was, after the plaintiff had elected to attack the award, the parties mutually agreed to have a new arbitration, and abide by that.

*C. Moss*, Q. C., for the plaintiff. We contend we have a right to set aside the by-law *in toto*. We tendered evidence

(*a*) *Trude* v. *Phœnix Ins. Co.*, 18 C. L. J. 54, and several other cases being in the same position, were also struck out on the same day on the same grounds.—REP.]

to attack the by-law, and we should not have been forced to elect, as we were. This is not a case of approbating and reprobating at all, it is not a case of first attacking a proceeding and then seeking to have the benefit of it.

[FERGUSON, J.—You attack the award, and say, though the by-law was good, the award was bad; then you say, the award was bad, because the by-law was bad.]

Yes, we say, first, the by-law was not valid; second, even if it was valid, the proceedings taken under it were not so taken as to make the award valid. We refer to *Watts* v. *Cockran*, 6 Jur. N. S. 768; *Lewis* on Equity Drafting, p. 180. This was a case of several grounds for the same relief. The by-law was bad, because passed without proper notices, not duly registered, and passed to serve the interests of individuals, and not of the public. But even if the by-law was good, we have a right now to dispose of the question of costs. We should not have been made to pay costs in any event, even if we were rightly put to our election.

[BOYD, C.—We cannot determine as to costs, until the question as to whether the by-law is good or not has been tried. FERGUSON, J.—If you were rightly put to your election, do you still contend the order as to costs was wrong?]

Yes. To come to the root of the matter, the bill was to resist the trespasses of the defendants on our lands. Passing the by-law does not by itself entitle the corporation to take possession of a road. The by-law, in this case, does not, on the face of it, purport to take power to enter on the lands. Under R. S. O. ch. 174, s. 509, the corporation cannot enter on land without a by-law; they must pass by-laws for opening roads, and also for the express purpose of entering on the land. See, also, sec. 456. No Act of a corporation will be protected, though authorized by the Legislature, unless done in the way laid down, viz., in this case by by-law: *Churchwardens of St. George's Church* v. *County of Grey*, 21 U. C. R. 265; *Reid* v. *Corporation of*

*Hamilton*, 5 C. P. 269; *The Queen* v. *The Vestry of St. Luke's*, L. R. 7 Q. B. 148, 153. Again, these rights of entry can only be exercised after compensation has been given under sec. 356: *Harrison's* Municipal Manual, 4th Ed. p. 517, note *b.* to sec. 509. The statute should not be so construed as to give a power of this extraordinary nature to a corporation, where no such power is given expressly. *Metropolitan Asylum District* v. *Hill*, L. R. 6 App. 193, lays down the principle as to the *onus* in such cases, and the need of express words. As to other corporations, railways, loan companies, &c., it is clear no such power exists as is now claimed for municipalities. If the corporation could enter into possession before the compensation is fixed, there would be no object in the provisions of the Act enabling corporations to proceed and have an arbitration, if individuals do not do so. Section 373 shows they have no such power. Section 377 provides that the arbitrators must make the award within one month. A further by-law is required under sec. 509, but even if such a by-law for entry had been passed, giving compensation is properly a condition precedent. On these grounds we were entitled to maintain our bill, even if the award was valid.

*H. T. Beck* on the same side. The fact of the second award being smaller than the first is no ground for saddling the plaintiff with costs. The first award was made *ex parte*. The presumption, if any, is that the ratepayers were influenced by this suit being brought to award a lower figure than they otherwise would have done. As to the question of the right of entry before compensation, I cite *Mayor of Montreal* v. *Drummond*, L. R. 1 App. Cas. 384, at p. 403; *Great Western R. W. Co.* v. *Miller*, 12 U. C. R. 654, at p. 659. As to the question of election, what we claim is simple indemnity. We are not claiming under the award. We do not require to say that the by-law is good. The fact of our saying the award is bad, does not necessitate our recognising the by-law as good. Both may be bad. It is no case for approbating and reprobating.

*W. Cassels*, for the defendants. This case came on for the hearing at which the decree complained of was made; the only question of argument was that of costs, and that is the only question that can be entertained at this re-hearing. The only question before the Court was one of costs, and that was disposed of as within the discretion of the Court and is not appealable. There is no appeal on a question of costs, unless they are given on a wrong principle. The plaintiff agreed of his own accord to a further arbitration, as appears on the record of the Court, and cannot now go back and attack the ruling of the Judge forcing them to elect. *Schultz* v. *Wood*, 6 S. C. 585, was a different case. The Court there forced the parties into what they did. The plaintiff's bill was filed on 20th November, 1880, and the year during which he could attack the by-law was gone by, the Court therefore had no jurisdiction: *Vandecar* v. *Corporation of Oxford*, 3 App. R. 131. As to railways the statutes are entirely different. Railway companies can enter on land in order to survey and mark it out, without the compensation being paid, but they cannot enter into possession without paying compensation, because the Acts make this a condition precedent. The Municipal Act does not make it a condition precedent. I refer also to *Harrison's* Municipal Manual, 4th ed., p. 374.

*J. B. Dixon*, on same side. The application is really one for costs. The plaintiff appointed an arbitrator under the by-law. This amounted to an acceptance of the by-law. Then the amounts are so small, it is beneath the dignity of the Court to notice the case. Besides the defendants had tendered the plaintiff a larger amount than was awarded, which was the reason why the arbitrators gave the costs of the arbitration and award against the plaintiff. I would ask the Court to make an order allowing the enforcement of the award, and so save the expense of a new application.

[BOYD, C.—That cannot be done now on this application.]

Then I maintain the by-law could not be attacked after a year had elapsed.

[FERGUSON, J.—Then the plaintiff is in the same position as if he had never been put to his election.]

Yes.

*C. Moss*, Q.C., in reply. The prayer of the bill is to restrain the defendants from proceeding to enforce this by-law and to compel them to quit possession of the plaintiff's lot. What we complained of was the entry on our land. The defendants sought to justify this by producing a by-law. We had a right then to assert reasons why the by-law did not bind us. When resisting trespassers it is sufficient for us to say simply, this by-law is no justification; it is not necessary for us to move to quash the by-law. Moreover a by-law of this kind has no effect in law until registered: R. S. O., 174, secs. 323, 507; *Beveridge* v. *Creelman*, 42 U. C. R. 29. This by-law was not registered till August, 1880. A motion to quash would be in order within a year from such registration. Meanwhile we had a right *quia timet* to resist trespassers. As to acquiescence, the answer of the defendants repudiates our act of appointing an arbitrator. So far from seeking to take advantage of our appointing an arbitrator, they repudiated the only ground on which they could rest such a contention. At any rate it was a matter of evidence as to why we made this appointment of an arbitrator, and it could not be held to bar us unless we had an opportunity to adduce such evidence. Then as to tender, all that was done was to pass a resolution that a sum of $60 should be paid, which was served on defendant, but the plaintiff taking the ground that he was not bound to accept, there was no tender. We never abandoned the right we claimed to be afforded this opportunity of calling these matters in question: *Wightman* v. *Fields*, 19 Gr. 559, shews that there is a right to preserve lands from trespassers, though no damage be shewn.

[FERGUSON, J.—There is no doubt about that.]

As to the right of the corporation to enter before pay-

ment, there is no summary mode by which a proprietor can recover payment of an amount awarded provided in the statutes; and this being so, and the statute leaving him to his remedy and the award, the Legislature must have intended him to have the right to retain the land until paid, The proper mode of proceeding by the township would have been not to take the proceedings complained of unless in a position to pay.

June 18, 1882. BOYD, C.—The plaintiff contended that the learned Judge who tried this case was wrong in forcing the plaintiff to elect whether he would attack the by-law or the award made thereunder. Strictly speaking, I do not think it was a case for election—there was nothing necessarily inconsistent in the plaintiff seeking cumulative relief by attacking both by-law and award. But apart from the theoretical injury, I do not see that any wrong has been done to the plaintiff which requires a reversal of the judgment below. The by-law impeached had been passed on June 22, 1878, and it was not attacked till this bill was filed on November 20, 1880. The plaintiff was aware from the first of its alleged invalidity, but so far from moving against it within the year allowed by the statute, he chose to recognize its validity by naming an arbitrator to act for him in assessing compensation for the land mentioned therein. It was not argued that the by-law was void on its face, or that it was not of the proper competence of the municipality to pass. In view of this state of facts I think *Vandecar* v. *Corporation of Oxford*, 3 App. R. 131, establishes that no Court had any jurisdiction to interfere therewith, and the by-law became by effluxion of time absolute and incontrovertible.

It is argued, that because the by-law was not registered till August, 1880, all grounds of objection are open for a year from that date, but I do not read the statute in this way. Although the by-law may not become effectual in law till it is registered, still that does not prolong the period within which, by the other sections of the statute,

it may be quashed by the proper Court. The corporation may properly abstain from registering the by-law till, by effluxion of time, it becomes valid and binding to all intents and purposes, and that was their manner of acting in the present case.

But there is another reason which disqualifies the plaintiff from complaining of being put to an election. Having in deference to the Judge's ruling elected to attack the award, he agrees to a consent decree, by which the award is set aside and a new arbitration is ordered. He then prosecutes that arbitration until another award is obtained, which has not been moved against, and is now conclusive upon him. He has gone far beyond what was needful in merely deferring to the ruling at the trial. Had he wished to preserve his right to complain of the enforced election he should either have so modified his consent as to protect himself, or he should have proceeded with the new arbitration under protest, or have applied to suspend the appointment of arbitrators till he could have moved against the decision of the Judge at the trial. But by this second arbitration he has so changed his own position and that of the defendants as to preclude him from now attacking the by-law. He has chosen to take the chances of obtaining an award in his favour, and cannot now be heard to say that by reason of the invalidity of the by-law the road should be closed up, and the defendants should be enjoined from taking the land, and mulcted in damages as trespassers. The principle of the decision in *Keith* v. *Keith*, 25 Gr. 110, applies to bar the plaintiff from repudiating his own action under the consent decree.

The only remaining question argued was this, that the judgment is wrong in awarding the general costs of the suit to the defendants. This was mainly put on the ground that the learned Judge erred in holding that a municipality had a right to enter on lands before an award was made and compensation tendered. The by-law in this case directed the opening of a road over the plaintiff's land, and this in substance imports that the land may be entered

upon for the purpose of making the road. The provisions of the Municipal Act leave no doubt that this is involved in directing a road to be opened. See sections 384, 506 507, 509, sub-sec. 7, 510, 511, 516, 523. The bill in effect, puts the matter in this way, by complaining that under the by-law the road was opened without any offer of compensation before any award was made. I agree in the views of the learned Judge upon this construction of the Municipal Act; and I call attention to the fact that the same conclusion was reached by the Court of Queen's Bench in *Stonehouse* v. *Enniskillen*, 32 U. C. R. 567, where it is said that the effect of sec. 325 of the Act is to enable the municipality to enter upon, take or use the land before making compensation. By directing a road to be opened, the land mentioned in the by-law ceases to be private property, and becomes appropriated for public purposes, so that it is no longer a trespass upon the individual proprietor to enter thereon in order to make the road passable and fit for public use. This being so, the plaintiff's case fails, in so far as it alleges the defendants to be trespassers, and the result of the last arbitration is to give him less than was awarded under the arbitration complained of in the bill. So the conclusion is manifest that the disposition made of the costs was in accordance with the usual course of the Court.

My decision is, therefore, that the decree complained of should be affirmed, with costs.

FERGUSON, J., concurred.

[CHANCERY DIVISION.]

## PARKES v. ST. GEORGE ET AL.

*Chattel mortgage—Consideration—Future advances—Assignment for the benefit of creditors—Creditors—R. S. O. ch. 119, ss. 1, 2, 6.*

Q. and A., partners, being indebted in a sum of $1,551.66, gave a chattel mortgage on their stock in trade to the creditor to secure $2,400; it being verbally agreed that the creditor would make further advances to the extent of $800; and Q. and A. subsequently made a voluntary assignment for the benefit of their creditors, after which the mortgagee seized the property included in the mortgage, and sold the same, undertaking to hold the proceeds subject to the order of the Court, whereupon a creditor, whose claim existed at the date of the mortgage, though he had not recovered judgment, brought the present action on behalf of all the creditors of Q. and A. to have the mortgage declared void, and the proceed paid to the assignee:

*Held*, that the mortgage was void, under R. S. O. ch. 119, for not stating on its face the true consideration.

*Held*, also, that neither the assignment for the benefit of creditors, nor the sale of the goods as aforesaid, disentitled the plaintiff to impeach the mortgage, and he was entitled to the relief claimed.

THIS action was brought by James Parkes, who sued as well on behalf of himself as of all other creditors of the defendants Quinolle & Arnold against Henri Quetton St. George, Joseph Quinolle, Florent Arnold, and Edward Roper Clarkson. The plaintiff claimed that a chattel mortgage made by the defendants Quinolle & Arnold to the defendant St. George should be declared void as against the plaintiff and other creditors of the mortgagors: that the defendant St. George might be ordered to deliver up the goods and chattels covered by the mortgage to the defendant Clarkson as assignee of the defendants Quinolle & Arnold for the benefit of creditors; and that the proceeds might be applied by Clarkson under the assignment; and the plaintiff also claimed judgment against Quinolle & Arnold for the amount of his debt.

The action came on for trial at Toronto on 24th November, 1882.

It appeared from the evidence that the defendants Quinolle & Arnold carried on business as restaurant keepers in Toronto, and became indebted to the defendant St. George, who carried on business as a wine merchant. On

January 24th, 1882, being then indebted to St. George on an open account for goods $205.59, and also on promissory notes then current, $1,346.07, they executed a mortgage in his favour on all their stock in trade and other chattels, with some trifling exceptions, to secure the sum of $2,400, the defendant St. George agreeing verbally that he would make further advances to the mortgagors to the extent of $800 as the mortgagors wanted it. The mortgage was duly registered, and the affidavit of *bona fides* stated that $2,400 was due to the mortgagee. After the execution of the mortgage only some trifling advances were made by St. George to the mortgagors, amounting in the aggregate to $133.80, and the $800 was not placed to their credit in his books.

On 3rd March, 1882, the defendants Quinolle & Arnold made a general and voluntary assignment to the defendant Clarkson, for the benefit of their creditors, and on the same day Clarkson took possession of the mortgaged goods.

On the 11th March, 1882, St. George seized the property under his chattel mortgage, and offered it for sale, and by an arrangement between him and some of the creditors of Quinolle & Arnold the sale was suffered to proceed, on the agreement that the proceeds of the sale should remain in the hands of the defendant St. George's solicitor to abide the result of litigation as to the validity of the mortgage. At the conclusion of the evidence the trial was adjourned until the 19th December, 1882, when it came on again for argument.

*W. G. Cassels*, for plaintiff. The mortgage, though good between the parties, may nevertheless be void as against creditors, and a sale by the mortgagee cannot defeat the creditors' rights: *Barker* v. *Leeson*, 1 O. R. 114. The statute R. S. O. ch. 119, sec. 6, is not complied with: the statute requires that an agreement for future advances shall be in writing, and requires the terms of the agreement and of the conditions of repayment to be fully set out in the mortgage by recital or otherwise. Here the alleged agreement to make

further advances is not disclosed upon the mortgage at all; and the failure to set forth the true agreement vitiates the mortgage and renders it void: *Robinson* v. *Paterson*, 18 U. C. R. 55; *Arnold* v. *Robertson*, 8 C. P. 147; *Hamilton* v. *Harrison*, 46 U. C. R. 127, at p. 130; *Walker* v. *Niles*, 18 Gr. 210. The seizure by the mortgagee makes no difference so long as the goods or proceeds can be earmarked. *Davis* v. *Wickson*, 1 O. R. 369, does not apply, because here while the goods were in the hands of the mortgagee proceedings were taken, and the sale was only allowed to proceed on the agreement that the proceeds should be held in place of the goods. Here the goods are clearly traced into the hands of one who holds them under an invalid mortgage. The mortgage was also void under R. S. O. ch. 118, as being a preference; it covered all the property of the debtor. It, moreover, provided that if a single article were removed the mortgage should become due; this was a virtual stoppage of the mortgagors' business; as the goods covered all the stock in trade; therefore it was not made to enable them to carry on their business, and, besides, a very small portion of the debt was actually due when the mortgage was given, as the notes had not matured. He referred to *Kalus* v. *Hergert*, 1 A. R. 78; *King* v. *Foxwell*, L. R. 3 Ch. 518; *Lomax* v. *Buxton*, L. R. 6 C. P., at p. 112; *Brayley* v. *Ellis*, 1 O. R. 119.

*J. Bethune*, Q.C., *W. G. Falconbridge* with him, for defendant St. George. If the property is not in St. George, it must be in the assignee, and that would defeat this suit: *Garrard* v. *Lord Lauderdale*, 3 Sim. 1. There was an assent by creditors to the assignment, and therefore it was not a mere voluntary transfer, and the plaintiff therefore could not seize the property, if he had execution; and as he could not seize, therefore he can have no *locus standi* here. If the property is not in the debtor, any execution the plaintiff may obtain cannot attach at all. As against the assignee, the defendant St. George has a perfect defence, as he cannot attack a transaction which is valid as against his assignor. If there were fraud, there

might be the right to avoid the transaction, but there can be no such right on any merely technical objection. This case is not distinguishable from *Davis* v. *Wickson*, 1 O. R. 369; *McMaster* v. *Clare*, 7 Gr. 550. The plaintiff does not get judgment against his debtors until to-day; he cannot rely upon that to attack a prior mortgage: *McGivern* v. *McCausland*, 19 C. P. 460; and the defendant St. George's title is good down to this day, and until execution is issued. The property having been sold, the Court cannot enquire as to the proceeds in the shape of money. The instrument being good between the parties, and possession having been taken thereunder, and acquiesced in by the assignee, that renders it good as against all the world: *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460; *Robinson and Joseph's* Dig. 582, 587.

The other defendants were not represented by counsel.

*W. G. Cassels* in reply. The statute declares that the mortgage is void as against creditors, not merely as to judgment or execution creditors: *Barker* v. *Leeson*, 1 O. R. 114. The taking possession of the goods was only following up a void mortgage which, as against the plaintiff, conferred no title. There was no new act or dealing, and before any *bonâ fide* purchaser intervened the creditors step in; and if no undertaking to hold the proceeds had been given, an injunction restraining the sale would have been obtained.

December 21, 1882. BOYD, C. The plaintiff was a creditor of Quinolle & Arnold at and before the date when the chattel mortgage was given to the defendant St. George. That was on the 24th January, 1882, for $2,400, and purports to be for a debt then due and owing. It does not correctly represent the true dealing between the parties to it. The arrangement was that the mortgage should cover the debt due when it was given, and also further advances to be made at the discretion of the mortgagee, to the extent of $800. This agreement was not in writing, and no change of possession took place as regards the goods

mortgaged. All remained with the mortgagors till they made an assignment for the benefit of creditors on the 3rd March, when the assignee Clarkson took possession. For an alleged breach of the mortgage there was a seizure made thereunder on March 11th while the goods were in the assignee's hands. The goods were then removed to the mortgagee's warehouse, and subsequently sold under an arrangement by which the proceeds were to be kept apart in the hands of the mortgagee's solicitors, to abide the result of this litigation. The action is practically on behalf of all creditors, as it is asked that the proceeds be paid to the assignee Clarkson for the benefit of all; and by the arrangement above mentioned it is to be considered that the property, or what represents it, can still be specifically ascertained. Upon this state of facts, I think that the proper deduction, from authorities which bind me, is that the mortgagee cannot retain the goods or their proceeds.

The instrument might have been framed under the 1st and 6th sections of the Chattel Mortgage Act, R. S. O., ch. 119, so as to afford on its face complete information as to each transaction, but here it does not represent the facts as to either. It is therefore, as in *Robinson* v. *Patterson*, 18 U. C. R. 55, a mortgage given in great part for a debt not existing, but for advances which the mortgagee had merely promised verbally to make, and which had not been made when the mortgage was executed or the affidavit for registry made. And as against creditors it cannot be sustained. The plaintiff was a creditor in existence at that time, who is prejudicially affected by the mortgage, and who had the right to complain of it as he did, even before recovering judgment and being in a position to issue execution. The principle of such cases as *Longeway* v. *Mitchell*, 17 Gr. 190, applies so as to justify the Court in restraining the mortgagee from embarrassing the plaintiff by disposing of the property, converting it into such a form as not to be traceable or seizable.

Nothing done by the mortgagee under the void or voidable instrument in the way of seizing and selling, upon an

undertaking to hold the proceeds subject to the order of the Court, can give him a higher or better title as against creditors than he had under his defective mortgage: *Barker* v. *Leeson*, 1 O. R. 114; *Davis* v. *Wickson*, *Ib.*, 369. I find that the views expressed in *Barker* v. *Leeson*, as to the meaning of "creditor," in the act are corroborated by the opinions to the same effect of Robinson, C. J., in *Holmes* v. *Vancamp*, 10 U. C. R. 510, and by Mr. Justice Patterson, in *Re Barrett*, 5 App. R. 215. The assignee Clarkson took only the equity of redemption under the voluntary assignment to him, the mortgage being valid as between the parties to it and volunteers under them. He therefore could not attack the mortgage as representing creditors, although an assignee in insolvency might do so: *Re Andrews*, 2 App. R. 24. This assignment intervenes between the mortgagee and the judgment and award of execution now given in favour of Parkes against Quinolle & Arnold, so that the effect of declaring the mortgage invalid is to allow the goods covered by it to fall into the general assignment for the benefit of all the creditors: *Richards* v. *James*, L. R. 2 Q. B. 285. This, indeed, is asked by the plaintiff, and I give judgment in that form, with costs to the plaintiff. There is no defence to the claim against the debtors. The plaintiff might have had judgment, and issued execution thereon at an early stage in these proceedings; and considering the manner in which the sale has been proceeded with, and the proceeds held in suspense, I do not think the general result should be affected by the order of the proceedings in the action.

*Judgment reserved.*

[CHANCERY DIVISION.]

## TRINITY COLLEGE v. HILL ET AL.

Where, after foreclosure, the rights of purchasers have intervened, any equitable claim which the mortgagor may have previously had to open the foreclosure, is, in this country at all events, to be considered forfeited.

*Campbell* v. *Holyland*, L. R. 7 Ch. D. 173 remarked upon, and *Platt* v *Ashbridge*, 12 Gr. 107, followed.

THIS was a petition of John Hill and James Hill, the two defendants in the above suit. The suit was one for the foreclosure of a certain mortgage of land, dated May 30th, 1862, and made between the petitioners as mortgagors, and the college as mortgagees. The bill of complaint was filed on June 30th, 1876, and a final order of foreclosure obtained on June 14th, 1878. The petitioners now sought to open the foreclosure proceedings under the circumstances which they set out in their petition. They alleged amongst other things that they had never received any notice of the proceedings for foreclosure; and they also stated, which was not disputed, that no proceedings had been taken to enforce the order of foreclosure, but that John Hill had been for twenty years past, and still was in possession of the lands in question; and that they were willing to pay the amount due on the mortgage. The service of the bill so far as James Hill was concerned had been substitutional, he having been at the time out of the jurisdiction. It appeared, however, that the plaintiffs, the mortgagees, had contracted to sell the lands to one Barnaby Grattan.

The petition came up for argument on Wednesday, October 11th, 1882.

*J. Bain*, for the petitioners. The established rule is laid down in *Campbell* v. *Holyland*, L. R. 7 Ch. D. 166, that even after foreclosure a party can come in and redeem. This case lays down the rule clearly that once a mortgage always a mortgage, and the purchaser stands in no better position than the mortgagee.

[BOYD, J.—Is not what the Court of Appeal says, in *Heath* v. *Pugh*, L. R. 6 Q. B. D. 345, totally opposed to this.]

Where no personal service of any of the papers in a suit has been made on a defendant out of the jurisdiction, the opportunity of redeeming the property will not be taken away. As against the college there will be little difficulty in opening the foreclosure. Is Grattan in any better position? The conveyance to him is not produced.

[BOYD, J.—The production of the conveyance is not important, if the Master of the Rolls is right in *Campbell* v. *Holyland*, L. R. 7 Ch. D. 166.]

*N. Hoyles* for the purchaser.—It would be a great hardship on the purchaser if redemption were allowed. *Campbell* v. *Holyland* is not an authority. It is inapplicable to this country. Real property is looked on in a very different light in England. The *dicta* of the Master of the Rolls are not binding, because what he proceeds on there is, that there had been no foreclosure. *Johnson* v. *Johnson*, 18 C. L. J. N. S. 403, 9 P. R. 259, did not proceed on such grounds, but is just such a case as this. *Patch* v. *Ward*, L. R. 3 Ch. 203, referred to in *Campbell* v. *Holyland*, L. R. 7 Ch. D. 170, is a strong case, and at p. 242 it lays down general principles which are not interfered with by *Campbell* v. *Holyland*, if we consider the circumstances under which that case was decided. *Roblin* v. *Greely*, 7 P. R. 125, shews that even if a final order of foreclosure had not been got it would not be material. The application under Ch. O. 116 was purely formal. As to the service on James Hill, substitutional service is equivalent to personal: *Watt* v. *Barnett*, L. R. 3 Q. B. D. 183; *Shaw* v. *Crawford*, 4 App. 371, and *Gunn* v. *Doble*, 15 Gr. 655, and other cases cited in *Shaw* v. *Crawford*, shew the Court will be slow to open foreclosure. In view of the above authorities, the Court cannot now say to the purchaser there are reasons why the Court should exercise indulgence at your expense, and open the foreclosure on which you rely. He also cited *Clarke* v. *Ellis*, 6 P. R. 115.

*S. VanKoughnet*, for the college. James Hill made no effort to pay the mortgage off, and *Brothers* v. *Lloyd*, 2 Ch. Ch. 119, shows where there has been such *laches* the Court will be very slow to open foreclosure. *Thornhill* v. *Manniug*, 1 Sim. N. S. 451, may also be cited.

*J. Bain*, in reply. *Patch* v. *Ward*, L. R. 3 Ch. 203, is cited in *Campbell* v. *Holyland*, *supra*, and has no application here. That the Court can set aside orders of foreclosure is clear. We do not rely on *Campbell* v. *Holyland*, *supra*, for that. *Patch* v. *Ward*, was a new bill. It was not an application in the suit in which the order of foreclosure had been obtained. It is not denied that it is open to parties to the original suit to ask the Court to open the foreclosure, unless there has been a serious change in the position of the parties. What we cited *Campbell* v. *Holyland*, *supra*, for is to shew that the same right holds good as against a purchaser, as well as against a mortgage. No doubt it is an innovation on what has heretofore been thought the rule. I deny that an application under G. O. 116, is a merely formal one. At all events I rely strongly on the case of *Campbell* v. *Holyland*, *supra*, and I think the circumstances are such as will induce your Lordship to open up the foreclosure.

October 25, 1882. BOYD, C.—The final order of foreclosure essentially changes the position and rights of mortgagor and mortgagee thereafter. As put by Lord Selborne, in *Heath* v. *Pugh*, 29 W. R. 906 (*a*) : "Its effect is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released." It is true that after foreclosure the right to sue upon the covenant to pay still remains ; and if that right is exercised, the Court regards it as an election on the part of the

(*a*) Also reported, L. R. 6 Q. B. D. 345.

mortgagee to open the foreclosure. But if instead of that the land is sold by him then he elects to forego his right to sue, and elects to deal with the property as his absolutely. While yet the mortgagee retains the property, it is not impossible to have the foreclosure opened in circumstances when it would involve great hardship to refuse relief, and the delay is satisfactorily accounted for. But no case has gone beyond that; and in my judgment it is a salutary rule to adopt in this country, where land is regarded as an article of commerce, that any claim of the mortgagor to the equitable interference of the Court is forfeited if before his application the rights of purchasers intervene. Such is the present case.

Against this position are some *dicta* of the Master of the Rolls in *Campbell* v. *Holyland*, L. R. 7 Ch. D. 173, not necessary for the decision of that case, which was one of purchase from the mortgagee of his interest before the foreclosure was absolute. But I prefer to follow the views expressed by VanKoughnet, C., in *Platt* v. *Ashbridge*, 12 Gr. 107, as better suited to the circumstances of this province, and more likely to enhance the value and encourage the improvement of land which has been foreclosed. Adverting to the position of the mortgagee after foreclosure, he says, when he in any way as such owner alters his relation to the land, he adopts it as his own and foregoes his debt, and neither he nor the mortgagor can afterwards treat it as a mere pledge for the debt, and insist that the latter is subsisting.

Apart from this view of the case, I should hesitate long in view of the authorities, before interfering with the foreclosure. I am by no means satisfied that the defendants were not well aware of the proceedings being taken to foreclose. Their inaction probably arose from the fact that till the last year or two the land was not worth more than what was due on the mortgage. I chiefly proceed, however, upon the former ground in dismissing the petition, and I suppose it must be with costs.

[This case has been carried to appeal.]

[QUEEN'S BENCH DIVISION.]

## ISABELLA ELLIOTT v. BROWN ET AL.

*Conveyance by married woman—Want of certificate—Possession contrary to deed—R. S. O. ch. 127, secs. 13, 14—Curing defect.*

A., a married woman, owning the whole lot, in 1834 by deed jointly with her husband purported to convey the east half to F. in fee simple. The conveyance was void in not having the proper magistrate's certificate endorsed thereon. F. never took possession, but in 1852 conveyed to H. through whom the plaintiff claimed. Shortly after the conveyance to F. he told A. that he would not live on the land or have anything to do with it. A. then procured some one to look after it for her, and about sixteen years before this action two sons of A. settled upon the west half of the lot upon the understanding that they were to have the whole land, each paying her $50 on account; but no deed was executed to them till 1875. They paid taxes on the whole lot, and cut timber at times upon the east half. In 1871 E., having obtained a conveyance of the east half, had a line run between the east and west halves and cut timber on the east half. An action of trespass was brought against him by A.'s sons which he settled. The east half was neither cleared, fenced, nor cultivated.

*Held*, CAMERON, J., dissenting, that those claiming under A. in 1873, when 36 Vic. ch. 18, was passed, were not in "actual possession or enjoyment" of the east half contrary to the terms of the conveyance, within the meaning of the proviso at the end of sec. 13 of that Act, and therefore that A.'s conveyance to F., void in its inception, was validated by sec. 12 of the Act (R. S. O. ch. 128, sec. 13), and the plaintiffs were entitled to recover.

*Per* CAMERON, J., the possession of A. and those claiming under her must be construed with reference to her paper title to the land, which remained in her, as her deed to F. was void, and it must therefore be held to have extended to the whole lot and not only to those parts actually occupied as in the case of a trespasser, and therefore the case fell within the exception in the Act, and the deed was not validated thereby.

THIS action was tried at the last Spring Assizes at Belleville by and before E. J. Senkler, Esq., Judge of the County Court of the County of Lincoln, sitting for the Chief Justice of the Common Pleas Division of the High Court.

The action was to recover possession of the east half of lot No. 5, in the 13th concession of the township of Hungerford, in the county of Hastings.

It appeared that the whole lot was granted by the Crown to Catherine Allard, a married woman, through whom the defendants claimed, by patent, dated 10th January, 1833. On the 4th July, 1834, she, in conjunction with her husband, by deed, void as the law then was,

purported to convey the east half of the lot to one Nathaniel Terry in fee simple, the land being then wild and in a state of nature. Terry never took possession of the land nor exercised any acts of ownership over it, but on the 6th February, 1852, he by deed of that date conveyed to one Frederick Albert Howe, through whom by several mesne conveyances the plaintiff claimed title. After the conveyance by Catherine Allard now in question was executed a year or so, she saw her grantee Terry, who intimated that he had been to look at the land and would not live on it, or have anything to do with it; and she and her husband, after going to and on the lot, got a gentleman living in the neighborhood to look after the lot for them, and about sixteen years before the action was brought two sons of Catherine Allard went upon the land, settling upon the west part or half. They went upon it on the understanding with their mother that they were to have the land, dividing it into north and south halves, and each paid to his mother in respect of the price of the land $50, but no deed was executed by their mother to them till 1875, after they had entered upon the land.

In February, 1852, Terry, as above stated, conveyed the east half to Howe, who conveyed to B. F. Davy, under an execution against whose administratrix, with the will annexed, the land was subsequently sold and conveyed by the sheriff of Hastings to John Ham Perry, who in 1871 conveyed to Francis Elliott. Elliott died intestate, leaving two sons, who in turn conveyed to their mother, the plaintiff.

Elliott, having obtained a conveyance of the land, wished to have a line run between the east and west halves, and applied to James Allard, then living in a house built by him on the west half of the lot, to share in the expense of running the line. James Allard at once told him he owned the land and forbid him to go upon the land; nevertheless Elliott had the line run and cut some timber off the lot, for which the Allards brought an action of trespass, the writ having been issued in December, 1872. This suit Elliott settled, and paid the

costs, but this was not done till after the 29th March, 1873, when the Act was passed which the plaintiff claimed made Allard's deed good. For some years previous to 1871 the Allards had cut and sold timber off the east half of the lot, which was very swampy, but had not put any fence around it, and had no actual or visible possession, unless their actual possession and residence on the west half constituted actual possession.

The learned Judge found in favour of the defendants, but stayed the entry of judgment until the following Michaelmas Sittings of the full Court.

In Michaelmas Sittings last, *Wallbridge*, Q. C., obtained an order *nisi* calling upon the defendants to shew cause why the verdict or judgment entered for the defendants should not be set aside and a verdict or judgment entered for the plaintiff, upon the grounds that the plaintiff proved a complete paper title in herself to the lands in the writ mentioned: that the defendants derived title through the same party (Catherine Allard) and did not prove title in themselves, or an actual possession or enjoyment of the said lands in the defendants, or in any one through whom they claimed, at any time before or on the 29th day of March, 1873, nor did in any other manner protect themselves by sec. 14, ch. 127 R. S. O.

*Dickson*, Q. C., shewed cause, and contended that the evidence shewed that on the 29th of March, 1873, Mrs. Allard was, by her sons, in the actual possession and enjoyment; that the east half of the lot was in woods, and the usual and customary acts of ownership over such kind of property were exercised and taxes paid. He referred to the Married Woman's Real Estate Act, 36 Vict. ch. 18, secs. 12 and 13.

*Wallbridge*, Q. C., supported the order. The deed given by Catherine Allard to Terry was cured by R. S. O. ch. 127, sec. 13, though defective in the omission of the certificate as to married women. He referred to *Heyland* v. *Scott*, 18 C. P. 52; *Dundas* v. *Johnston*, 24 U. R. 547; Consol. Stats. U. C. ch. 85, sec. 12.

March 10, 1883. ARMOUR, J.—The principal question argued before us was, whether Mrs. Allard was, on the 29th day of March, 1873, in the actual possession or enjoyment of the land in question in this suit according to the true intent and meaning of R. S. O. ch. 127, sec. 14.

By R. S. O. ch. 127, sec. 13, it is provided that "Every conveyance before the twenty-ninth day of March, 1873, executed by a married woman, of or affecting her real estate, in which her husband was a party, is and shall be taken and adjudged to be valid and effectual to have passed the estate, which such conveyance professed to pass of such married woman in the said real estate, notwithstanding the absence or want of a certificate of her consent to convey the same; and notwithstanding any irregularity, informality, or defect in the certificate (if any), and notwithstanding that such conveyance may not have been executed acknowledged or certified, as required by any Act at or before the said date in force respecting the conveyance of real estate by married women, or may not have been executed by the married woman in presence of her husband, or on the same day on which, or at the same place at which such conveyance was executed by her husband."

And by sec. 16 it is provided that "Nothing in this Act contained shall render valid any conveyance to the prejudice of any title subsequently to the execution of such conveyance, and before the said date, acquired from the married woman by deed duly executed and certified as by law required, unless the actual possession or enjoyment of the real estate conveyed or intended to be conveyed by the prior conveyance has been had at any time subsequent thereto by the grantee therein, or those claiming by, from or under him, and he or they have been in such actual possession or enjoyment continuously for the period of three years before the said date, and he or they were at the said date in the actual possession or enjoyment thereof; and nothing in this Act contained shall render valid any conveyance from the married woman which was not exe-

cuted in good faith, *or any conveyance of and of which the married woman or those claiming under her is or are in the actual possession or enjoyment contrary to the terms of such conveyance.*"

The Acts theretofore passed respecting the conveyance of their real estate by married women were 43 Geo. III. ch. 5; 59 Geo. III. ch. 3; 2 Geo. IV. ch. 14; 1 Will. IV. ch. 2; 2 Vic. ch. 6; 9 Vic. ch. 11; 14 & 15 Vic. ch. 115; 22 Vic. ch. 35; Consol. Stat. U. C. ch. 85; 32 Vic. ch. 9; 34 Vic. ch. 24, and 36 Vic. ch. 18, from which latter the two above quoted sections are incorporated in R. S. O. ch. 127, the second of the two above quoted sections being founded upon 22 Vic. ch. 35, sec. 5.

The Statute 22 Vic. ch. 35, sec. 3, made valid the conveyance by a married woman of her real estate, although a certificate of her consent to be barred of her right of dower therein, instead of a certificate of her consent to convey the same, had been endorsed thereon. And section four provided that whenever the requirements of the Acts of Parliament respecting conveyances by married women had been complied with, their conveyances should be deemed valid, although the certificate endorsed thereon was not in strict conformity with the forms prescribed by the said Acts, or any or either of them. And section five provided that that Act should not render valid any conveyance "to the prejudice of any title subsequently acquired from the married woman by deed duly executed and certified as by law required, nor any conveyance from the married woman which was not executed in good faith, nor any conveyance of land of which the married woman, or those claiming under her, is or are in the actual possession or enjoyment, notwithstanding such conveyance."

The words in R. S. O. ch. 127, sec. 14, "contrary to the terms of such conveyance;" and the words in 22 Vic. ch. 35, sec. 5, "notwithstanding such conveyance," would seem to mean the same thing.

In *Murray* v. *Thorniley*, 2 C. B. 217, the question was whether the appellant was entitled to be registered as a

voter under 2 Will. IV. ch. 45, sec. 26, as a person in actual possession of a rent charge to which he was entitled. Tindal, C. J., said: "It was contended on the part of the appellant that he had the complete right to the rent charge from the time of the execution of the deed by which it was granted; and that he had the actual possession also within the meaning of the statute, because he had all the possession of which the subject matter is capable, before the first day of payment had actually arrived. The question undoubtedly turns upon the meaning of the words 'actual possession,' and we think those words mean a possession in fact, as contra-distinguished from a possession in law; and that, as the possession in fact of a rent charge must be the actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed. * * The actual possession of rent being therefore a well known legal phrase or expression, the Legislature cannot be taken to have used it in any other than such well known sense, that is, as contradistinguished from such possession in law, or right to the rent charge, as the bare delivery of the deed of grant would confer. * * And as it is quite clear that in the case of land there must be more than the execution of the conveyance—that there must be actual possession or recipt of the rents and profits—there seems no reason why in the case of an incorporeal hereditament, to which the provision of the statute equally applies, there should not be such further actual possession as the nature of the subject itself is capable of." *Hayden* v. *Twerton*, 4 C. B. 1, is to the same effect. See also *Heelis* v. *Blain*, 18 C. B. N. S. 90; *Hadfield's Case*, L. R. 8 C. P. 306.

In *Coverdale* v. *Charlton*, L. R. 4 Q. B. D. 104, actual possession is discussed under the following circumstances. By an award, made under an Inclosure Act, passed in 1766, two private roads, E and H, were set out. About 1818 the

road E. became a public highway. Down to 1863 the surveyors of highways for the parish of C., within which E. and H. were situate, had from time to time let the pasturage upon E. and H. to the plaintiff. He thereupon commenced to depasture the herbage with his cattle on the roads. The defendant interfered with the plaintiff's enjoyment of the pasturage. The Court held that the local board having no power to demise H., being a private road, the plaintiff had not sufficient exclusive possession as occupier, to enable him to maintain an action.

Bramwell, L. J., at p. 118, as to the claim founded on possession, said: "I think the plaintiff has not been able to make out his case. It was attempted to be made out in this way. It was said that there was a *de facto* possession. But it is difficult to say that there is a *de facto* possession when there is no possession except of those parts of the lane which are in actual possession, and there is an interference with the enjoyment of the parts which are not in actual possession. My meaning is this. If there were an enclosed field and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an unenclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common. If it would not be a *de facto* possession, it would be a nominal possession. If no right were attached to it, it would not be a constructive possession. That I look upon as being the condition of things, and consequently the plaintiff had not a *de facto* possession beyond the spots where his animals were grazing." In speaking of "enjoyment" as applied to easements, it is said in *Gale* on Easements, 5th ed., p. 207: "In order that the enjoyment, which is the *quasi* possession of an easement, may confer a right to it by length of time, it must have been open, peaceable and 'as of right.' * * The doctrine of the law of England, as cited by Lord Coke from Bracton, exactly agrees with the civil law. The possession must be long, continuous and peaceable. Long, that is,

'during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceful, because, if it be contentious and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be *longus usus nec per vim nec clam, nec precario.*'"

In putting a construction upon the words "actual possession or enjoyment," in the statute under consideration, and in considering whether Mrs. Allard had on the 29th day of March, 1873, "such actual possession or enjoyment," we must consider these words altogether apart from the constructive possession derived from title, and must consider whether she had such actual possession or enjoyment irrespective altogether of her constructive possession. Had she, in short, a *de facto* possession or enjoyment at that date of the land in question? I think that in order to entitle the defendants to succeed Mrs. Allard must have been shewn to have had at that time, at least, that sort of possession or enjoyment of some part of the land in question which would have ripened into a title under the Statute of Limitations, or would have extinguished the title of the true owner; and it is quite clear from the dissenting judgment in *Shepherdson* v. *McCullough*, 46 U. C. R. 573, which was approved of by the Court of Appeal in *Harris* v. *Mudie*, 7 App. R. 414, and from what was held by the Court of Appeal in *Harris* v. *Mudie*, that she had not at that time that sort of possession or enjoyment.

She had sold timber off it some thirteen or fourteen years before the trial. One of her sons had settled on the adjoining half lot in 1866 or 1867, and built upon it. He had in the subsequent winters cut and sold timber off the land in question, and in the winter of 1873 both he and one Elliott, the plaintiff's predecessor in title, were taking timber off it and disputing about the possession of it. No part of the land in question was on the 29th day of March, 1873, cleared, cultivated, or enclosed. The proviso of the statute under consideration was, in my opinion, passed for the protection of those who had settled upon

the lands therein referred to, and had improved them, and not for the protection of those who had not settled upon them, but had merely visited them for the purpose of despoiling them.

I do not think therefore that Mrs. Allard had on the 29th day of March, 1873, the actual possession or enjoyment of the land in question, according to the true intent and meaning of this statute.

The conveyance therefore from her husband and her, of the 4th day of July, 1834, to Nathaniel Terry, must be adjudged to be valid and effectual to have passed her estate in fee to Terry.

The effect of the statute is to make this conveyance valid from its date, and the defence raised under the Statute of Limitations must fail, as Mrs. Allard and those claiming under her have not had that sort of possession which would either ripen into a title or extinguish a title.

In my opinion judgment ought to be for the plaintiff, with costs.

HAGARTY, C. J.—The case seems to turn on whether Mrs. Allard, or those claiming under her, was or were, on the 29th March, 1873, in the actual possession and enjoyment of this land contrary to the terms of her prior conveyance.

Her conveyance in 1834 of the east half to Terry was void up to the passing of the Act of 1873.

This Act makes it a valid conveyance from its execution, unless she or her sons under her was or were in the actual possession or enjoyment on the 29th March, 1873.

I agree that we must read the words "actual possession and enjoyment" as something more tangible and apparent than the possession annexed by operation of law to the legal ownership. She had sold the west half many years ago to Rogers. Both halves continued in a wild state till about 1865-6.

It seems clear that about that time she meant that her sons should enter upon the land. The east half now in

dispute was almost wholly a swamp. The sons settled on the west half, and appear to have intended dividing the 200 acres into a north and a south half. They cut and sold timber off the east half down to 1871, no portion of it being either cleared or fenced.

Then, in 1871, Elliott appears claiming title to the east half under Mrs. Allard's deed of 1834. He enters and proposes to have the line run between the east and west halves. Allard refuses, and Elliott causes it to be run by a surveyor in December of that year, and threatened Allard with prosecution if he cut on the east side of the line. Elliott proceeded to cut the timber, Allard cutting near him. Then Allard takes legal advice, and a writ in trespass was issued 21st December, 1872.

It does not appear when it was served, the declaration not being filed till September, 1873, six months after the statute came into force. Pleas were put in by Elliott denying plaintiff's title, and asserting title in himself.

It is said by Allard that after the writ was served—whenever that was—Elliott told him he found his title was bad, and offered to pay for the trees he had cut, and that he cut no more. And again, a long time after, Elliott told him he had paid the attorney's costs. The suit never came to trial. Elliott died in 1876. Some of his family swore that he drew timber and firewood off the lot, certainly down to 1874, if not to 1875.

I certainly infer from the evidence that when the Act came into effect, 29th March, 1873, the east half was in dispute between Elliott and the Allards; and that as far as any actual possession was concerned, it was neither in one nor the other exclusively, but that each was asserting his right as best he could on wild land, by attempting to take timber from it.

If the Allards were living on this disputed tract, cultivating and farming it in ordinary occupation, I would not consider that any mere challenge of their right by Elliott, or assertion of title in himself, would suffice; or even an entry in the nature of a trespass on an actual and visible

opssession would necessarily prevent the operation of the saving clause in the statute. We might then perhaps properly hold there was an actual possession and enjoyment in defendants. But I doubt our right to hold, under the facts in evidence, that such a state of things existed as the statute seems to contemplate to prevent the design of the Legislature from operating to make valid her conveyance to Terry in 1834.

The learned Judge who tried the case expressed his opinion that had the Allard title rested solely on the Statute of Limitations, he could not have found in its favour, and in that view I concur. It is more than probable that the statute of 1873 was either not known or not understood by the litigant parties when it became law.

On the whole, on the best consideration I can give the case, I am of opinion that the Allards were not on the 29th March, 1873, in that actual possssion and enjoyment, contrary to the terms of the prior conveyance, which I think must have been contemplated and intended by the Legislature.

CAMERON, J.—The decision of the question presented in this case depends upon the proper effect to be given to the following provision in section 14 of ch. 127 R. S. O.—"And nothing in this Act contained shall render valid any conveyance from the married woman which was not executed in good faith, or any conveyance of land of which the married woman, or those claiming under her, is or are in the actual possession or enjoyment, contrary to the terms of such conveyance"—as applied to the facts in evidence.

I am of opinion that the possession of the Allards was an actual and not a constructive possession merely.

When the Allards, sixteen years ago, entered upon the land, Catherine Allard was unquestionably the owner. Her deed to Terry being void she entered as the owner, and her actual possession of the part cleared and cultivated was as much an actual possession of the whole lot

as it was of the west half of the lot; and that it was an actual possession in law of the west half of the lot cannot, I think, be disputed.

In *Hunter* v. *Farr*, 23 U. C. R. 327, Chief Justice Draper thus states the law in relation to such an entry: "If a man has title to a lot of land, though he has never entered into the actual possession of it, the law deems him to be in possession till some one else enters adversely to him, not recognizing his title; and so a *fortiori* if he enters and occupies a part."

This principle, while held inapplicable to the land in dispute between two adversely claimed boundaries, seems to be fully recognized in the somewhat recent case of *Clarke* v. *Elphinstone*, L. R. 6 App. Cas. 164; and I think this general principle must be held to apply in giving a construction to the words "actual possession or enjoyment, contrary to the terms of such conveyance," used in the said 14th section.

If Catherine Allard had, after the erection of the house by her son, gone to live therein and afterwards executed a deed of the whole lot, void as this was, and remained in the same possession, doing no further acts of ownership than the evidence shews were done on the east half in the present case, the statute would not, I think, have validated the deed against such possession. Her deed being void, the constructive possession which the law gave her under the patent from the Crown was never taken away from her, and when her sons entered sixteen years ago her constructive possession became an actual possession contrary to the terms of her deed, as effectual as to the east half as to the west half. The sons of Catherine Allard and the defendants who bought from them would seem to be within the equity of the statute in favour of persons acquiring title from a married woman after the execution of a defective deed by such married woman, if not within the exact language of the statute. If when the sons entered upon the land the mother had duly conveyed to them, it is clear the statute would not have validated the conveyance to Terry

against them, for no one under such conveyance was in the actual possession of the land conveyed for the three years before the 29th of March, 1873.

From 1869 the whole lot appears to have been assessed to James C. Allard, and was so continuously assessed down to 1876, thus shewing, in addition to his acts of ownership in cutting timber on the east half of the lot, he was claiming dominion and control over the whole lot, and held himself liable for the taxes of the whole. I do not know how, without putting a fence round the lot, he was to manifest more clearly and decidedly his claim of ownership or possession of the whole lot. This is not the question of possession by a squatter of land against the true owner, but of the owner against a void title, vitalized, so to speak, by an Act of the Legislature, unless it comes within the terms which by the statute itself prevent its being brought into life.

The decisions therefore upon the statutes of limitation furnish little help in putting the proper construction upon the words "actual possession or enjoyment," as used in the 14th section of the Act.

It think it may well be conceded that these words mean more than a mere constructive possession, such as a person has by the Crown patent, or conveyance from the owner in fee, without going upon the land at all; but that does not help to determine what actual possession or enjoyment of wild land is, nor whether an actual possession by visible occupation of one acre of a hundred or two hundred acre lot is possession of the whole.

I presume it cannot be doubted that Catherine Allard on the 1st day of December, 1872, assuming that her sons were then on the west half as her servants, could have by such possession maintained an action of trespass against any one who committed a trespass on the east half, and the sons, when they entered in their own right by their arrangement with their mother on the north and south halves of the whole lot, could equally have maintained trespass against a trespasser on their respective portions of the east half;

and it would be by reason of their actual, and not their constructive possession, actual possession of one acre of a lot drawing to it the actual possession of the whole lot; and to so hold is not in conflict with the authorities which my brother Armour has summarized in support of the contrary view.

I am of opinion, therefore, the finding of the learned County Court Judge in favour of the defendants was right, and the plaintiff's motion to set aside the same should be dismissed. The title Mrs. Davy took under her husband's will, if any, does not appear, and it by no means follows that the effect of the statute being to validate the deed made by Mrs. Allard from its date, makes the sale by the sheriff of B. F. Davy's interest in the land valid, when at the time of sale he had no interest in the land. If he had conveyed by deed he might and no doubt would be estopped from setting up his want of title at the time of conveyance, but the doctrine of estoppel will not apply to prevent his heirs questioning the want of any interest in B. F. Davy to pass by the sheriff's deed at the time it was made.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## McKenzie v. Dwight.

*North-West Mounted Police warrant—Assignment of—Action for misrepresentation as to right of holder.*

The defendant was assignee of a land warrant issued to a constable of the North-West Mounted Police Force, for service in that body, which entitled him upon its face to locate 160 acres upon any of the Dominion lands, subject to sale at $1.00 per acre. The defendant induced the plaintiff to purchase the warrant by representing to him that he would be entitled to obtain from the Government 160 acres of land. There were lands subject to sale at $1.00 per acre when the warrant was issued and thereafter. By various statutes and Orders in Council the Dominion lands were made subject to sale at higher prices than $1.00 per acre, but these land warrants were to be accepted by the Government in part payment of $1.00 per acre. The plaintiff was refused lands at $1.00 per acre by the Crown, and then brought this action to rescind the sale to him on the ground of the misrepresentation. The jury found that defendant represented to plaintiff, to induce him to purchase, that the warrant would entitle him to 160 acres of land; that the plaintiff purchased on the faith of this; that the representation was false; and that defendant made it without knowing whether it was true or false, intending it to be relied upon.

*Held*, Armour, J., dissenting, that the plaintiff must fail; for the construction of the warrant clearly expressed that the holder was entitled to 160 acres of land at $1.00 per acre, and not simply to a credit of $160 on a purchase, and the representation was such as defendant might properly make.

*Per* Armour, J.—The representation that the warrant would entitle the plaintiff to 160 acres of land comprehended the affirmation of fact by the defendant that there were then Dominion lands subject to sale at $1.00 per acre, and this not being so the plaintiff should succeed.

Statement of claim.

1. The plaintiff is a clerk in the office of the Credit Valley Railway Company, in the city of Toronto.

2. The defendant is a clerk in the office of the Great North Western Telegraph Company, in the city of Toronto.

3. On or about the 8th day of March, 1882, the defendant, who was then an intimate friend of the plaintiff, and who, although he has not yet attained the full age of twenty-one years, is and has for some time past been a sharp shrewd man of business, proposed to the plaintiff to sell to the plaintiff a certain certificate, dated the 2nd day of August, 1880, purporting to be signed by J. S. Dennis, the Deputy of the Minister of the Interior for the Dominon of Canada, and by A. Russell for the Surveyor-

General of Dominion lands, being numbered 0297, and certifying amongst other things that constable Philess B. Brunette, a member of the North-West Mounted Police force, was entitled to locate 160 acres of land, being one-quarter section of land, upon any of the Dominion lands, subject to sale at one dollar per acre, and which certificate was spoken of by all the parties concerned in the transaction hereinafter set out, and is properly known as a "Mounted Police Warrant," and to which certificate or warrant the plaintiff craves leave to refer when the same is produced to this Honourable Court.

4. Previous to the said day the plaintiff had had no experience whatever in any business relating to such certificates, but the defendant had had very considerable experience in such matters, having been extensively engaged in speculating in such warrants for some time previously thereto.

5. The defendant offered to sell the said certificate to the plaintiff for $312, and stated to him, in answer to questions in that behalf, that the said certificate would entitle him, the plaintiff, if he purchased the same, to 160 acres of land in the Province of Manitoba, or the North West Territories of Canada, free from settlement duties, and exempt from taxation for five years from the date of location, and that the plaintiff could locate the same at any time.

6. The defendant frequently on the said occasion assured the plaintiff in the most positive terms that he was quite familiar with such certificate, and knew of his own knowledge from past experience that the plaintiff would be enabled with the said certificate to procure from the Government of Canada 160 acres of land as aforesaid.

7. The plaintiff was at that time desirous of becoming the owner of land in the Province of Manitoba, or the North-West Territories of Canada, but never had any intention of becoming a speculator in the purchase of said certificate, and with the intention solely of obtaining 160 acres of land by means of the same, he purchased the said

certificate from the defendant, and paid him therefor the sum of $312.

8. In making the said purchase the plaintiff relied solely upon the representation of the defendant, in whose statements he then had the utmost confidence, and if he had not believed that the possession of the said scrip would have entitled him to 160 acres of land he would not have purchased or paid for the same, as the defendant well knew when he offered the same to the plaintiff, and when he made the said representations.

9. Shortly after the said money had been paid the plaintiff made application to the proper authorities in that behalf to have himself located for 160 acres of land, when he was informed, and as the fact is, as the defendant knew when he made the said representations, that the said certificate did not entitle the plaintiff to 160 acres of land, but only certified him to be credited in the books of the Dominion Lands office with the sum of $160, on account of any purchase which he the plaintiff might make of lands belonging to the Dominion of Canada, and which the plaintiff might desire to locate.

10. So soon as the plaintiff learned that he could not get 160 acres of land for the said certificate, and that the defendant's representations were untrue, and that he had been defrauded by the defendant, he tendered back the said certificate to the defendant and demanded from him a return of the said sum of $312, but the defendant refused and still refuses to accept the said certificate and pay said money to the plaintiff.

11. The plaintiff still holds the said certificate, and hereby offers to hand the same over to the defendant just as it was received from him, upon payment of the said sum of money and interest from the time the same was paid to the defendant.

12. The defendant made the said representations to the plaintiff knowing the same to be false, with the intention of defrauding the plaintiff out of the payment made as aforesaid, and the plaintiff charges that he is therefore entitled to recover the said payment from the defendant.

13. The plaintiff shews that the defendant never had any right or title to the said certificate, and did not regularly and properly transfer the same to the plaintiff, and on this ground alone the plaintiff is entitled to a return of the said purchase money.

14. The plaintiff claims payment from the defendant of the said sum of $312, and interest thereon from the 8th day of March last, and his costs of this action.

Statement of defence.

1. The defendant admits that in or about the month of March last he did sell to the plaintiff for the sum of $312 a certificate known as a Mounted Police Warrant, and delivered the same to the plaintiff, and to which warrant the plaintiff also craves leave to refer when the same is produced to this Honourable Court, but whether the warrant so sold to the plaintiff be the warrant referred to in the plaintiff's statement of claim the defendant cannot say, but leaves the plaintiff to make proof thereof.

2. The defendant denies the allegations contained in the sixth and twelfth paragraphs of the plaintiff's statement of claim, and says that he was not familiar with such certificates, and did not know of his own knowledge that the plaintiff would be thereby enabled to procure 160 acres of land from the Government of Canada, nor did he on any occasion assure the plaintiff that he would be enabled thereby to procure from the Government 160 acres of land.

3. Previous to the purchasing of the said certificate by the plaintiff from the defendant, the defendant produced it to the plaintiff, and plaintiff read and examined the same for himself, and then requested the defendant to hold the offer to sell said certificate for the price of $312 open until he, the plaintiff, should make further enquiries and investigations as to the same, which request the defendant complied with, and the plaintiff, after seeing and examining said certificate, and making further and other enquiries about the same, returned to the defendant and purchased and received the same from the defendant at the price aforesaid.

4. The defendant during the negotiation told the plaintiff that he had been informed that the said certificate was good for 160 acres of land, but that the plaintiff would have to ascertain for himself as to the correctness of such information, and the defendant produced the said certificate to the plaintiff to enable him to ascertain for himself, and the plaintiff made the purchase in reliance upon his own judgment and the result of his own enquiries and investigations, and not upon any statement or representations whatever of the defendant.

5. At the time the said certificate was produced and shewn to the plaintiff, and when the same was sold and delivered to the plaintiff, the defendant had a good right to sell the same, and an assignment thereof was endorsed on the back thereof, and signed by the former owner, with a blank left for the purpose of inserting the name of the assignee to be filled in, and the plaintiff was then aware of the nature and form of the transfer thereof that was intended to be and which was made to him, and was satisfied therewith, and accepted the delivery of said certificate with said endorsement thereon in form aforesaid, as a good and sufficient transfer to him the plaintiff, and the defendant believes and charges the fact to be that the plaintiff afterwards filled in his own name in the said assignment as the assignee thereof.

6. If the plaintiff requires the defendant to execute any further or other assignment or transfer to him, the plaintiff, the defendant is ready and willing, and hereby offers to execute the same, but at the plaintiff's cost and expense.

The trial took place at the last Fall Assizes at Toronto, before Cameron, J., and a jury.

The facts fully appear in the judgment.

The jury found that defendant represented to plaintiff, to induce him to purchase the scrip, that it would entitle plaintiff to 160 acres of land: that the plaintiff purchased the scrip on the faith of this: that the representation was false; and that defendant made it, without knowing it to be true or false, with the intention of its being relied on

A verdict was entered for the plaintiff for $322.27.

February 20, 1883. *Bethune*, Q. C., obtained an order *nisi* to set aside the verdict and enter a nonsuit or verdict for the defendant, or for a new trial on the law and evidence, and weight of evidence, and on the ground that the judgment as entered on the findings of the jury was contrary to law applicable to the facts found by the Jury; and that if any misrepresentation was made by defendant, it was one of law and not of fact, having reference to the legal effect of a document of which the plaintiff had the same means of judging as defendant; and that there was no representation by defendant that the Government had, when the warrant was sold to plaintiff, any lands for location by the holder of said warrant at one dollar per acre.

November 29, 1882. *McMichael*, Q. C., supported the order *nisi*. The representation was that it was good for 160 acres, whenever the Government put out lands at one dollar per acre. There was no misrepresentation.

*McCarthy*, Q. C., contra. Defendant thought the holder could at once get the 160 acres somewhere in the North-West. Therefore he sold on this belief, and plaintiff bought on the same belief. It is then a case for rescission: *Pollock* on Contracts, 1st ed., 413. No title was ever transferred to this warrant; it was treated as if a negotiable instrument. See *Redgrave* v. *Hurd*, L. R. 20 Ch. D. 1; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259. No doubt there was a misrepresentation made to plaintiff, and therefore he is entitled to a rescission. See *Southall* v. *Rigg*, 11 C. B. 481.

*McMichael*, Q. C., was heard in reply.

March 10, 1883. ARMOUR, J.—By 36 Vic. (1873) ch. 35, sec. 17, D., it is provided that "the Governor-in-Council, may, from and out of any of the lands of the Dominion in the Province of Manitoba or in the North-West Territories, make a free grant, not exceeding 160 acres, to any constable or sub-constable of the said force, who at the expiration of three years of continuous service in

the said force shall be certified by the commissioner of police to have conducted himself satisfactorily, and to have sufficiently and ably performed the duties of his office during the said term of three years."

And by sec. 32 it is provided that "all regulations or orders in council made under this Act shall be published in the *Canada Gazette*, and shall thereupon have the force of law from the date of their publication, or from such later date as may be therein appointed for their coming into force; and a copy of any such regulations purporting to be printed by the Queen's printer shall be *primâ facie* evidence thereof." And by sec. 33 it is provided that "the department of Justice shall have the control and management of the police force and of all matters connected therewith, but the Governor-in-Council may at any time order that he same shall be transferred to any other department of the civil service of Canada, and the same shall accordingly by such order be so transferred to, and be under the control and management of, such other department."

The Act 36 Vic. (1873) ch. 35, was afterwards amended by 37 Vic. (1874), ch. 22, by 38 Vic. (1875), ch. 50, and by 39 Vic. (1876), ch. 21.

By 42 Vic. (1879), ch. 36, sec. 1, the several Acts, 36 Vic. ch. 35, 37 Vic. ch. 22, and 38 Vic. ch. 50, are wholly, and 39 Vic. ch. 21, is in part repealed, and it is thereby provided, "that all appointments made and all things lawfully done under the enactments hereby repealed shall remain valid unless and until it shall be otherwise ordered under this Act, and all proceedings commenced under the same may be continned under this Act, which shall not be construed as a new law, but as a consolidation and continuation of the said repealed enactments, with and subject to the amendments hereby made." And by sec. 10, it is provided that "the Governor in Council may, from and out of any of the lands of the Dominion in the Province of Manitoba, or in the North-West Territories, make a free grant, not exceeding 160 acres, to any member of the said force who may enter the force before the first day of July next, after the pass-

ing of this Act, and who at the expiration of five years of continuous service in the said force, shall be certified by the commissioner to have conducted himself satisfactorily, and to have efficiently and ably performed the duties of his office during the said term of five years." And by sec. 28 it is provided that "all regulations or orders in council made under this Act shall be published in the *Canada Gazette*, and shall thereupon have the force of law from the date of their publication, or from such later date as may be therein appointed for their coming into force, and a copy of any such regulations purporting to be printed by the Queen's printer shall be *primâ facie* evidence thereof." And by sec. 29 it is provided that "the Department of the Interior shall have the control and management of the police force, and of all matters connected therewith; but the Governor-in-Council may at any time order that the same shall be transferred to any other department of the civil service of Canada, and the same shall accordingly by such order be so transferred to, and be under the control and management of, such other department."

This Act, 42 Vic. ch. 36, was amended by 45 Vic. ch. 29, but not so as to affect the above quoted provisions.

The following is a report of a committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in Council on the 27th November, 1876.

"On a memorandum, dated 11th November, 1876, from the Honourable the Secretary of State, bringing under the consideration of council the subject of free grants of land to constables and sub-constables of the North-West Mounted Police Force, under 36 Vic. ch. 35, sec. 17, and recommending that he may be authorized to issue warrants for a free grant of land from and out of any of the lands of the Dominion open to general settlement in the Province of Manitoba, or in the North-West Territories, not exceeding 160 acres, to any constable or sub-constable of the said Force who at the expiration of three years of continuous service in the said Force shall be certified by the Commis-

sioner of Police to have conducted himself satisfactorily, and to have efficiently and ably performed the duties of his office during the said term of three years, the assigning and regulating of such warrants to be regulated in all respects by the provisions of sections 23 to 26, both inclusive, of the Dominion Lands Act, 35 Vic. ch. 23, the committee submit the above recommendation for your Excellency's approval."

The following is a report of the committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in Council, on the 16th May, 1879:

"On a report, dated the 5th May, 1879, from the Honourable the Minister of the Interior, stating that by order in council of the 27th of November, 1876, the Honourable the Secretary of State for Canada was authorized to issue warrants for free grants of land from and out of any lands of the Dominion open to general settlement in the Province of Manitoba, or in the North West Territories, not exceeding 160 acres, to any constable or sub-constable of the said force, who at the expiration of three years of continuous service in the said force shall be certified by the commissioner of police to have conducted himself satisfactorily, and to have efficiently and ably performed the duties of his office during the said term of three years, the assigning or locating of such warrants to be regulated in all respects by the provisions of sections 23 to 26, both inclusive, of the Dominion Lands Act, 35 Vic. ch. 23: that the control and management of the north west mounted police having been by order in council of the 14th of November, 1878, transferred to the Department of the Interior, the minister recommends that he be authorized in future to sign land warrants for service in the north-west mounted police—the committee advise that authority be granted as recommended."

The land warrant in question in this suit was as follows:

"No. 0297." "Dominion of Canada." "0297."
"Department of the Interior."

It is herby certified that under the orders in Council of 27th November, 1876, and 16th May, 1879, authorizing free grants of lands to certain constables and sub-constables for service in the North-West Mounted Police Force, constable Philess B. Brunette is entitled to locate 160 acres, being one certain quarter section upon any of the Dominion Lands subject to sale at one dollar per acre.

Given under my hand and seal of office this second day of August, 1880.

Recorded in the Dominion Lands Office.

(Signed,) J. S. DENNIS, [L.S.]
*Deputy Minister of the Interior.*

(Signed,) A. RUSSELL, for the Surveyor-General.

NOTE.—This certificate may be located at any of the offices of Dominion lands by the owner, or by returning it with his request to that effect endorsed thereon, specifying the province and land district in which he wishes the location made, it will be located for him. Should he locate it himself he must fill up and sign the following application:

To the agent of Dominion Lands at ..... } 18 } Locate this Certificate in the ..... quarter of section ..... Township ..... Range. ..... Meridian.

Attested.

*Agent Dominion Lands.*"

The assigning and locating of this land warrant is, as has been seen by the order in council of the 27th of November, 1876, to be regulated by the provisions of sections 23 to 26 of the Dominion Lands Act, 35 Vic. ch. 23. These provisions were amended by 37 Vic. (1874) ch. 19, sec. 5, by adding a sub-sec. at the end of section 25, and were further amended by 39 Vic. (1876) ch. 19, sec. 3, by adding a proviso to sub-sec. 1 of section 23.

By 42 Vic. (1879) ch. 31, sec. 129, the Acts 35 Vic. ch 23, 37 Vic. ch. 19, and 39 Vic. ch. 19, are repealed, subject to this proviso: "that all enactments repealed by any of the

said Acts shall remain repealed, and that all things lawfully done, and all rights acquired or liabilities incurred under them, or any of them, shall remain valid and may be enforced, and all proceedings and things lawfully commenced under them, or any of them, may be continued and completed under this Act, which shall not be construed as a new law, but as a consolidation and continuation of the said repealed Acts, subject to the amendments hereby made and incorporated with them; and anything heretofore done under any provision in any of the said repealed Acts which is repeated without alteration in this Act, may be alleged or referred to as having been done under the Act in which such provision was made, or under this Act."

The Act 42 Vic. ch. 31, is amended by 43 Vic. (1880) ch. 26, and by 44 Vic. (1881) ch. 16.

Sections 24 to 29, both inclusive, of 42 Vic. ch. 31, comprise sections 23 to 26, both inclusive, of 35 Vic. ch. 23, as amended by 37 Vic. ch. 19, sec. 5, and by 39 Vic. ch. 19, sec. 3.

By 35 Vic. ch. 23, sec. 29, "Unappropriated Dominion lands, the surveys of which may have been duly made and confirmed, shall, except as otherwise hereinafter provided, be open for purchase at the rate of $1 per acre."

By 42 Vic. ch. 31, sec. 30, "Unappropriated Dominion lands, the surveys of which may have been duly made and confirmed, shall, except as otherwise hereinafter provided, be open for purchase at the rate of $1 per acre," and by 44 Vic. ch. 16, sec. 4, the following was substituted for 42 Vic. ch. 31, sec. 30, "Unappropriated Dominion lands, the surveys of which may have been duly made and confirmed, shall, except as otherwise hereinafter provided, be open for purchase at such prices, and on such terms and conditions regarding settlement or otherwise, as may be fixed from time to time by the Governor in Council, provided that no such purchase shall be permitted at a less price than $1 per acre."

By 42 Vic., ch. 31, sec. 125, the following powers are delegated to the Governor-in-Council: (*b*) "To reserve from

general sale and settlement Dominion lands to such extent as may be required to aid in the construction of railways in Manitoba or in the territories owned by the Dominion, and to provide for the disposal of such lands, notwithstanding anything contained in the said Act, in such manner and on such terms as may be deemed expedient." (*g*) "To make such orders as may be deemed necessary from time to time to carry out the provisions of the said Act," &c.

By section 7 of the regulations respecting the disposal of certain Dominion lands for the purpose of the Canadian Pacific Railway, dated July 9th, 1879, the price of both pre-emption and railway lands in belt E. is fixed at the uniform rate of $1 (one dollar) per acre.

By section 6 of the regulations respecting the disposal of certain public lands for the purposes of the Canadian Pacific Railway, dated October 14th, 1879, which superseded the regulations of July 9th, 1879, the price of railway lands in belt E. is fixed at $1 (one dollar) per acre, and by section 7, "All payments for railway lands and also for preemption lands within the several belts shall be in cash, and not in scrip, or military, or police bounty warrants."

By Order in Council of the 19th June, 1880, the 7th section of the Order in Council of 14th October, 1879, was repealed, "and the scrip now outstanding, as also that which may yet require to be issued to satisfy claims so far authorized, is to be accepted at its par value in the purchase of railway and preemption lands, as well as in the purchase of Dominion lands under the provisions of the law." The scrip in question consists of (2) "Police Bounty Warrants."

On the 25th day of May, 1881, the regulations of the 14th October, 1879, were rescinded, and other regulations substituted for them, by section 7 of which "the lands described as public lands shall be sold at the uniform price of $2 per acre;" and by section 22: "Payments for public lands, and also for preemption, may be in cash, or in scrip, or in police, or military bounty warrants."

On the 1st day of January, 1882, new regulations were substituted for the regulations of the 25th May, 1881, fixing the minimum price for Dominion lands in Manitoba and the North-West Territories at $2 per acre, and providing that payments for land may be in cash, scrip, or police or military bounty warrants.

It will thus be seen that at the date of the land warrant in question, August 2nd, 1880, there were Dominion lands in Manitoba and the North-West Territories "subject to sale at $1 per acre," but that at the time of the sale of this land warrant by the defendant to the plaintiff there were no such lands. This fact was also proved on the trial of this cause by a gentleman from the office of the Department of the Interior called as a witness for that purpose.

It was also proved that the Government had in May, 1882, declined to permit the plaintiff to locate 160 acres of land under the land warrant in question, because they held no lands in Manitoba or the North-West Territories open for sale at $1 per acre, but would accept it in payment of $160 only on account of the purchase money of such land as he might locate.

It was found by the jury that the defendant represented to the plaintiff, in order to induce him to purchase this land warrant, that it would entitle the plaintiff to 160 acres of land: that the plaintiff purchased this land warrant on the faith of such representation: that such representation was false, and that the defendant when he made such representation made it without knowing that it was true or false, with the intention that it should be relied upon.

The question to be determined does not appear to me to be whether Philess B. Brunette, assuming that he was a person to whom the provisions of the Act 36 Vic. ch. 35, sec. 17, and of the orders in Council of 27th November, 1876, and 16th May, 1879, would apply, is entitled under these provisions to 160 acres of land in Manitoba or in the North-West Territories, but whether the assignee of Philess

B. Brunette of the land warrant in question which was issued to him is entitled under and by virtue of it to 160 acres of land in Manitoba, or in the North-West Territories.

It may be, and perhaps would be, that if Philess B. Brunette, not having this land warrant issued to him, or not having accepted it, were prosecuting a petition of right against the Crown to obtain 160 acres of land under the provisions of the said section of the said Act and of the Orders in Council, he would be entitled to obtain them, but that in my view is not the question here.

The land warrant in question was however issued to Philess B. Brunette, and was accepted by him, and he has assigned, and his assignee has taken under such assignment, only the "right, title, property, claim, and demand" of Philess B. Brunette to the said land warrant. The assignee can therefore obtain from the Crown only what the Crown is bound to give under and by virtue of the land warrant itself.

This land warrant entitled Philess B. Brunette "to locate 160 acres, being one certain quarter section upon any Dominion lands subject to sale at one dollar per acre;" that is to say, 160 acres of land worth one dollar per acre, or in other words, $160 worth of land. This is the construction put upon it by the Crown, and having regard to all the surrounding circumstances is probably the true construction.

By its very words, however, it entitled him to locate 160 acres only upon any Dominion lands subject to sale at one dollar per acre, and although at the date of it there were Dominion lands answering that description, yet at the time of the sale of it by the defendant to the plaintiff there were no such lands.

The representation, found by the jury to have been made by the defendant to the plaintiff, that it would entitle the plaintiff to 160 acres of land, comprehended within its terms the affirmation of fact by the defendant that there were then Dominion lands subject to sale at one dollar per acre.

The jury having found that this representation was false, and that it was made by the defendant in order to induce the plaintiff to buy the land warrant, and that the plaintiff purchased the land warrant on the faith of such representation, and that the defendant made this representation without knowing that it was true or false, with the intention that it should be relied upon, the plaintiff is entitled to have his purchase rescinded, and to be paid back his purchase money.

Lord Cairns, in *Reesse River Silver Mining Co.* v. *Smith*, L. R. 4 H. L., at p. 79, states the rule to be, "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." And in the latest exposition of the law upon this subject that I have seen, the judgment of the Court of Appeal in *Redgrave* v. *Hurd*, L. R. 20 Ch. D. 1, the Master of the Rolls says, at p. 12: "As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law, a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. * * There is another proposition of law of very great importance, which I think it is necessary for me to state, because, with great deference to the very learned Judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a set-

tled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations. * * Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts. Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease; as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, 'You were not entitled to give credit to my statement.' It is not sufficient therefore to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity. * *

In no way, as it appears to me, does the decision, or any of the grounds of decision, in *Attwood* v. *Small*, support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud, that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud."

In my opinion the decree made in this cause is right, and the motion should be dismissed, with costs.

HAGARTY, C. J.—In the Act of 1872, 35 Vic. ch. 23, sec. 23 declares that "in all cases in which land has heretofore been or shall hereafter be given by the Dominion for military services, warrants shall be granted in favour of the parties entitled to such land, * * and such warrants shall be recorded," &c.; and sub-sec. 1: "Such warrants may be located by the owners thereof in any of the Dominion lands open for sale, or may be received in payment for a homestead claim for the same number of acres, or in payment in part or in full, as the case may be, for the purchase at public or private sale of Dominion lands, at the value shewn upon their face, estimating the number of acres in the warrant at the price mentioned therein."

Sub-sec. 2: "In accepting warrants as so much purchase money any deficiency shall be payable in cash. But should any payment by warrant or by amount in warrants be in excess, the Government will not return any such excess."

Sub-sec. 3: "In locating a warrant, should the same be for any aliquot part of a section, it must be located in a legal sub-division of corresponding extent; for instance, a warrant calling for 160 acres must be located in a certain quarter section intact."

Secs. 24, 25, and 26 provide for transfer, loss of warrant, and death before location, &c.

Sec. 29 provides that unappropriated Dominion lands should (with exceptions) be open for purchase at $1 per acre.

The Dominion Lands Act, passed 15th May, 1879, 42 Vic. ch. 31, repeals the Act of 1872, re-enacting in secs. 24, 25, 26, 27, the provisions of secs. 23 to 26, inclusive, of the repealed Act; and sec. 30 re-enacts sec. 29 of the repealed Act as to the unappropriated lands being (with exceptions) open for purchase at $1 per acre.

36 Vic. ch. 35, regarding the North-West Police Force (1873), sec. 17, declares that the Governor-in-Council may make a free grant of land, not exceeding 160 acres, to any constable, &c., after three years' service, &c., out of any of the Manitoba or North-West lands.

The Act of 1879 for the North-West Mounted Police, 42 Vic. ch. 36, sec. 10, also enables the Governor to make a free grant, not over 160 acres, out of Manitoba or North-West lands to any member of the force entering it before 1st July, 1879, after five years' service.

44 Vict. ch. 16, in amendment of the Act of 1879, sec. 4, amending sec. 30 of the Act of 1879, says that unappropriated lands surveyed shall be open for purchase, &c., &c., provided no such purchase shall be permitted at a less price than $1 per acre.

Even without the light thrown on it by the statutes and orders in council, &c., it appears to me very plain that this certificate or land warrant entitles the holder to 160 acres of land, and not merely to a right to a credit of $160 in money on any purchase of Dominion lands.

I can hardly see how any person taking or holding it could regard it otherwise than as a right to locate 160 acres.

At the date at which it was granted the Government held abundance of land at the declared price of $1 per acre, and the Act cited, of 1881, a year after the certificate, speaks of land open for purchase at $1 per acre.

At the date of the certificate the statute law plainly provided for members of this police force, on certain conditions of service, obtaining grants of 160 acres of land.

I am unable to understand on what principle the Government refuse to allow force to be given to such a certificate or warrant. It entitles the grantee to locate 160 acres upon any of the Dominion lands subject to sale at $1 per acre, and the directions at the foot shew how the applicant is to locate on a named quarter section.

We may not understand the precise existing regulations of the department at the date of the letter from the surveyors' department to the plaintiff in May (*a*), but we cannot

(*a*) This letter stated that the Government held no lands in Manitoba or the North-West Territory open for sale at $1 per acre, and that the plaintiff could not therefore secure, under his warrant, land to the extent of a full quarter section; but that a land warrant would be accepted in the purchase of land (any vacant odd-numbered section north of the Pacific Railway Belt) up to its full value, $160.

see how the right to 160 acres of land at $1 per acre can be wholly refused.

If this be the ultimate decision of the Government, it seems totally to alter the effect of this land warrant, and turns it into a mere representative of $160 in money.

We must not suppose that any wrong to the holder of these warrants either can be intended or permitted.

If these documents do only represent a money value to $160, it is to be feared that much injustice may be caused, as we do not think that persons dealing with such securities could look upon them in the light or to the effect stated in the letter from the department. In this view we cannot see how any of the findings of the jury can support a verdict for the plaintiff.

When defendant represented to the plaintiff that this document would entitle him to 160 acres of land, we think the representation was proper, and such as he might properly make.

The finding that the defendant made the statement without knowing whether it was true or false, and with the intention it should be relied on, seems to be immaterial.

The action is based upon the alleged false and fraudulent statement by defendant that the certificate entitled the holder to 160 acres of land, and that defendant then knew that it would not so entitle the holder, but only to a credit of $160 on account of any purchase of land.

The rule will be absolute to enter a verdict for defendant, with costs; but judgment not to be entered unless within one month the defendant has supplied the defect in the title to the warrant, to be approved of by the Master of this Court.

CAMERON, J., concurred with HAGARTY, C. J.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## HATELY V. MERCHANTS DESPATCH COMPANY ET AL.

*Carrier—Damage to goods carried—Right of action by consignor—Nonsuit—New trial—Joinder of consignee as co-plaintiff—Constitutional question—Notice to Attorney-General—46 Vic. ch. 6, O.*

The plaintiff consigned goods to parties in England, and shipped them by the defendant companies on bills of lading, describing them as shipped by the plaintiff to be delivered to —— order or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading to various parties in England to whom he had sold the goods. The consignees paid the drafts drawn upon them for the price, and the goods having been seriously damaged in transit they made claim upon the plaintiff for the loss. The plaintiff now sued for the damage and was nonsuited, on the ground that he had not sufficient interest, or was not the proper person to sue.

The Court, without deciding as to the plaintiff having no right of action, or the effect of R. S. O. ch. 116, sec. 5, set aside the nonsuit, and directed a new trial, with leave to the plaintiffs to add as co-plaintiffs any or all of the consignees or endorsees of the bills of lading, the evidence already given to stand with any additions the parties might desire, reserving all costs.

The validity of R. S. O. ch. 116, sec. 5, was disputed on the ground that it was *ultra vires* as interfering with Trade and Commerce, but the Court refused to decide the point without notice to the Attorney-General and Minister of Justice under 46 Vic. ch. 6, sec. 6, O., which would involve great delay, and adopted the above course as being the speediest and least expensive.

THE plaintiff sued the defendants, the Merchant's Despatch Co., the Great Western Railway Co., and the Great Western Steamship Co., for damages to a large quantity of butter shipped by him through them to parties in England, under bills of lading describing the butter as shipped by plaintiff from London, Ontario, to Bristol and Cardiff, England, "to be delivered unto ——— order or to his assigns, he or they paying freight."

The case was brought down to trial at the last Fall Assizes, at Brantford, before Burton, J. A.

It appeared that the plaintiff sold the butter to different parties, through his agents in England, and indorsed the bills of lading. The butter was seriously damaged in course of transit, but the persons to whom it was sold paid the drafts for the price and made claim against the plaintiff for the amount of loss sustained.

The plaintiff was nonsuited at the trial on the ground that he had not sufficient interest, or was not the proper party to sue.

February 14, 1883, *Moss*, Q. C., and *Lees*, moved, on notice, to set aside the nonsuit and enter a verdict for the plaintiff, or to proceed with the trial.

*Moss*, Q.C., and *Lees*, (Brantford,) for the plaintiff. There was a special contract with the carriers made by the plaintiff which enables him to maintain an action against them for the loss of or damage to the goods: *Dunlop* v. *Lambert*, 6 Cl. & F. 600; *Hutchinson* on Carriers, sec. 723 *et seq.* The letters and telegrams to and from Barr and the plaintiff make a complete contract, and the bills of lading need only be considered as the means adopted as between the defendants themselves of carrying out the contract with the plaintiff. Besides, the plaintiff retained a control over the goods. The bills of lading were attached to the drafts which the plaintiff drew through the Bank of Montreal, and were to be retained by the bank until the payment of the drafts. The bills of lading bound the defendants to deliver to the plaintiff's order, and they were not endorsed to any purchaser. The plaintiff established a case of loss and damage entitling him to judgment, and the only question left was for the defendants to determine as between themselves which of them should bear the judgment. The defendants, not having given any evidence, and having elected to have the case decided upon the evidence adduced on behalf of the plaintiff, should be held bound by their election, and judgment should now be entered for the plaintiff, and defendants should not be granted the indulgence of a new trial: *Macdonald* v. *Worthington*, in Appeal, 7 A. R. 531. The R. S. O. ch. 116, sec. 5, does not apply. This is a foreign bill of lading. The Legislature of Ontario has no power to legislate in regard to it. Moreover, the Act only applies where the endorsement of the bill of lading operates to pass the property, which is not the case here. At any rate the plaintiff ought to have been allowed to add the

consignees as parties plaintiff. This is a case for the operation of marginal rules 89, 90, and 103 of the O. J. A. See *Abbott* on Shipping, 12th ed., 272 (*n*). The plaintiff has now the consent of these parties, and is willing to have them now added as co-plaintiffs.

*W. G. P. Cassels*, for the Great Western Railway Co. The ruling of the Judge was right. The evidence shewed that as to one of the consignees the plaintiff was merely a commission agent. The consignees could not be joined in one action. Their interests were dissimilar and adverse, and the same rule is applicable as in the case of suits to recover insurance effected for the members of a family. It is clear from the evidence that the plaintiff had no further interest. He had endorsed the bills of lading, had been paid in full, and by his letters repudiates liability to the consignees. The Revised Statute allows an assignment of the bills of lading and passes the right of action of the consignees. If any cause of action exists it is by the consignees. In any event the Great Western Railway Company is not liable. The statement of claim is indefinite. It does not shew liability on the part of any defendant. The evidence shows the loss arose from heating, but it is clear the butter was on ice during the time it was in the custody of the railway. The contract was made with the Merchants' Despatch Company: *Collins* v. *Bristol & Exeter R. W. Co.*, 7 H. L. Cas. 194; and it is a through contract. The condition protects, and the Great Western Railway Company is not governed by the Railway Act of 1879. In any event the statute would not apply beyond the jurisdiction.

*B. B. Osler*, Q. C., and *T. S. Plumb*, for the Great Western Steamship Company. The plaintiff has shewn no property in the goods after shipment to entitle him to sue. Delivery to the carrier is delivery to the consignee in the absence of a special contract between the consignor and the carrier. The evidence here shews that the plaintiff bought as agent upon a standing order from the consignees, and shipped for their account and at their risk, and that he drew for and has been paid the full price of the goods. It is essential to

ascertain the right party to sue, for if the wrong party recover the carrier can be sued again: *Browne* on Carriers, pp. 476-8; *Angell* on Carriers, sec. 491, *et seq.* The right of action vested in the consignees by the endorsement of the bills of lading to them: R. S. O. ch. 116, sec. 5; *Blanchard* v. *Page*, 8 Gray, 292, 298. *Dunlop* v. *Lambert*, 6 Cl. & F. 600, was prior to the Imperial Act 18 & 19 Vic. ch. 111, with which the Act in this country corresponds. But the defendants are protected by the special condition of the bill of lading. No complaint was made by the consignees on delivery, nor for six weeks after. The application to add or substitute new plaintiffs under O. J. A. Rules 89, 90, & 103 (*a*) (which are identical with the English rules) is only entertained where the original plaintiff has no actual *interest* in the result: *Fitzadams* Judicature Act, p. 178; *Clowes* v. *Hilliard*, L. R. 4 Chy. D. 413; *Duckett* v. *Gover*, L. R. 6 Chy. D. 82; *Tildesley* v. *Harper*, L. R. 3 Chy. D. 277; *Long* v. *Crossley*, L. R. 13 Chy. D. 388; *New Westminster Brewery Co.* v. *Hannah*, 24 W. R. 899. At all events the nonsuit should stand as against the defendants the Steamship Company, for no damage is brought home to them, no delivery to them by the Merchants' Despatch being proved until after the admitted date of injury: *Browne* on Carriers, pp. 87, 526, 528; *Leigh* v. *Smith*. 1 C. & P. 638. [ARMOUR, J.—If the nonsuit is set aside at all the Merchants' Despatch Company can insist that you be retained in order that they may go on and prove delivery to and damage by you.] It is submitted that they are estopped from so contending by having moved for a nonsuit on their own behalf. They could only reach the Steamship Company by availing themselves of the machinery which the plaintiff set in motion and which they elected to stop.

*J. K. Kerr*, Q. C., and *Millar*, for the Merchants Despatch Company. The consignees were the proper parties to sue. The bill of lading, the request notes, and letters from the plaintiff to the consignees shewed the goods were sent at the latter's risk, who had also paid the plaintiff for

the property, and it was not shewn that they had taken any step to recover from the plaintiff. By R. S. O. ch. 116, the plaintiff transferred both the right of property and of action to the consignees, who accepted the property, and after such acceptance and payment they alone could sue. The nonsuit was general, in favour of all the defendants. If plaintiff had been nonsuited only as to one the others would have given evidence to shew which of the defendants was really liable. It was not shewn by the plaintiff that the property was ever delivered to the Merchants' Despatch Company, or was ever in their possession. It was proved that the Grand Trunk Railway Company delivered the property to the New York Central Railway Company, who delivered it to the Steamship Company, and therefore the nonsuit as to the Merchants' Despatch Company should stand. If the nonsuit should be held right as to some only it should be held right as to those against whom the plaintiff shewed any negligence, for it was directed under Rule 107, J. A., that the question of liability between the defendants should be tried in this action. There was evidence before the case was stopped that the Great Western Railway Company delayed the butter at the Suspension Bridge, and that the Steamship Company accepted it before it had been damaged; therefore as to these two the nonsuit should not stand.

They cited *Steele* v. *Grand Trunk R. W. Co.*, 31 C. P. 260; *Gordon* v. *Great Western R. W. Co.*, 34 U. C. R. 224; *Crawford* v. *Great Western R. W. Co.*, 18 C. P. 510; *Browne* on Carriers, 295; *Collins* v. *Bristol R. W. Co.*, 7 H. L. 194.

March 10, 1883. HAGARTY, C. J.—It is a question of a good deal of nicety whether a consignor, in plaintiff's position, is debarred from suing. Before the passing of the Imperial Act 18 & 19 Vic. ch. 111, copied in our Ontario Act 33 Vic. ch. 19 (1869), R. S. O. ch. 116, the question was much discussed, and the gen eral state of the law is considered in *Dunlop* v. *Lambert*, 6 Cl. & F. 600, in th

House of Lords. Lord Cottenham's judgment is very full.

The head note is: "Though generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action against the carrier; yet if the consignor make a special contract with the carrier, such contract supersedes the necessity of shewing the ownership in the goods, and the consignor may maintain the action though the goods may be the property of the consignee."

The subject is discussed in *Abbott* on Shipping, 12th ed., (1881,) p. 272, and *Dunlop* v. *Lambert* is referred to as shewing "if a special contract be made between the consignor and the carrier, the consignor may sue upon it without shewing his ownership in the goods." This significant note is added: "Since the Judicature Acts the question whether the consignor or consignee should sue, is not of so much practical importance as it was before those Acts, as now, where there is a doubt who should sue, both may be joined as plaintiffs. * * Non-joinder of a plaintiff, or bringing the action in the name of a wrong person, may in general be cured by amendment."

In *Brown* v. *Hodgson*, 2 Camp. 36, Lord Ellenborough said that he would recognize no property but that recognized by the bill of lading; and as the consignor shipped them "by order and on account of Hesse & Co.," the consignees, they could alone sue for loss.

In *Joseph* v. *Knox*, (also cited in *Dunlop* v. *Lambert*,) 3 Camp. 320, plaintiffs shipped the goods in London to be delivered abroad to Davis, plaintiffs paying freight in London. The goods were the property of Davis, the consignee. Lord Ellenborough held that the shippers could recover: that as the promise was made to them, and the consideration moved from them, they could recover the value and hold it as trustees for the real owners.

Sir R. Phillimore says: "There is no doubt that prior to 18 & 19 Vic. ch. 111, the indorsement and delivery of the bill of lading transferred to the indorsees the property but

not the contract of the shippers, and therefore at common law, though they might have sued the owners or the master for what is technically called the conversion, they had no cause of action against them upon the contract for non-delivery of the goods:" *The Figlia Maggiore*, L. R. 2 Ad. & Ecc. 110.

In *Shepherd* v. *Harrison*, L. R. 4 Q. B. 196, 493, 5 H. L. 128, the shippers took the bill of lading to their own order, the invoice was sent to persons for whom the goods were purchased, stating they were on account and at the risk of those persons. The bill of lading was sent to the shippers' agent in England, who refused to accept a draft for the price. Lord Westbury points out that the effect of the transaction in law, and according to mercantile usage, was that the shippers controlled the possession of the captain, and made him accountable to the holder of the bill of lading, which was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped. He says, 5 H. L. 128: "They had therefore all the incidents of property vested in themselves. Now, that was by no means inconsistent with the special terms of the shipment, namely, that the cotton was shipped on account of and at the risk of the buyers."

See also as to the effect of the Statute, The "*Freedom*," L. R. 3 P. C. 599.

The bills of lading here provide for either the shipper or his assigns paying freight.

We have seldom seen a case in which, with the large expenditure that must have been incurred in preparation, it has been so difficult to get any intelligible connected narrative of the manner in which these shipments, invoices, drafts, &c., were made.

In support of the nonsuit defendants relied on the Ontario Statute, 33 Vic. ch. 19, R. S. O. ch. 116, sec. 5, following the Imperial Statute 18 & 19 Vic. ch. 111, declaring that "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason

of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made to himself."

This statute is challenged by plaintiff's counsel as being *ultra vires* the local Legislature, being a matter of trade and commerce reserved for the Dominion Parliament.

We cannot decide this point under the recent Ontario Act without notice to the Attorney-General and Minister of Justice, and this would involve a further argument next May Sittings.

The case would thus be thrown over another six months.

We have considered what course should be taken to avoid further delay and prevent unnecessary cost, and have come to the conclusion that our wisest course will be to set aside the nonsuit and direct the case to be sent down for trial, with leave to the plaintiff to add as co-plaintiffs any or all of the alleged consignees or endorsees of the Bills of Lading.

We are not prepared to hold that, apart from this Ontario statute, the plaintiff has no right of action as original owner or consignor.

We do not wish to conclude the defendants on this point, so far as our judgment is concerned, but allow it to remain still open for argument if the case comes before us after the trial.

If we rest it wholly on the narrow ground of plaintiff's right to maintain the action we might require further consideration, and another six months' delay.

The defendants have to settle amongst themselves as to the liability, if any exist. The primary dealing of the plaintiff seems to have been with the Merchants' Despatch Company; but each of the defendants insists that the liability, if any, is on some other defendant.

All questions of costs are reserved. All the evidence already given may stand, with any additions the parties may desire.

ARMOUR and CAMERON, JJ., concurred.

*Judgment accordingly.*

[CHANCERY DIVISION.]

## GUNN V. TRUST AND LOAN COMPANY ET AL.

*Pleading—Ambiguity—Demurrer—Prayer for general relief.*

Where the allegations in a bill of complaint were of an ambiguous character, hovering between two inconsistent alternatives, neither of which supported the conclusion suggested by the pleader, a demurrer for want equity was upheld.

The Court will regard the *intuitus* with which the allegations in a bill of complaint are made, and will not allow the prayer for general relief to control the obvious frame of the record.

The primary object of the bill was to enforce a contract of sale of land between N. an insolvent, of whom the plaintiff was assignee, and one C. N. was made a party because, as the bill alleged, said C. N. pretended that one L. who had advanced money to N. on the security of the property, had conveyed his interest to C., while the plaintiff charged the contrary, and alleged that if such conveyance was made yet it was without value, and made to defeat N.'s and L.'s creditors. A demurrer by C. N. was allowed, on the grounds above mentioned, and because the bill was multifarious.

This was an appeal to the full Court, from an order of Blake, V. C., allowing the demurrer of the defendant Charles Webster North, to the plaintiff's amended bill of complaint.

The bill was filed by the plaintiff, as assignee of the estate and effects of Samuel North, against the Trust and Loan Company of Canada, William Beaumont Leather, and the Consolidated Bank of Canada, and alleged that the defendants the Trust and Loan Company has entered into a contract with Samuel North, previous to his insolvency, for the sale of building lot number one in block number four, in that part of the city of Hamilton described and known as McNab's new survey, and that part of lot number eighteen in the second, otherwise called the third concession of the township of Barton, in the county of Wentworth, for the sum of $1,200: that the said Samuel North had entered into possession of the said land and placed improvements thereon to the amount of $3,000, and that he had paid large sums to the Trust and Loan Company on account of the purchase money; and that the defendant William Beaumont Leather had advanced to the

said Samuel North on the security of the said property the sum of $1,800.

The bill also alleged that judgments had been recovered against the said Leather at the suit of the Consolidated Bank of Canada, and executions had been placed in the hands of the sheriff, which were a lien upon the interest of the said Leather in the said lands.

The bill prayed that it might be declared that the plaintiff, as assignee of said Samuel North, was entitled to the said land subject to the liens of the defendants; for a sale of the said lands and an account of what was due to the defendants, or any of them; and that out of the proceeds of the sale might be paid, (1) what was found due to the defendants the Trust and Loan Company; (2) the costs of the plaintiff after suit; (3) what was found due to the other defendants according to their priorities; (4) that the residue might be paid out to the plaintiff as such assignee.

The bill was amended, making one Jane Chapman and Charles Webster North parties thereto. The ground on which Jane Chapman was made a party was alleged to be that she claimed to be entitled to the lands in question by virtue of a deed from Samuel North, made prior to the plaintiff's appointment as assignee in insolvency of Samuel North; and the plaintiff charged that such conveyance, if it existed, was fraudulent and void as against himself as such assignee in insolvency.

The paragraph of the amended bill which disclosed the reason for making Charles Webster North a defendant was as follows:

15*b*. "The defendant Charles Webster North asserts and pretends that the defendant William Beaumont Leather has by deed assigned and conveyed to said Charles Webster North all said Leather's right, title, and interest in to and concerning the premises, while the plaintiff charges the contrary, and shews to your lordships, that even if any such assignment or conveyance was in fact made by said Leather to said Charles Webster North, yet the same was

so made without any value or consideration, and after the commencement of this suit, and during the pendency of this suit, and for the purpose, and with the intention and design, both on the part of said Leather and said Charles Webster North, of defrauding, hindering, and delaying the creditors of said Samuel North, who are represented by the plaintiff in this suit, and the creditors of said Leather, of whom he then had, as the said Charles Webster North well knew, a large number to whom the said Leather was heavily indebted, including the defendants the Consolidated Bank of Canada. And the plaintiff submits that under the circumstances, and under and by virtue of the statutes in that behalf, the said alleged assignment and conveyance by said Leather to said Charles Webster North is fraudulent, void, and of no force or effect as against the plaintiff."

The grounds of demurrer were multifariousness and want of equity. The appeal was heard before the full Court on the 9th of January, 1882.

*R. Martin*, Q.C., and *W. Cassels*, for the appellant. Chy. G. O. 439, 440, apply. There is but one case arising out of the original contract. The case is complete against the Trust and Loan Company, and all other claims are derivate and collaterally connected with it. They cited *Townend* v. *Toker*, L. R. 1 Ch. 446, 457, 458; *Darling* v. *Wilson*, 16 Gr. 255; *Clark* v. *Bogart*, 27 Gr. 450; *Boustead* v. *Shaw*, Ib. 280; *Thmpson* v. *Holman*, 28 Gr. 35, 41; *Grant* v. *Eddy*, 21 Gr. 45; S. C. in App. 568; *Attorney-General* v. *Poole*, 4 My. & Cr. 17, 31; *Turner* v. *Robinson*, 1 S. & S. 313; *Parr* v. *Attorney-General* 8 C. & F. 409, 433, 435; *McKenzie* v. *Brown*, 15 Gr. 399; *Goetler* v. *Eckersville*, Ib. 82, 85; *McLaren* v. *Fraser*, Ib. 239; *Nelson* v. *Robertson*, 1 Gr. 530, 535; *Gillespie* v. *Grover*, 3 Gr. 558, 582; *Cox* v. *Barker*, L. R. 3 Ch. D. 359; *Campbell* v. *Holyland*, L. R. 7 Ch. D. 166, 169.

*C. Moss*, Q.C., for the respondent. Section 15 *b.* is the only one which relates to C. W. North; no part of the prayer of the bill affects him. The allegations in this par-

agraph are not enough to call for an answer, and moreover they are bad for uncercainty; *Owster* v. *Grand Trunk R. W. Co.* 26 Gr. 93; S. C. 28 Gr. 428. It is also bad for multifariousness; *Crooks* v. *Glenn*, 8 Gr. 239; *Mole* v. *Smith*, Jac. 499: *Patterson* v. *Long*, 5 Beav. 186. He also cited *McCreight* v. *Foster*, L. R. 5 Ch. 604; *Crabtree* v. *Poole*, L. R. 12 Eq. 13.

*R. Martin*, Q. C., in reply. C. W. North is properly before the Court in order to be redeemed, and this disposes of the demurrer for want of equity.

March 11, 1882. BOYD, C.—The only paragraph of the bill which discloses the reason for making the defendant who demurs a party is 15*b*. That is certainly of an ambiguous character, hovering between two inconsistent alternatives, to use the language of Wood, V. C., in *Rawlings* v. *Lambert*, 1 J. & H. 466. The allegations there are, first, that the defendant pretends to have a conveyance, of which the plaintiff charges the contrary: and, second, if there is such a conveyance it is fraudulent and void as against the plaintiff. If there be no conveyance, then the defendant should not be a party: if there is a conveyance, then the pleader does not sufficiently allege facts to lead up to the conclusion that it can be impeached under the 13th Elizabeth, c. 5. The design alleged of delaying the creditors of the assignor, Leather, will give no cause of action to one who is not a creditor of Leather. The intention to defraud the creditors of Samuel North, whom the plaintiff represents, is not founded on any allegation of facts shewing that the property assigned is exigible by the plaintiff for those creditors. No equity is shewn against the defendant who demurs if either aspect of the pleading is separately considered, and if the conjoint effect of the two incongruous alteratives is considered, the result is equally disastrous to the equity of the bill.

Then the bill is multifarious. Its primary object is to enforce the contract of sale between the insolvent and the Trust and Loan Company. If the demurring defendant

were made a party in order to redeem him so as to perfect a title to the plaintiff, there would be no objection to this; but so far from offering to redeem, the whole suit as regards the demurring defendant is antagonistic.

*Gaughan* v. *Sharpe*, 6 App. R. 417, shews that the Court will regard the *intuitus* with which the allegations in the bill are made, and will not allow the prayer for general relief to control the obvious frame of the record. An express decision upon the same point in pleading will be found in *Johnson* v. *Fesenmeyer*, 25 Beav. 88, affirmed in appeal in 3 DeG. & Jo. 13.

The main contention raised by the bill against the demurring defendant is, that the security he holds is fraudulent and void. In this aspect he has no possible interest in the other contentions of the bill between the plaintiff and Jane Chapman, and between the plaintiff and the company.

I think the order should be affirmed, with costs. Leave to amend if desired, on the usual terms.

[CHANCERY DIVISION.]

## SAYLOR v. COOPER.

*Right of way—Way of necessity—"Premises"—Parties—Amendment.*

Where C., by deed conveyed certain land to S., who owned certain land adjoining the land of C., but not adjoining the land now conveyed, and the deed proceeded—"and I further convey the right of way to cross my land * * from the highway * * to the land owned by S., * * to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of S., his heirs and assigns forever."

*Held*, that the right of way was not a mere way in gross, but became appurtenant to the land of S., generally, and not merely to the land conveyed by the deed.

The word "premises" in a deed may cover not merely the land conveyed, but all that goes before in the deed.

Where C., conveyed to S., land which was inaccessible from the highway without passing over the lands of C., or some other person,

*Held*, that a way of necessity was impliedly granted by C., over his land conveyed to S.,

Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a party to an action claiming such way and

Where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing.

THIS was an action brought by Adam Henry Saylor against Freeman Cooper, to establish his claim to a certain right of way over the defendant's land, under the circumstances fully set out in the judgment.

The action was tried at Belleville on May 6th, 1882.

*Wallbridge*, Q. C., with him *G. O. Alcorn*, for the plaintiff. The plaintiff claims a right of way: first, under the grant of December 29th, 1865; and secondly, he claims a way of necessity. As to the deed of December 29th, 1865, the right granted thereby was not merely personal; if a right is intended to be merely of a personal nature, it is termed a "liberty:" *Sweet's* Concise Prec., 2nd ed., 141, 170; Bythew. and Jarm. Conv. Prec., 3rd ed. by Sweet, 4th vol. pp. 148, 669, 689; *Ib.*, 9th vol. p. 876; *Allen* v. *Combe*, 11 A. & E. 759; *Henning* v. *Burnett*, 8 Ex. 187. As to the way of necessity, I cite *Turnbull* v. *Merriam*, 14 U. C. R. 265.

*C. Moss* Q. C., for the defendant. The plaintiff has only an equitable interest; the instrument of January 3rd, 1880, did not pass the legal estate, therefore A. Hubbs Saylor was the proper person to bring this action. Besides this instrument only professes to affect the eighteen and a half acres; and before the date of it A. Hubbs Saylor had granted away the one acre comprised in the deed of December 29th, 1865, so that he had only the privilege left. This privilege so granted by the latter deed of December 29th, 1865, was a mere personal privilege, a right of way in gross, and as such it could not be assigned: *Ackroyd* v. *Smith*, 10 C. B. 164; *Goddard* on Easements, 2nd ed., 254-8; *Keppell* v. *Bailey*, 2 M. & K. 517. Moreover, the *habendum* to this deed does not extend to the right of way. As to the way of necessity, the plaintiff can get to the five acres, as to which he claims this way of necessity, from his own land.

*G. O. Alcorn*, in reply. A person in possession under a contract for purchase may maintain trespass, and the plaintiff can maintain this action; but if not, I ask leave to amend. [*Moss*, Q. C., objected.] The agreement under which the plaintiff claims includes the five acres. He cited *Gale* on Easements, 5th ed., 15, 84, 85: also, *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650.

June 14, 1882. PROUDFOOT, J.—Adam Hubbs Saylor being the equitable owner of eighteen and a half acres of land, part of lot 4 in the 1st concession of the military tract of the township of Hallowell, entered into an arrangement with the defendant, who owned fifty acres, adjoining his, of the same lot, which was carried into effect by a deed of the 29th December, 1865, made between the defendant of the first part, his wife of the second part, and Adam Hubbs Saylor of the third part, whereby in consideration of $30 the defendant granted to A. H. Saylor, one acre of the said lot not adjoining the eighteen and a half acres; and the deed then proceeded: "And I further convey the right of way with a team or teams to cross my land from

the highway, at some convenient place to the land" (the eighteen and a half acres) "owned by Adam Hubbs Saylor, south of the lands owned by the defendant. The said A. H. Saylor is to make good all damages done to fences, gates, and growing crops, by crossing over said lands with team or otherwise, together with all the appurtenances thereto belonging, to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of the party of the third part, his heirs and assigns forever."

By deed of 20th of August, 1872, the defendant conveyed to the said A. H. Saylor five acres adjoining the eighteen and a half acres.

By instrument under seal, dated 3rd January, 1880, A. H. Saylor agreed to sell to the plaintiff the eighteen and a half acres and other land, "and all rights and privileges contained in deeds from Cooper to A. H. Saylor," for the consideration of $6,000 with interest at 6 per cent, from the 1st January, 1880, and extending to 1899; the interest on the 1st January, 1881, and $333 annually, for three years; and the remaining $5,000 in equal annual payments of $313.70, for sixteen years, with accrued interest on all sums unpaid, upon payment of $1,000 and interest, within three years from the 1st of January, 1880.

No default has been made by the plaintiff under this agreement.

A right of way was used by A. H. Saylor under the agreement of 1865, until he agreed to sell to the plaintiff, and by the plaintiff since, till interrupted by the defendant, on a site on the west side of the defendant's land, and which the defendant says is the most convenient for his land, if plaintiff is entitled to a way at all. The plaintiff also claimed a right of way of necessity to the five acres bought from the defendant.

The defendant has interrupted the plaintiff in the use of this way.

The action is brought claiming the free and unobstructed user of the right of way from the highway to the plaintiff's land, and an order to prevent the defendant obstruct-

ing it; damages for the obstruction; and damages for an assault made on the plaintiff by the defendant.

The defendant denies that A. H. Saylor acquired the right of way as alleged. Defendant says that A. H. Saylor had only the defendant's license or permission given voluntarily to enter on the land while the defendant so willed. That A. H. Saylor had no right to transfer any right of way over the defendant's land. That the right of way was not appendant to the land of A. H. Saylor; and that no part of defendant's land was set apart for such right of way.

The defendant objected at the hearing that the plaintiff having only an equitable interest, the agreement for purchase not passing the legal title, he could not bring the action. The plaintiff, not admitting the plaintiff's inability, asked leave to amend by making A. H. Saylor a co-plaintiff.

As regards the claim to the way of necessity, at least, which could only pass with the grant of the soil, I think it is necessary that the owner of the legal estate should be before the Court, and it seems to me to be a proper case to permit the amendment.

It was also contended that the agreement for purchase only applied to the eighteen acres; and that before the date of it A. H. Saylor had granted away the one acre granted in the deed of December, 1865, in which the right of way was granted. The language of the agreement is not very technical, but I think that agreeing to sell all the *rights and privileges* acquired under the *deeds* from the defendant, is wide enough to call for a conveyance of the land not already disposed of, comprised in these deeds. But this is not of much importance under the amended record.

I think it clear that the plaintiffs are entitled to a way of necessity to the five acres. It was said that the way of necessity only arose to enable the plaintiff to get to his own land, and that eighteen acres adjoined the five acres, and that access could be had from one to the other But both pieces of land are landlocked. The reason for a way

of necessity is to enable the owner to make it available for the purposes for which it was purchased, by giving an access to a highway. The five acres were inaccessible without passing over the lands of the defendant, or of some other person; and as the defendant sold the five acres a way of necessity is acquired by implied grant over his land: *Goddard* on Easements, 2nd ed., 216. But as such a way can only be used for purposes connected with the enjoyment of the five acres, it becomes necessary to inquire whether the plaintiffs have a right of way under the deed of December, 1865. This was not claimed as an easement, but under the grant.

The defendant says it was a gratuitous personal license given to A. H. Saylor during the will of the defendant, and that he has determined it by the exercise of his will.

There is a conflict of evidence as to its being gratuitous. The plaintiff A. H. Saylor says that the $30 named as a gross sum in the deed of December, 1865, was the consideration for the acre of land *and* the right of way. The defendant says, and in this his wife supports him, that the $30 was the price for the acre alone, and that it was after the agreement for the purchase of the acre at that price that the plaintiff asked, just as the deeds were about being signed, to have the clause as to the right of way put in; that the defendant objected to this clause as giving a right to pass in summer, when A. H. Saylor said he would put in a clause to prevent that, and then inserted the clause as to damages. The defendant says it is different from what he thought it was. The construction of the deed, in my opinion, would make the consideration apply to all it professed to grant, and assuming that parol evidence may be given to shew the consideration to apply only to a part, I do not think that the evidence of the defendant and his wife should be allowed to countervail that of the plaintiff supported by the deed; more especially since in another respect the defendant admits that the deed is different from what he thought it was. For it is clear that there is no limitation of the right to the winter,

and it is hardly possible to conceive that the defendant could have thought that by a clause making A. H. Saylor liable for injury to fences, gates, and growing crops, he was limiting him to the use in winter. All the parties seemed to me respectable, and while not acting on the evidence of the defendant and his wife, I do not wish it to be inferred they were wilfully telling an untruth, but that their memory is defective.

It was also contended that the grant was personal to A. H. Saylor, and that the *habendum* only applied to the land. The *habendum* is, "To have and to hold the aforesaid lands and premises, &c., unto and to the use of the said party of the third part, his heirs and assigns forever." No doubt the word *premises* is often used as applicable to the lands conveyed, but I do not know that there is any rule requiring it to be limited in that way,—it is wide enough to cover all that goes before in the deed, and I think it must be so understood here.

It was then contended that it was a grant of a way in gross, and not assignable at law.

The case to which I was referred, *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650, appears to me to be in favour of the plaintiff's contention that it was not a way in gross, but a right of way that by the operation of the deed of December, 1865, became appurtenant to the eighteen acres. It is difficult to give a clear explanation of the effect of that case without the diagram found in the report; but the following passage from the judgment of James, L. J., is perhaps enough to shew its applicability to the present. He says: "In the present case the right of way is expressed to be over a passage running between the highway and the piece of ground which is granted by the deed; it is therefore a grant of a right of way to and from that triangular piece of ground. This must be construed reasonably as meaning a right of way between the highway and the yard of the inn of which the grantees were the owners, the triangular piece of ground not being intended to be held as a separate property, but being granted only for the

purpose of being thrown into the yard, so as to make a more convenient boundary line between the properties of the grantor and the grantees. I therefore am of opinion that this was a right of way which would pass as appurtenant to the inn."

Now, laying aside the triangular piece of ground, as was done by James, L. J., there was a grant of a right of way from the highway to the land of the grantees, which was held to make it appurtenant to that land. So here the conveyance is by the defendant of a right of way to the land of the plaintiffs, which would therefore become appurtenant to that land. It was granted for a consideration, by deed, to the grantee and his heirs and assigns.

The case of *Ackroyd* v. *Smith*, 10 C. B. 164, which was much relied on by the defendant, is explained in *Thorpe* v. *Brumfitt*, and it contained no decision that the right of way there was in gross.

I think the plaintiff entitled to judgment, and to an order restraining the defendant, &c., from obstructing the said way or preventing the plaintiff from using it to and from the plaintiff's land aforesaid. The way of necessity will run over the same line.

The plaintiff is entitled to damages for the obstruction and for the assault on A. Henry Saylor; and it will be referred to the Master at Belleville to assess them.

The plaintiff to have his costs.

[CHANCERY DIVISION.]

## FAULDS V. HARPER ET AL.

*Mortgage—Equity of redemption—Statute of Limitations in mortgage cases—Parties—R. S. O. c. 108, ss. 11, 19, 20, 43.*

The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage.

Hence, in a redemption suit, where the mortgagor died intestate in 1858, leaving children, the plaintiffs therein, some of whom, if alone, would have been barred as to redemption by R. S. O. c. 108, ss, 19, 20.

*Held*, since some of the children had not been adult for five years preceding the filing of the bill, none of the plaintiffs were barred by the statute.

R. S. O. c. 108, s. 43 applies to mortgage cases as well as other cases. *Hall* v. *Caldwell*, 8 U. C. L. J. 93 followed. *Forster* v. *Patterson*, L. R. 17 Ch. D. 132, and *Kinsman* v. *Rouse*, ib. 104 not followed.

One of the mortgagor's surviving children died an infant and intestate before this suit.

*Held*, that this suit enured to the benefit of those entitled to her share, including her mother as tenant for life under R. S. O. c. 105, s. 27.

*Held*, also, the mother should be directed to be made a party in the master's office under G. O. 438, since the present case did not fall under the Judicature Act.

*Semble*, if under that Act the same might have been directed under Rule 89.

THIS was a suit for the redemption of a certain mortgage of real estate under the following circumstances:—

William Faulds mortgaged the lands in question on the 29th of April, 1857, to his father, Andrew Faulds, to secure £475, part of the purchase money of the land, and on the 1st of July, 1858, during the pendency of the said mortgage, died intestate, leaving six children, of whom one, Eliza Jane, died under age and intestate, on the 7th of April, 1868.

Default having been made in the payments under the mortgage, Andrew Faulds instituted proceedings in this Court for the sale of the property, against the heirs of William Faulds, and a decree for sale was made on the 26th of June, 1861, under which the lands were sold to the defendant Joseph Harper on the 12th of April, 1862. The deed under this sale was made to Harper on the 16th of June, 1862, and on the same day the land was reconveyed by Harper to A. Faulds.

Afterwards Andrew Faulds died, having by will devised all his real estate to his wife, Ann Faulds, for life, and to be sold on her death, and the proceeds divided, &c.

The surviving executor, one W. E. Murray, sold the land in question to the defendant James C. Lane on 27th of December, 1879, who on the same day gave a mortgage to the defendant Margaret Harper, for $4,780.29, the purchase money, or a part of it.

On the 27th of February, 1880, this bill was filed by the five surviving children of William Faulds, charging that the purchase by Harper was made for Andrew Faulds, and that notwithstanding they had a right to redeem, and charging Lane with notice of their title.

Two of the plaintiffs, Wesley and Matilda, had not attained their majority five years before filing the bill.

The defendants to the suit were Margaret Harper, who was a daughter of Andrew Faulds, and the sole surviving residuary legatee under his will, and also executrix of her coresiduary legatee under the said will, Joseph Harper, her husband, and James C. Lane.

The prayer of the plaintiffs' bill was (1) that it might be declared that the said Andrew Faulds always had the lands in question as mortgagee under the mortgage to him, and in no other way, and that he and his executors always held, and the defendant James C. Lane did then hold the said lands subject to the plaintiffs' right to redeem the same; (2) that they might be declared entitled to the equity of redemption of the said lands, and might be allowed to redeem the same; (3) that an account of the rents and profits of the said lands rightly due to them might be taken, with interest; and for payment thereof, after deducting the amount due on the said mortgage; (4) that upon redemption of the said lands all proper persons might be directed to join in the re-conveyance thereof to the plaintiffs, and that the mortgage from Lane to Harper might be assigned or discharged by the defendants Margaret Harper and Joseph Harper to the plaintiffs; for the costs of suit, all proper directions and general relief.

Each of the defendants put in a separate answer to the plaintiffs' bill. The defendant Margaret Harper answered that she had no personal knowledge as to the sale of April 12, 1862, but believed that her husband Joseph Harper purchased *bonâ fide* for his own use, and not as agent for any one, and that he sold to Andrew Faulds at an advance: that Matilda Faulds, widow of William Faulds above mentioned, and her children, the plaintiffs, were, as she was informed and believed, in possession of the lands until about the time of the said sale: that her father Andrew Faulds entered into possession on the day when he purchased from Joseph Harper, and that he, during his lifetime, and his wife Ann Faulds, as his devisee, until her death in 1869, remained continually in possession thereof by their tenants, and received the rents and profits without let or hindrance; that from Ann Faulds's death she and her co-residuary legatee received the rents and profits until the death of the latter, since which time she had collected the same; that all the plaintiffs, except one, had attained majority upwards of five years before the commencement of this suit, and she claimed the benefit of the Statute of Limitations. She also submitted that the plaintiffs had by *laches* and neglect disentitled themselves to relief; that Matilda Faulds, widow of William Faulds, and also W. E. Murray, the surviving executor of Andrew Faulds, and a certain pecuniary legatee under the will of Andrew Faulds, but whose legacy had been paid to him, were necessary parties to this suit, and she claimed the same benefit as if she had demurred on this account. She admitted the mortgage of December 27, 1879, but said J. C. Lane was a *bonâ fide* purchaser for value without notice of the facts alleged in the bill, and she claimed to be entitled to set up against the plaintiffs every defence which Lane could set up against them; and that she was a purchaser or mortgagee for value without notice.

James C. Lane, by his answer, admitted the purchase of December 27th, 1879, and the mortgage of the same date to Margaret Harper, but denied all notice of fraud or

collusion on the part of Andrew Faulds and Joseph Harper, and he claimed to be a *bonâ fide* purchaser of the lands in question for value, without notice of any equities, rights, or claims of the plaintiffs; he also claimed the benefit of the Statute of Limitations as aforesaid; submitted that the plaintiffs were disentitled to relief through laches; that W. E. Murray was a necessary party; that the deed from the said Murray to him was duly registered, without notice of the plaintiffs' claim, and he claimed the benefit of the registry laws; and he also, as a *bonâ fide* purchaser for value, claimed the protection of this Court as against all parties to the suit in which the decree of June 26th, 1861, under which the lands were sold to J. Harper, was made.

Joseph Harper, in his answer, denied all fraud and collusion with Andrew Faulds in respect of the last mentioned sale, or that he purchased as his agent, and said that he purchased *bonâ fide*, and for his own use, and resold in good faith to Andrew Faulds, two months or thereabouts after making the said purchase and getting a conveyance of the said lands.

The cause was heard at London on October 12, 1880, before Blake, V. C., who the same day made a decree declaring the three eldest of the plaintiffs barred by the Statute of Limitations, and dismissing the bill so far as they were concerned. He declared the two younger plaintiffs were not entitled to redeem the land, but were each entitled to one fifth of the proceeds of the sale, subject to what was due on the mortgage from William Faulds to Andrew Faulds, and referred it to the Master to take the account on the footing of these declarations, gave liberty to Lane to pay the money into Court; and reserved the question of costs.

The case was reheard at the instance of Margaret Harper, some time since, while the late Chancellor and Vice-Chancellor Blake were members of the Court, but they having ceased to be members of the Court before judgment was given, it was reargued again on the 13th January, 1882, in

the Divisional Court of the Chancery Division of the High Court of Justice, before Proudfoot and Ferguson, JJ., the present Chancellor having been engaged in the case while at the bar.

*W. P. R. Street*, for the appellant, Margaret Harper. The statute began to run in 1862, even against the infants: R. S. O. ch. 108, sec. 5, sub-secs. 1, secs. 43, 45. The mother was barred in 1873, and the infants, Wesley and Matilda, were barred as to Eliza Jane's share in 1876, and, therefore, the two younger plaintiffs were, in any event, only entitled in sixths, not in fifths. When the statute begins to run it continues, notwithstanding subsequent disabilities. The claims of all parties are barred: *Hall* v. *Coldwell*, 8 U. C. L. J. 93; R. S. O. ch. 108, sec. 19; *Forster* v. *Patterson*, L. R. 17 Ch. D. 132; *Kinsman* v. *Rouse*, *Ib.*, 104; *Harlock* v. *Ashberry*, L. R. 18 Ch. D. 229; *Fisher* on Mortgages, 3rd ed., 304. The land has been sold and the claim is no more than a money claim. The costs of Lane, the purchaser, should be paid by the plaintiffs: *Pearce* v. *Morris*, 5 Ch. 227; *Merritt* v. *Stephenson*, 6 Gr. 567, and 7 Gr. 22. The mortgage was extinguished by the sale. Lane and the parties entitled must take such rights as they can get under the actual circumstances.

*W. Cassels*, for the plaintiffs. *Hall* v. *Coldwell*, *supra*, is an express authority, and binding on us. Here five plaintiffs file a bill to redeem; the mortgagee goes into possession, tries to sell, and buys himself; he devises to the plaintiffs. It is beyond question that, while the right of any one to redeem remained, the mortgagee must assign on payment. That was the position in 1879 when the sale took place, nor can the sale alter it: *Ford* v. *Allen*, 15 Gr. 565; *Whittick* v. *Kane*, 1 Paige (N. Y.) 201. If the right to the shares is to be considered, Eliza's share passed to the mother for life, and the reversioners could not take action till after the death of the tenant for life. The statute extinguished the life estate of the mother, but it did not

transfer it. There never was any partition, and as tenants in common each had an interest in the whole of the land. If one has a right to redeem, he or she can redeem the whole: *Grey* v. *Richford*, 1 App. 112, 2 S. C. 432. He also cited *Barwick* v. *Barwick*, 21 Gr. 39; *Coote* on Mortgages, 4th ed., 936; *Fisher* on Mortgages, 3rd ed., 742.

*W. P. R. Street*, in reply. The taking of the new title from the mother did not make any difference. If there is a right to redeem all, the mother is a necessary party. *Dawkins* v. *Lord Penrhyn*, L. R. 6 Ch. D. 318. *Watkins* v. *Williams*, 3 McN. & G. 622, was also cited.

June 22, 1882. PROUDFOOT, J., [after stating the facts.] —Vice-Chancellor Blake, who heard the cause, having found as a fact upon the evidence, that, at the sale under the decree of the lands in question, Harper bought them for Andrew Fauld the mortgagee, and the evidence being amply sufficient to support this conclusion, if the witnesses were believed, I do not think the decree in this respect should be disturbed.

The counsel for Margaret Harper contended that the decree was erroneous in any case, in giving the two younger plaintiffs one-fifth each of the proceeds of the sale: that the plaintiffs' mother was barred by the Statute of Limitations, as to the share of Eliza Jane in 1873, and these two plaintiffs in 1876. But he contended further, that all the plaintiffs were barred by the statute, as there was no saving of disabilities in mortgage cases. And in support of this he referred to the cases of *Forster* v. *Patterson*, L. R. 17 Ch. D. 132, and *Kinsman* v. *Rouse*, *ib.* 104. These cases do seem to have so determined, but at an earlier date our own Court of Appeal, in *Hall* v. *Caldwell*, 8 U. C. L. J. 93, held otherwise, and that decision is binding upon me, and, if I may venture to say so, it enunciates the true construction of the statute.

As to the other point, whether the plaintiffs were entitled in fifths or in sixths, it is not of much importance at present, for I think the decree was erroneous in deciding that any of the plaintiffs were barred by the statute.

The equity of redemption is an entire whole. There is scarcely any thing better settled than the right of the mortgagee to insist upon being redeemed entirely or not at all, although separate properties are included in the mortgage: *Merritt* v. *Stephenson*, 6 Gr. 567, 7 Gr. 22. And any one person entitled to a share in the equity of redemption may insist upon paying off the whole mortgage debt, and the mortgagee is bound to convey to him the mortgaged premises, and the mode of doing so in such a way as to protect the interest of the other owners is pointed out in *Pearce* v. *Morris*, L. R. 5 Ch. 227. Mr. Fisher, in his work on Mortgages, 2nd ed., s. 497, refers to cases involving this principle, and he repeats the same statement in his 3rd ed. s. 1195. "So long as the mortgagor holds possession of any part of the estate, no lapse of time will bar his right: for as to the part of which he keeps possession, his right remains. And as he cannot redeem that separately, he is allowed to redeem all." He cited *Rakestraw* v. *Brewer*, Sel. Ca. Ch. 56; *Burke* v. *Lynch*, 2 Ba. & Be. 426, and in a note adds: "There seems no reason to doubt that the rule will apply under the statute" (3 & 4 Wm. 4 ch. 27, s. 28, the equivalent of our R. S. O. ch. 108, s. 19, 20, 21.) The provision in these sections that an acknowledgment of the mortgagor's title given to one of several mortgagors, or to one of several persons claiming through them, shall be as effectual as if given to all, is a recognition of this rule. The conclusion is inevitable, that so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all.

The R. S. O. ch. 108, sec. 11, enacting that the possession of one co-partner, joint tenant, or tenant in common, shall not be deemed the possession of the others, does not apply here, for the plaintiffs were all out of possession, as they could not be said to have possession of a right to redeem; but in any case it only applies to contests between the joint owners: *Meyers* v. *Doyle*, 9 C. P. 371. Though the possession of one joint tenant may enure as the possession of both *for their mutual benefit*: *Keyse* v. *Powell*, 2 E. & B. 132.

The right of the parties has not been affected by the sale that has taken place, the proceeds of the sale still retain the quality of the real estate they represent: *Ruggles* v. *Beikie*, 3 O. S. 347; *Campbell* v. *Campbell*, 18 Gr. 254; *Thompson* v. *McCaffrey*, 6 P. R. 193.

With regard to the share of Eliza Jane, the child who died, an infant and intestate, in 1868, it devolved on her mother for life, with reversion to her brothers and sisters, &c.: R. S. O. ch. 105, sec. 27. And as I think that while any of the owners is entitled to sue for redemption, it enures for the benefit of all, this suit will enure for the benefit of those entitled to her share. The reversioners are before the Court, her mother, the tenant for life, is not. As tenant for life, her mother is entitled to redeem, and if she relied on the own right might probably be barred by the statute, but as she could enforce it through the others who are not barred for her benefit, she is a proper party to this suit. I think in this case, however, the Court can, and ought to direct her to be made a party in the Master's office, under *Regula Generalis*, 438. That order has not been retained in the Judicature Act, but this case is to be decided by the former practice of the Court. (Judicature Act, Rule 494.) If it fell under the Judicature Act, there would be no question of this under the larger powers of adding parties found in Rules 89 *et seq.*

I think the decree should be varied by declaring all the plaintiffs, and their mother, entitled to the whole proceeds of the sale, the mother as tenant for life of one-sixth, subject to payment of what may be due on the mortgage, to Andrew Faulds, and direct the mother to be made a a party in the Master's office.

The widow may also be entitled to an equivalent for dower in the whole or part of the proceeds, for which she may make a claim in the Master's office.

There will be no costs of the abortive re-hearing—the Harpers will pay the plaintiffs the costs of this re-hearing.

FERGUSON, J.—The case has been clearly stated by Mr. Justice Proudfoot.

I am also of the opinion that the finding of the learned Judge before whom the cause was heard, that at the sale under the decree of the Court of the lands in question, Harper bought them for the mortgagee, Andrew Faulds, is supported by the evidence, and should not be disturbed.

It was contended on the argument that sec. 43 of ch. 108, R. S. O., relating to disabilities, has no application to mortgage cases, and in support of this contention the cases *Forster* v. *Patterson*, 17 Ch. Div. 132, and *Kinsman* v. *Rouse*, *Ib.* 104, were cited. These decisions certainly appear in point, and in favour of the proposition contended for; but in the case, *Hall* v. *Caldwell*, 8 U. C. L. J. 93, referred to by Mr. Cassels, our own Court of Appeal held the opposite, and this decision is, I think, binding upon this Court, notwithstanding those other and later cases; and, this being so, it cannot be denied that there are two of these plaintiffs whose right to redeem has not been barred by the statute, for it is shewn that this suit was brought within the period of five years from the time they attained the age of twenty-one years. Then, there being two plaintiffs, Wesley Bell Faulds and Matilda Elizabeth Faulds, entitled to redeem, can the mortgagee do otherwise than submit to be redeemed as to the whole?

In *Story's* Eq. Jur. sec. 1023, it is said: "It is clear that the equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees, and representatives (strictly so called) of the mortgagor, but also in the hands of any other persons who have acquired any interest in the lands mortgaged, by operation of law, or otherwise, in privity of title. Such persons have a clear right to disengage the property from all incumbrances in order to make their own claims beneficial or available. Hence, a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainderman * * and, indeed, every other person, being an incumbrancer, or having legal

or equitable title or lien therein, may insist upon a redemption of the mortgage in order to the due enforcement of their claims and interests respectively in the land. When any such person does so redeem, he or she becomes substituted to the rights and interests of the original mortgagee in the land, exactly as in the civil law."

In White and Tudor, L. C. 4th ed., p. 1063, it is said: "As the conveyance of an estate by way of mortgage is merely to secure the debt, persons entitled to certain interests in the equity of redemption * * may come into a Court of equity, and redeem the estate."

And at page 1968 of 4th Am. ed. these words occur: "The general principle would seem to be, that every one who has an interest in the land, and would be a loser if the mortgage were enforced, is entitled to redeem." This right may be exercised by a lessee for years, and is not confined to those who have a title in fee or of freehold. See *Averill* v. *Taylor*, 4 Selden 44, also referred to *ib.*

In *Pearce* v. *Morris*, L. R. 5 Ch. 227, Lord Hatherley, L. J., is reported to have said: "Any person, in short interested in an equity of redemption is entitled to redeem, and when, being so entitled, he tenders the mortgage money and interest, he, having a part in the equity of redemption, is entitled to the delivery of the title deeds, and to have a conveyance of the property. In what form that conveyance shall be drawn depends upon the circumstances."

In *Fisher* on Mortgages, 2nd ed. sec. 497, it is said, "So long as the mortgagor holds possession of any part of the estate, no lapse of time will bar his right, for as to the part of which he keeps possession his right remains, and as he cannot redeem that separately he is allowed to redeem all."

These authorities, and there are others that might be mentioned, seem to me to indicate very clearly indeed, that so long as there is any person who is in a position to redeem, that is, whose right has not been barred, the mortgagee must submit to redemption as to the whole mortgage; and that the decree is erroneous in declaring that

three of the plaintiffs are barred by the Statute of Limitations of all claim to the mortgaged premises, and as to any share or interest in the purchase money received or to be received by the defendant Harper, and that the right and title of these three plaintiffs is vested in the defendant Harper, and in dismissing the bill as to these plaintiffs. I am of the opinion, that whatever may be found due to the defendant Margaret Harper, upon proper accounts being taken on the footing of the original mortgage security is all that she is entitled to, and that she must submit to be redeemed.

The share of Eliza Jane, the child who died intestate in 1868, devolved upon her mother for life. The mother is still living, and I think she should be a party to this suit. She may, however, I think, be made a party, as pointed out by Mr. Justice Proudfoot, under the powers of General Order 438.

I do not see that we are called upon here to decide any question that may arise between the co-plaintiffs. I, however, agree in the view, that the redemption will be for the benefit of all interested in the equity of redemption, and that the decree may be varied as pointed out in the judgment of Mr. Justice Proudfoot. I think the widow should be at liberty to make a claim for dower in the Master's office, and to sustain it if she can.

I agree that there should be no costs of the first rehearing, and that the defendant Harper should pay the plaintiff's costs of this rehearing. (*a*)

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(*a*) This case has been appealed.

[CHANCERY DIVISION.]

## FRAZER v. GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

*Insurance—Payment of premium in cash—Principal and agent—R. S. O. ch. 161, sec. 34.*

An agent instructed to receive payment for his principal, cannot as a general rule accept anything but money.

*Held*, therefore, on this principle, and also in view of R. S. O. ch. 161, sec. 34, and of the fact that the renewal receipt in question in this case contained a notice that it would not be valid unless dated and countersigned by the agent on the day on which the money was paid, that, where in consideration merely of a setting off of debts as between the agent of an insurance company and a policy holder, the former wrongfully delivered a renewal receipt to the latter, the receipt did not bind the company, and the policy lapsed.

THIS was an action brought by Isabella Fraser, plaintiff, against the Gore District Mutual Fire Insurance Company, defendants, to recover the amount alleged to be due under a certain policy of fire insurance, taken out on a certain harness shop and other property of the plaintiff.

In her statement of claim the plaintiff set up the said policy, which insured the property for one year ending June 1st, 1879, and which she alleged had been duly renewed from year to year by the defendants by virtue of their renewal receipts issued for the years ending June 1st, 1880, June 1st, 1881, and June 1st, 1882, respectively, upon the payment by her to them of the sums mutually agreed upon between her and the defendants for that purpose. She alleged that about September 15th, 1881, while the said policy was still in force, a loss by fire occurred, and she was in all respects entitled to the payment of the damage thereby occasioned, but the defendants refused to pay the same. She claimed damages accordingly, and general relief.

By their statement of defence the defendants admitted the making of the policy, but said that it had expired by effluxion of time before the time of the fire, and also that the plaintiff had no insurable interest in the said property

referred to in the statement of claim, or in any event was not interested to the extent of the amount claimed by her.

The action was tried at the spring sittings at Berlin, on April 7th, and 8th, 1882, before Patterson, J. A. On the close of the plaintiff's case, Bethune, Q. C., for the defendants, objected that under R. S. O. ch. 161, sec. 34, the policy became void, because the money for the last renewal was not paid before the expiration of the previous renewal. Mr. Jacob, counsel for the plaintiff, argued that there was an agreement to give credit for this, and that this operated as a waiver. The learned Judge, however, ruled in favor of the defendants' contention, and on April 8th, gave judgment of nonsuit against the plaintiff, with costs.

The circumstances under which the last renewal premium was alleged to have been paid by the plaintiff sufficiently appears in the judgment of the learned Chancellor. The policy contained no special provision as to the mode of payment of the premium; neither was it alleged by the defendants that the policy itself specifically limited the power of the agent so far as concerned the matters in question. The amount of the premium was $25. The agent of the defendants gave a renewal receipt to the plaintiff on August 3rd, 1881, some five or six weeks before the occurrence of the fire.

It also appeared from the evidence that the course of dealing between the company and the agent was for the agent receiving the premium to credit it to the company, and waiting till the end of the month, to send it then to the company.

In his evidence the agent said the company did not require regularity in the monthly accounting, but sometimes intervals of six months occurred.

The remaining facts of the case sufficiently appear from the judgment of the learned Chancellor.

*J Maclennan, Q. C.*, for the appellant. The real question between the parties is as to the payment of the premium.

At the trial, R. S. O. ch. 161, sec. 34, was relied upon, and the non-suit was based on that. The company are estopped from saying they were not paid, and we had a right to presume the money was paid. [BOYD, C.—Here the agent had nothing equivalent to money which he might have sent.] But we had the renewal receipt, this makes all the difference. An agent authorized by the company, and trusted by them with an instrument which was to testify payment of the premium, made the agreement with the plaintiff before the time when the premium was due. The mode of dealing of the company was such that, if we had paid the money to the agent for the premium, we would have been insured, though he might not have remitted the money to the company till some lapse of time. [PROUDFOOT, J.—If the plaintiff had agreed to pay a canary instead of the premium, would that have been sufficient?] If the course of dealing between the agent and the company was, that the agent was to be the debtor of the company till the end of each month, then the agent was entitled to make himself debtor to the company for any premium. The receipt was handed over long before the fire; then, after the fire, the company make this objection. True, we had not actually delivered the harness, but if we should not deliver the harness, the agent could sue us. R. S. O. 161 does not help the defendants. It was for a different purpose. Sec. 75, under which this policy was issued, gave this and other companies power to do business on cash principles. Companies are prohibited issuing hazardous policies for a larger period than a year; but they may renew. What the Legislature intended substantially to establish was, that there should be a new premium every year. The Legislature did not mean to say a party could not pay his premium by giving his note. If the company could take a note, they could give credit, and deal in a more or less accommodating way with their clients. Then the question is, was this as between man and man a transaction which entitled us to consider ourselves insured.

*C. Moss*, Q. C. for the defendants. The agent was bar-

gaining in his own behalf with the plaintiff's husband. It must be assumed the assured knew the agent had no authority to deal for this insurance otherwise than for cash. The statute provides for this. The company never received anything in respect of this premium. The plaintiff had no right to assume that because the receipt was delivered to him, the agent had accounted to the company. It was procured in an irregular way. The plaintiff did not pay cash for it. The parties knowing the agent's position, he would have no authority to bind the company by such a transaction; *Montreal Ass. Co.* v. *McGillivray*, 13 Moo. P. C. 87. Nothing but money payment would suffice; *Walker* v. *The Provincial Ins. Co.*, 8 Gr. 217; *Merritt* v. *Niagara District Mutual Fire Ins. Co.*, 18 U. C. R. 529. It would be against the policy of the Act to allow such irregular proceedings. The object of the Act was, to enable companies always to have a certain amount of cash on hand. The purpose of sec. 75 was to enable companies to draw a certain amount of cash from their insurances, instead of always having to resort to premium notes. To bind the company the money must be paid to the agent on the delivery of the receipt. If paid before, the money must have reached the hands of the company. [BOYD, C.—Have you not to introduce the principle applicable in cases where there are two innocent persons, one of whom has suffered? The plaintiff and her husband were not to assume the agent would fail in his duty.] I contend nothing but payment of actual cash would bind the company. Sec. 34 applies to all policies. Under it a renewal only takes effect on the assured paying a cash premium, when the policy is on that basis. The assured has nothing to do with any arrangement as between the agent and the company. Sec. 43 gives directors power to waive certain things, thus implying that other objections are not to be waived. In every case mutual insurance companies are to be strictly bound by explicit directions contained in the statutes relating to them; per Sir J. B. Robinson, *Walker* v. *Provincial Ins. Co.*, 8 Gr. 217. It is as much a fraud on

the company to hand over the receipt without the money having been paid, as it would be for a third person to steal it; and why should the company who give a receipt for a particular purpose, and to be used for a particular purpose, be held to put the person whom they give it to in a position to commit a fraud, as against a third person who knows that he himself is not doing right?

*J. Maclennan, Q. C.*, in reply. That the agent did not credit this premium to the company in his books is immaterial. It can make no difference in our position, which is, that having made arrangements for payment of the premium, and received from the company the evidence of payment provided by the statute, we have nothing to do with subsequent misconduct of the agent. The statute says the renewal receipt shall have the same effect as a policy. Then it must not be argued as though we had given the harness to the company. If the insurance company had been a private individual, there can be no question that under similar circumstances he would be liable. *Mutual Ass. Co.* v. *McGillivray, supra, and Walker* v. *Provincial Ins. Co.*, are quite different cases. Even conceding that the premium had to be paid by cash, this is what we stipulated for. The agent undertook to see it paid. Sec. 34 is not applicable to all policies. It is clearly restricted to policies for one year or less, and reading it with sec. 75, it's quite plain the object the Legislature had in view was that the premium should not be spread over a number of years. There is nothing material in the exact time of payment. All the Legislature means is, that the income which the company receives from such policies is to be an annual income, or an income recurring at a shorter period, if the policy be for a shorter period. What the Legislature means by "cash" is such payment as other insurance companies receive. There is nothing to prevent credit being given. "Cash" is used as meaning simply "money," it cannot be inferred to mean "money down." The nonsuit ought to be set aside.

July 9, 1882. BOYD, C.—The defendant company is an Ontario company, and the agent White, with whom the dealing as to insurance took place, was a local agent of the company. All cases as to foreign companies and general agents resident within the jurisdiction, such as cited and acted on in *Moffatt* v. *Reliance Mutual Life Ins. Co.*, 45 U. C. R. 561, are therefore inapplicable here. The general rule is well settled that an agent instructed to receive payment for the principal cannot accept anything else than money. If payment is made out of the usual course, it lies on the person who sets up the exceptional mode of payment to shew the authority of the agent to bind his principal. Any doubt that exists as to the sufficiency of the payment should be given against the person dealing with the agent, as he always has the power of protecting himself by applying at head-quarters. The insured in this case is affected with notice of the general law as found in R. S. O. ch. 161, sec. 34, (p. 1453,) to the effect that "cash payments for renewal must be made at the end of the year for which the policy was granted, otherwise the policy shall be null and void," as well as with notice of the special provision on the face of the renewal receipt, in these words: "Not valid unless dated and counter-signed by the agent on the day on which the money is paid." The usual course of dealing contemplated is manifestly payment of cash to the agent at the end of the year on the delivery of the renewal receipt. In this case there was no payment of cash at the end of the year, or at any other time by the insured; but instead of this a very peculiar arrangement was made between the company's agent and the husband of the insured. The policy ran out on the 1st of June. In April, the husband undertook to make a set of harness for the agent, who agreed to pay him partly in cash, and to pay the balance to the company as the consideration of this renewal receipt. The agent expected to get the harness by June, but did not get it till October or November, after the fire. No entry of this transaction is to be found in the books of either party to it. The

agent did not pursue his usual course of debiting the company with the premium as if paid to him or payable by him, and failed to make a return of this as renewed in a statement sent by him to the head office in August, after he had delivered the receipt to the plaintiff. After the fire, the agent sent forward the amount for the premium, which the company forthwith returned and repudiated liability. The agent himself puts it in this way in his evidence: that the premium was paid by the harness; but as a matter of fact the harness was not completed at the time of the fire. This is an isolated transaction; no course of dealing is proved which would tend to mislead the plaintiff or work an estoppel against the company. No evidence is offered that the company knew of their agent receiving anything else but money for the payment of premiums.

The substance of what was done, is neither more nor less than a setting off of debts as between the agent and the plaintiff. He became liable to pay $25 for the balance (a) of the price of a set of harness deliverable *in futuro;* she was liable to pay $25 to the Insurance company, and it is agreed that the debt for the harness shall be cancelled by the agent making good the payment to the company. If the premium was paid by the promise of the harness or by the harness itself, or if it was paid by means of the agreement to set off what was due for the harness against what was due for the premium, in any aspect, the agent was exceeding his authority; and the company on learning what was done, might well refuse to ratify it. It would be most unjust to the Insurance company to uphold what was done as a payment of the premium, and so to compel them to accept what the agent was pleased to do in this extremely questionable and suspicious transaction, as within the scope of his authority, actual or ostensible. I cannot put the case more forcibly than in the language of Byles, J., in *Sureting* v. *Pearce*, 7 C. B. N. S. 485: "The

(a) The agent had previously paid $30 on account of the harness. The harness was complete at the time of the fire, but had not been delivered. The price was to be $55.

general rule of law is that an authority to an agent to receive money, implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal; but, if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it, and upon that principle, it has been held as a general rule that the agent cannot receive payment in anything else but cash." See also *Hoffman* v. *Hancock*, 92 U. S. Rep. at p. 164. In the present case no course of dealing is proved either as between the agent and his principal, or as known to the plaintiff, which could affect the legal presumption that the only authority of the agent was to receive money for the premium. Upon the evidence, I think the learned Judge came to a correct conclusion in nonsuiting the plaintiff, and his judgment should be affirmed, with costs.

PROUDFOOT, J., and FERGUSON, J., concurred.

[CHANCERY DIVISION.]

## O'DONOHOE v. WHITTY.

*Solicitor and client—Costs—Duty of solicitor—Notice of sale under mortgage—Service of under R. S. O. ch. 104—Leave to appeal.*

Where F., a solicitor, on behalf of his client, served a notice of sale under a mortgage made pursuant to the Act respecting Short Forms, R. S. O. ch. 104, upon what he believed, after diligent enquiry, was the last place of residence of the mortgagor in this Province, and did so on the instructions of his client, who was fully advised as to the said enquiries and their result, and *bonâ fide* deeming such service sufficient :

*Held*, that F. was entitled, as against his client, to tax the costs of the proceedings under the power of sale, although it appeared the mortgagor really was at the time of such service, within this province.

R. S. O. ch. 104, permits substitutional service at the residence, though the mortgagor may be within the jurisdiction. But even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who *bonâ fide* acted on that view of the statute should not lose his costs of so effecting service.

Where services are rendered by a solicitor at the instance of a client, possessing the like knowledge of the matters of fact as the solicitor, the *onus* is on the client to establish negligence, ignorance, or want of skill, by reason of which alone and entirely the services have been utterly worthless, if he resist the taxation of costs incurred by such services.

Where the question involved affected matters arising in the exercise of statutory powers, and was of general interest, leave was given to appeal although a sum less than $200 was at stake.

This matter arose out of an appeal from taxation by the Mr. J. H. Thom, one of the taxing masters of this Court, of the bill of costs of the defendant's solicitors, of and incidental to the exercising the power of sale in the mortgage in question in this cause, under an order of reference dated December 23rd, 1881.

The mortgage was one dated November 29th, 1869, and made in pursuance of the Act respecting short forms of mortgages, between Joseph Breckon and Mary Breckon his wife, to the Rev. A. J. Broughall, and containing the proviso that the mortgagee, in default of payment for three months, might, on giving one month's notice, enter on and lease or sell the said lands.

At the time of suit the defendant, Maria Whitty, was the owner of the mortgage, and the suit was one for redemption brought by the plaintiff, as assignee of the

equity of redemption, under an unregistered conveyance from one Malachi Corbett, who appeared on the registry books as owner thereof.

Before proceeding to judgment, however, the plaintiff settled with the defendant, paying her the principal and interest due under the mortgage; and by instrument in writing dated December 5th, 1881, the plaintiff, after reciting that Messrs Fitch & Lees, the defendant's solicitors, claimed certain costs against the defendant in respect of the said mortgage, undertook and agreed to and with the defendant to pay and satisfy so soon as they could be ascertained all such costs to the said Messrs Fitch & Lees.

Amongst the said costs were those in question in this matter, being costs of and incidental to the exercise of the power of sale in the said mortgage.

By order made in Chambers on December 23rd, 1881, on the application of the said defendant's solicitors, it was referred to Mr. J. H. Thom to tax between solicitor and client all costs claimed by the said applicants against the defendant in respect of the mortgage in question.

By a certificate of Mr. Thom afterwards made at the request of the said defendant's solicitors, it appeared:

1. That in the taxation of the said bill of costs so referred to him, it was admitted by Mr. O'Donohoe, the plaintiff, that he was at the time of the proceedings taken by the defendant's solicitors under the power of sale in the mortgage in question, the owner of the equity of redemption under an assignment thereof to him.

2. That Mr. O'Donohoe objected to the bill of costs, on the ground that a purchaser could not be compelled to accept title, as notice was not sufficiently given.

3. That the following was the note of his judgment entered in his diary: "Hold O'Donohoe assignee of equity of redemption, had notice by letters between the defendant's solicitors and him filed, and that service of notice was at the place the defendant told her solicitors was Malachi Corbett's last place of residence."

4. That he had taxed the costs to the defendant's solicitor at the sum of $187.10.

It appeared by the letters in question, that on September 22nd, 1879, the defendant's solicitors wrote to Mr. O'Donohoe to ask if he could inform them as to Corbett's residence: that on September 24th, 1879, Mr. O'Donohoe replied that Corbett was then working on the Canada Pacific Railway, between Winnipeg and Prince Arthur's Landing, and asking the amount due on the mortgage and who had a right to discharge it; that on September 26th, 1879, the defendant's solicitors replied that the defendant was owner of the mortgage and could give a discharge of it: that on December 24th, 1879, in reply to a letter from defendant's solicitors, the plaintiff informed him that Corbett had not returned, but was working on the railway somewhere between Winnipeg and Prince Arthur's Landing: that on January 27th, 1880, the defendant's solicitors wrote to the plaintiff enquiring as to what was Corbett's last place of residence in Ontario; and that on January 28th, 1880, Mr. O'Donohoe replied that Mrs. Breckon, the mother of Corbett, was living on Church street in Toronto.

It further appeard that on February 4th, 1880, a notice of the intention of exercising the power of sale in the mortgage, in the usual form, and directed to Malachi Corbert, was served by leaving the same at the residence of his mother and sister in Church street, Toronto.

It also appeared by the affidavits of Mr. Fitch, one of defendant's solicitors, that in addition to the information as to the last place of residence of Corbett obtained from the plaintiff, he was told by the husband of the defendant, or by the defendant, that Mrs. Breckon resided in Toronto, and so far as he could remember they confirmed the information he had received from the plaintiff that the said residence was Corbett's last place of residence in Ontario: that he was instructed to serve the notice of exercising the power of sale at the said residence upon Mrs. Breckon; that the said notice of exercising the power of sale was so served after making the fullest enquiries, and in the *bond*

*fide* belief from all those enquiries that he was serving the said notice at Corbett's last place of residence in Ontario, in which belief the defendant and her husband appeared to fully concur: that being unable to ascertain definitely the post office address of the said Corbett, but understanding from the plaintiff that he was employed on the Canada Pacific Railway between Winnipeg and Prince Arthur's Landing, he caused a copy of the said notice to be mailed to him at the latter place, and so far as he could remember or ascertain, the said notice was never returned through the Dead Letter Office, and he believed the same was received by Corbett; that he had many interviews from time to time at the special request of the defendant, with several individuals in negotiations, and for the purpose of effecting a sale of the said property after the failure to sell at auction, but no objection was taken in any of these negotiations to the insufficiency of service of the notice of sale: that he took a very great deal more time and trouble in the matter than he would in ordinary cases, because the defendant was much pressed by creditors, and was continually urging him to try and get the money for her out of this property: that he had been informed and understood that Malachi Corbett was a young man unmarried, who, when in Ontario, resided with his mother in Toronto, and that for some years he had not resided in the vicinity of the property mortgaged: that before writing his first letter to the plaintiff, dated September 22nd, 1879, he was informed by the defendant and her husband that the plaintiff was a relative of Corbett's, and could furnish his address to enable him to be served with the necessary notice of sale: that he had since been informed and believed the plaintiff to be an uncle of Corbett's, and that the plaintiff admitted before the Taxing Master, on the taxation of costs, that he was the holder of an unregistered conveyance from Corbett of the premises, which was executed prior to the receipt of the said first letter from him, the deponent: that after the receipt of the answer from the plaintiff to his letter of January 27th, 1880, he

asked the defendant or her husband to make enquiries as to Corbett's last place of residence, and that the result of such enquiries was that his said last place of residence in Ontario was in Toronto with his mother: that in his office docket, under date February 2nd, 1880, was the following entry: "Ins. from Whitty, Corbett's last place of abode in the Province, 94 Shuter Street, Toronto. Lr. to agents with notice and copy."

Other affidavits was put in in support of the statement in the affidavit of Mr. Fitch.

From the affidavit of Malachi Corbett himself, it appeared that he was a resident of North Gwillimbury all his life up to the time he left for Prince Arthur's Landing: that he sometimes came to the city of Toronto on business, and at such times would stay at his mother's who kept a boarding house on Church street, in Toronto; that he never had a permanent place of abode in Toronto; that from August, 1879, till October, 1881, he was engaged in contract work upon a section of the Canada Pacific Railway, and had his residence upon the said section: that the said section was within Ontario, and when the proceedings were commenced for exercising the power of sale in the mortgage, he was a resident of Ontario: that he had never been served with any notice of exercising said power of sale, nor did he ever receive any such notice by mail or otherwise; that he was the owner of the equity of redemption in the mortgage in question, and shortly before leaving for Prince Arthur's Landing, conveyed the same to the plaintiff for sale.

By his written objections to the taxation, the plaintiff objected to the allowance of the whole or any part of the bill of costs of the defendant's solicitors, on the ground that no written notice was ever given to the mortgagor, his heir or assigns, by the defendant, of her intention to exercise the power of sale in the mortgage, either personally or at his or their usual or last place of residence within Ontario, as required by law.

On February 20th., 1882, the plaintiff appealed before

Proudfoot, J., in Chambers, from the said certificate of the Taxing Master, on the grounds stated in his written objections, and on May 22, 1882, judgment was given allowing the appeal, with costs, on the ground that the information given should have put the solicitor on enquiry whether Corbett resided out of the Province or not, and that the solicitor should have told the client that service would be useless if Corbett did not reside out of Ontario.

On June 7th, 1882, the defendant's solicitors made a motion before the Divisional Court by way of appeal from this decision.

*C. Moss*, Q. C. for the appellants. The appellants proceeded on information derived from their client, and on other information from which they *bonâ fide* believed that the mortgagor's last place of residence was at his mother's house in Toronto. If a man is in the Province you can serve personally or at his last place of abode; if out of the province you must serve personally; *Gough* v. *Park*, 8 P. R. 492; *Re Hardy, Poole* v. *Poole*, 3 Chy. Ch. 179; *Thomson* v. *Milliken*, 13 Gr. 104; *Major* v. *Ward*, 5 Ha. 598; *Re Clarke*, 1 D. M. & G. 43.

*W. Fitzgerald*, contra. Corbett's affidavit shews he never was out of Ontario, and had no permanent place of abode in Toronto. His last place of abode at all events never was at Toronto, it would be where he last was on the line of railway in this province. He should have been served personally, there was no alternative in this case. The last place of abode must be not the last known place of abode, but the last place of abode absolutely. He cited *Pulling* on Attorneys, 3rd ed., p. 155, 327; *Roe* v. *Stanton*, 17 Gr. 389; *Stokes* v. *Trumper*, 2 K. & J. 232; *Allison* v. *Rayner*, 7 B. & C. 441; *Bartlett* v. *Jull*, 28 Gr. 140.

*C. Moss*, Q. C. in reply. The question is not whether the service was absolutely good, but whether, in view of what they knew, the solicitors acted reasonably so as to charge their client. The plaintiff had a deed of the equity of redemption from Corbett at the time he gave the inform-

ation, but he concealed this fact. He held it in trust to sell for the mortgagor. He also referred to *In re A. B. a solicitor*, 8 U. C. L. J. N. S. 21.

September 7, 1882. BOYD, C.—This matter was argued before Mr. Justice Proudfoot, and by him decided upon a construction of the statute prescribing the manner of serving notice, with which I find myself unable to agree. The service is to be made "either personally or at his or their usual or last place of residence within this Province:" R. S. O. ch. 104, p. 997. The learned Judge held that service could not be made at the residence unless it appeared that the mortgagor was out of the jurisdiction, and that the solicitor should have told his clients, as a matter of law, that the service he was about to make would be useless if the mortgagor was still in the Province. But as I read the Act there is an alternative mode permitted. The service may be (1) personal, or (2) at the mortgagor's usual place of residence within the Province, or (3) at his last place of residence within the Province. The first and second modes of service are probably suggested by the practice pursued in serving process in ordinary litigation in the Court of Chancery, in which it is not essential that the service be personal, but it may be validly made by leaving the copy with a grown-up inmate at the defendant's place of abode: *Daniell's* Ch. Pr., 5th ed., p. 367,

It cannot be the intention of the Act that service may not be effected at the mortgagor's usual or last place of residence unless he is out of the Province, because that would be to import a restriction into the statute which is not fairly deducible from its language.

Provision may well have been intended for the case of a mortgagor leaving home for a wandering life on lake or land in Ontario, where it would be unreasonable to compel the mortgagee to follow and perhaps waste time and money in a fruitless search. This construction is supported by *Major* v. *Ward*, 5 Ha. 598, and to some extent also by subsequent legislation, whereby service of notice

is made merely directory, and the failure to give notice does not invalidate the sale: 42 Vict. ch. 20, sec. 4, O.

Assuming the construction put upon the statute by Proudfoot, J., to be correct, still I think, upon authorities not cited to him, that it was not a case for overruling the decision of the taxing officer allowing the bill of costs. It will not be denied that the construction of the statute is doubtful, but it by no means follows that there was any want of skill or negligence on the part of the solicitor in giving it the meaning which he did.

In *Bulmer* v. *Gilman*, 4 Man. & Gr. 108, a parliamentary agent put a construction upon an order of the House of Lords doubtful in its terms, which was different from that which was adopted by the House, whereby it became necessary to abandon his proceedings in passing the bill through the House of Commons, but he was not held to be guilty of such negligence as to disentitle him to recover remuneration for the services he had rendered. To the same effect is the decision in *Chapman* v. *VanToll*, 8 E. & B. 396, and *Elkington* v. *Holland*, 9 M. & W. 659.

But as I regard the case the question of costs is to be determined, not by ascertaining whether the mortgagor was in or out of the Province, and not by determining what was as an absolute fact his last or usual place of residence in February, 1880, but by a consideration of what was then known to solicitor and client, and by reference to the then position of affairs. It had been ascertained, so far as I can make out from the papers, that the mortgagor was a young unmarried man, who had moved with his mother to Toronto some five years before from the neighbourhood of the land. She began to keep a boarding-house in Toronto, and he lived with her there for some time before he went off to the North-West in August or September, 1879. His object in going away was to work on the line of railway somewhere between Prince Arthur's Landing and Winnipeg, and he was expected to return upon the opening of navigation. I see no reason to doubt, as a matter of fact, that his mother's home was his last place of residence

in Toronto before leaving for the North-West. It was reasonable to infer from all this information that he was away for a temporary purpose, not with any intention of settling in the new country, but intending to return within a few months. Nor was it unreasonable to suppose that he would have no settled residence on the line of railway, but would be working and moving from place to place as the line progressed.

The client and her husband would well know that the expense of serving the mortgagor personally, or of finding out exactly his whereabouts, would be very considerable, and would entail great delay, which the mortgagee, from her needy circumstances, was anxious to avoid. In this state of facts, and having this common knowledge, the solicitor is instructed to serve at what is considered by them all as the last place of residence of the mortgagor in Ontario, and he does so, both he and the client and her husband *bonâ fide* believing that service there made will be sufficient to justify the exercise of the power of sale. The fact that the mortgagor was then within the limits of the Province, if it be a fact, was unknown to them; the fact that he had then a fixed place of abode in the Province elsewhere than in Toronto, if it be a fact, was also unknown to them all alike. Did the solicitor, then, fail in duty towards his client in making the service as and when he did? Did he act so recklessly, so negligently, so unskilfully as to deprive him of all the costs of these proceedings?

All that the solicitor was in law required to do was to tell the client that in order to exercise the power of sale notice had to be served at the usual or last place of residence of the mortgagor in Ontario. This duty he discharged, as I think, correctly enough. Thereafter it was from information derived from the client and others that the solicitor pursued his investigations in order to find out where this place was. It is to be assumed, in the absence of proof to the contrary, that the solicitor did his duty, and that all the information gained by him was duly communicated to the client, and it appears that the client

concurred with the solicitor in believing that the right place had been ascertained. Now, upon these questions of fact, and upon the inferences and probabilities to be made and deducible therefrom, the client and her husband were as well able to form a conclusion as the solicitor. The conclusion formed by the client is indicated in her direction to her solicitor to serve at the place where the service was made.

I am of opinion that no case of negligence is made out against the solicitor to disentitle him to tax these costs as against his client and as against the plaintiff, who stands in the shoes of the client.

The services being rendered at the instance of the client, with the like knowledge of the matters of fact as the solicitor, the *onus* is on the client to establish negligence, ignorance, or want of skill, by reason of which alone and entirely the services have been utterly worthless. The responsibility for what was done in this case is to be placed rather on the client than on the solicitor, and the latter should not be deprived of his costs, because possibly if the sale had gone on, and bidders had attended, a valid objection might have been subsequently raised as to the sufficiency of the notice. The mortgagee took her chance of that, and the solicitor is not bound to guarantee absolute accuracy in what was done.

My conclusion is therefore that there was no duty cast on the solicitor to inform the client that service at the last or usual place of abode would be of no avail unless the mortgagor was then out of the Province: that the solicitor came to a not unreasonable conclusion in thinking that the usual and last place of residence of the mortgagor was at his mother's house: that in any aspect of the case the client was as well able to judge of the facts and probabilities for and against this as the solicitor. The client then knowing what was known instructed the service, and I see no reason for holding that the solicitor was so blameworthy as to lead me to interfere with the decision of the taxing officer in his favour.

The order setting that decision aside should, in my judgment, be reversed with costs.

FERGUSON, J., concurred.

Afterwards, on December 7th, 1882, the plaintiff moved before the Divisional Court for leave to appeal from the above judgment.

*N. W. Hoyles*, contra. Leave should not be given, the amount involved being less than $200, and the construction of the statute not being necessarily involved: *Khine* v. *Snadden*, L. R. 2 P. C. 50; *Brown* v. *McLaughlin*, L. R. 3 P. C. 458; *Johnston* v. *St. Andrew's Church*, L. R. 3 App. Cas., at p. 163.

*Per Curiam*:—The question involved affects matters arising in the exercise of statutory powers of sale, and is of general interest. For this reason the plaintiff may appeal on filing the proper security. Costs of the application to be paid by the applicant, as it is a matter of indulgence.

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[CHANCERY DIVISION.]

## YOUNG ET AL. v. ROBERTSON.

*Demurrer—Specific performance—Misjoinder of parties—Judicature Act.*

Where a demurrer is raised to a statement of claim for specific performance on the ground of no sufficient agreement, it is enough if in any aspect of the case, the plaintiff may be entitled to some relief. In this case it was held, on the statement of claim set out below, that a concluded contract was shewn, and that defendant was liable.

Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer.

Where the owners of the property in an action for the specific performance of a sale of land, were married women, and their husbands were joined as co-plaintiffs, and the defendant demurred *ore tenus*, on ground of misjoinder of parties, leave was given to amend by making the husbands defendants, or by adding next friends for the married women as co-plaintiffs.

DEMURRER to statement of claim.

The statement of claim in this case was filed by Catharine Mary Young and John B. Young, her husband, Anna C. Cawthra and Henry Cawthra, her husband, plaintiffs, against Thomas Robertson, defendants.

It set out that, on or before October 8th, 1880, the plaintiffs A. C. Cawthra and C. M. Young, were seized of and entitled to certain premises, which, at the request of the defendant, the plaintiffs, on or about the said date, offered in writing, duly signed, to lease to him in the following words:

"The undersigned hereby offer to lease to Thomas Robertson, of the city of Hamilton, and his assigns all and singular, that certain parcel or tract of land and premises situate, lying and being in the said city, and being composed of that block of land bounded by Queen, Duke, Hess, and Robinson streets, on the following terms: Rent to be $200 per year, payable half yearly, on October 1st and April 1st in each year, and all taxes and water rates. Term to commence on April 1st, next, and to be for ten years from that date; possession, however, to be given on the acceptance by Mr. Robertson of this offer, with full permission to him and his assigns, his or their operatives, at any time from that date to commence any erections at his or their free will and pleasure. * * This offer to be open for acceptance until January 1st next, and when accepted in writing the undersigned, in consideration thereof, hereby agree to and with the said Robertsen to join him in executing the ordinary statutory lease of the said premises on the above terms, and for the term specified, &c. * * The said Robertson shall have the right to sublet without leave of the undersigned, their heirs or assigns."

The statement of claim went on to allege that on December 17th, 1880, the defendant accepted the said offer and the terms therein contained, by letter of that date, as follows:

"Hamilton, Canada,
"December 17, 1880.

"John B. Young, Esq.,

"Dear Sir,

"I will accept the offer made to me in writing on October 8th last, by Mrs. Young and Mrs. Cawthra, to lease the block of city property bounded by Queen, Hess, Duke, and Robinson streets; but I wish the lease made to 'The Hamilton Canning Company,' to whom I have agreed to assign my rights. The letters patent incorporating the company are applied for, and I expect them to be issued in a few days. As soon as they are I will advise you and lease can be prepared. Please say whether this will be satisfactory.

"Yours truly,

"THOMAS ROBERTSON."

That afterwards, on April 22nd, 1881, the plaintiffs' solicitors caused a letter to be written to the defendant, informing him that they had received instructions to prepare a lease of the said premises in accordance with the terms of the said agreement, and asking whether the same should be made to the said defendant or to the Hamilton Canning Company: that the defendant refused to accept the said lease, and wrote to the plaintiffs a letter, dated November 8th, 1881, informing them that he had assigned all his right, title and interest in the said offer of the plaintiffs to one Alexander Robertson, of the county of Snohomish, in Washington Territory, United States of America: that the said A. Robertson was a man of no means, resident outside the jurisdiction, had never been produced by the defendant for the purpose of accepting a lease; and they, the plaintiffs submitted that they were not now, nor ever were, bound to accept the said A. Robertson as a lessee of the said premises: that the defendant had refused and still refused to carry out the said agreement, either by accepting a lease to himself or to the Hamilton Canning Company, although applied to on that behalf; and although frequently requested to perform the said agreement and to state whether he would accept a lease of the said premises either for himself or the Hamilton Canning Company, he has refused to execute such a lease himself or to accept one for any other than the said A. Robertson, and rejected all proffers and tenders on the part of the plaintiffs to carry out the said agreement: that they, the plaintiffs, had sustained large damages by reason of the failure of the defendant to carry out his said agreement, and submitted they were entitled to specific performance of the same by the said defendant, and to an account and payment of damages sustained.

And the plaintiffs claimed, (1) Specific performance of the said agreement; or (2) An account of damages sustained, and an order for payment; (3) Their costs of this action; (4) General relief.

To this statement of claim the defendant demurred as follows:

The defendant demurs to the plaintiffs' statement of claim, and says that the same is bad in law, on the ground that it does not shew any agreement between the plaintiffs and the defendant, or any agreement entered into between the plaintiffs and the defendant whereby the defendant is made liable in the manner claimed by the said plaintiffs, and on other grounds sufficient in law to sustain this demurrer.

The demurrer came up for argument on October 18, 1882, before Boyd, C.

*W. Cassels*, for the demurrer. There has been no acceptance, no bargain of any kind, till, at all events, April 22nd, 1881, and before this the defendant had transferred his rights to A. Robertson, whose being out of the jurisdiction and impecunious is no objection. It was an offer to lease, with a provision to sublet. If there has been any acceptance, there has been *laches* sufficient to deprive the plaintiffs of any relief; at any rate the assignee is the person to deal with, and not the defendant. Besides, before any completed acceptance, on December 17th, 1880, the defendant pointed out that he had assigned his rights to the Canning Company, and adds: "Please say if this is satisfactory?" How can they come against him now? Then the proper parties are not before the Court: *Spenser* v. *Macdonald*, 19 Gr. 467.

[*W. Nesbitt*. I concede this and ask leave to amend.]

Rule 196 seems to prevent any amendment being granted.

*W. Nesbitt*, contra. As to the acceptance being complete, I refer to *Fulton* v. *Upper Canada Furniture Co.*, 32 C.P. 422; *Bruce* v. *Tolton*, 4 App. 144. The letter of December 17, 1880, was an unqualified acceptance. As to the effect of defendant's statement that he wished the lease made to the Canning Company, see *Bonnewell* v. *Jenkins*, L. R. 8 Ch. D. 70, and cases cited in *Fry* on Specific Performance, 2nd ed., p. 126, secs. 280, 281. A granting of such indulgence does not alter the fact of the contract being a

completed one; *ib.* sec. 281. The case of *Kennedy* v. *Lee*, 3 Mer. 441, shews that a reasonable time for acceptance was all that was necessary. There can be no assignment of a mere offer: *Maynell* v. *Surtees*, 3 Sm. & G. 101, 117. The only question is whether we ought to have proceeded against the Canning Company.

[BOYD, C.—I can only look at this record, and the Canning Company does not exist so far as this record goes.]

The cases shew the assignee could not enforce specific performance. We would have a right to the covenant of the assignor: *Crosbie* v. *Toote*, 1 My. & Cr. 431; *Buckland* v. *Hall*, 8 Ves. 91; *Willingham* v. *Joyce*, 3 Ves. 168. It was not for us to seek the assignee: *McCreight* v. *Foster*, L. R. 5 Ch. 604; *S. C.* in App. L. R. 5 H. L. 321; *Crabtree* v. *Poole*, L. R. 12 Eq. 13. And as to the want of parties, I refer to *Werdermann* v. *Société Générale d'Electricité*, L. R. 19 Ch. D. 246, 30 W. R. 33. The question of *laches*, does not arise on the pleadings. I cite also *Prujn* v. *Soby*, 7. P. R. 44; *Roche* v. *Jordan*, 20 Gr. 573.

*W. Cassels*, in reply. This is not a demurrer for want of parties at all. It is a demurrer for want of equity, because there are *no* proper parties to the suit: *Blackburn* v. *McKinlay*, 3 Chy. Ch. 65; *Dawkins* v. *Lord Penryhn*, L. R. 4 App. 51. In any event if the amendment is allowed, we are entitled to the costs of the demurrer.

October 25, 1880. BOYD, C.—It is not necessary to consider what may be the full measure of the rights of the plaintiff upon this record, in order to dispose of the demurrer, that there is no agreement shewn between the parties whereupon the defendant is made liable to the plaintiff. It is enough if in any aspect of the case the plaintiff may be entitled to some relief. The argument for the demurrer proceeded on the ground of there being no concluded contract pleaded. To this I cannot assent. There is first the offer to lease to the defendant or his assigns, which was to remain open till the 1st January. Before that date the defendant writes: "I will accept

the offer made to me, but I wish the lease made to the Hamilton Canning Company, to whom I have agreed to assign my rights. The letters patent incorporating the company are applied for, and I expect them to be issued in a few days. As soon as they are, I will advise you, and lease can be prepared. Please say whether this will be satisfactory." It is to be inferred that this was satisfactory, for on the 22nd April, the plaintiff's solicitors informed the defendant that they were about to prepare a lease in accordance with the agreement, and asking whether it should be to the defendant or the Canning Company. The defendant refused to accept the lease, and wrote to the plaintiffs in November that he had assigned his interest in the offer to a person out of the jurisdiction. According to this state of facts, the defendant had dealt with the offer as subsisting in November, and he failed to communicate whether the company had secured letters of incorporation. Either they had become incorporated or they had not. If they were incorporated the plaintiffs knew that the defendant had agreed to assign his right to that company, and assented to his doing so by the letter of April. If that company had failed in being incorporated, still the acceptance of the defendant remained enforceable against him, in the absence of laches, which cannot be considered on this demurrer. Either way he was liable to perform or answer for the non-performance of the contract; but when called upon he refused, and after apparently unreasonable delay, he assigned his rights to a person alleged to be of no substance and out of the jurisdiction. Whether any one else should be joined as defendant is not important on this demurrer; the defendant is certainly to some extent and in some manner liable, if he has no defence upon the facts. The demurrer is overruled, with costs.

Another ground of demurrer *ore tenus* was mentioned in the argument, to which the plaintiffs at once submitted, and asked leave to amend: namely, that the suit is wrongly constituted, because the owners of the property are married women, and they join their husbands as co-

plaintiffs. *Primâ facie* it must be taken that the action is that of the husbands, and that the wives have no authority or control over it: *Wake* v. *Parker*, 2 Keen at p. 71. But this case shews that even under the old practice suits so constituted were common, and that the Court would take care in the decree to protect the rights of the married women. The ground of the objection rests upon the doctrine of misjoinder of parties, which is not now a ground of demurrer under the practice established by the Judicature Act: *Werdermann* v. *Société Générale d'Electricité*, L. R. 19 Ch. D. at p. 250; *Roberts* v. *Evans*, L. R. 7 Ch. D. 830. The case is not like that cited by Mr. Cassels of *Dawkins* v. *Lord Penrhyn*, L. R. 4 App. Cas. 51, for here two of the plaintiffs have title and a right of action, and the objection really is, that their husbands should be defendants, or if co-plaintiffs, that the married women should sue by next friends.

The result is, that I allow the record to be amended as to parties, on payment of $5 costs, which may be set off against the costs of the demurrer.

[CHANCERY DIVISION.]

## HENDRIE v. THE GRAND TRUNK RAILWAY OF CANADA.

## THE GRAND TRUNK RAILWAY OF CANADA v. THE TORONTO, GREY, AND BRUCE RAILWAY.

*Railway company—Bondholders—Right to vote as shareholders—Voting—Toronto, Grey, and Bruce Railway Co.*—31 *Vict. c.* 40, *s.* 21 (*O.*)—38 *Vict. c.* 56, *s.* 13 (*O.*)—44 *Vict. c.* 74, *s.* 14 (*O.*)

Under a statute which provided that, in the event at any time of the interest upon the bonds of a railway company remaining unpaid and owing, then, at the next general meeting of the company, all holders of bonds should have and possess the same rights and privileges, and qualifications for directors, and for voting, as are attached to shareholders, provided that the bonds, and any transfers thereof, should have been first registered in the same manner as was provided for the registration of shares.

*Held*, that the words "at the next general meeting" were merely indicative of the earliest period at which the bondholders might vote, and that the statute did not require a new registration in order to entitle the bondholder to vote at any subsequent meeting, so long as the interest remained unpaid.

*Held*, also, that the bondholders' right to vote was not limited to the right of voting for directors, but that they had the right to vote on all subjects properly coming before a general annual meeting upon which shareholders might vote.

And where a subsequent statute extended the bondholders' right of voting to "special meetings:"

*Held*, also, that the bondholders had the like right to vote on all subjects coming before "special meetings."

When a further statute authorized the railway company to enter into agreements with any other company, for leasing or working its line, provided that assent thereto should be given by at least two-thirds of the shareholders present, or represented by proxy, at any meeting specially called for the purpose.

*Held*, that the word "shareholders" must be interpreted to include all who were entitled to vote as shareholders, which included bondholders.

*Held*, also, that the registered bondholders were entitled to vote at a special meeting called for the purpose of obtaining the assent of the shareholders to such an arrangement, on the question of its adoption.

*Osler* v. *Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 506; and *Re Johnson and Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 535, followed.

*Held*, also, that the votes of registered bondholders having been rejected, the arrangement, though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed.

The suit of *Hendrie* v. *The Grand Trunk R. W. Co. of Canada*, was brought by William Hendrie, on behalf of himself and all the bondholders of the Toronto, Grey, and

Bruce Railway Company who voted against the confirmation of the agreement with the defendants in question in the action, and the Toronto, Grey, and Bruce Company, as plaintiffs, against The Grand Trunk Railway Company of Canada defendants.

This suit was commenced on the 29th June, 1881, but an amended bill was subsequently filed on the 31st January, 1882. The plaintiffs prayed that an agreement, dated May 13, 1881, whereby the defendants agreed to lease the line of railway of the plaintiffs' company might be declared not to have been duly confirmed at a meeting called for that purpose; that it might be declared that the proceedings at the said meeting were null and void, so far as they related to the said agreement, and that the agreement had not received the required assent under the Act, 44 Vict. ch. 74, O., and that it might be delivered up to be cancelled; and also that it might be declared that the votes of certain bondholders had been improperly rejected, and should be received; and for an injunction restraining the defendants' company from acting under the agreement; and for costs and general relief.

The action of the Grand Trunk Railway Company was commenced by a writ issued 1st September, 1881, in which the Grand Trunk Railway Company of Canada were plaintiffs, against The Toronto, Grey, and Bruce Railway Company as defendants. This latter action was brought for the specific performance of the agreement impeached in the suit of *Hendrie* v. *The Grand Trunk R. W. Co.*

Both causes came on for trial together, before Proudfoot, J., at the sittings at Toronto, on the 12th December, 1882.

It appeared by the evidence that the agreement in question, whereby the Grand Trunk Railway Company agreed to lease the line of the Toronto, Grey, and Bruce Railway Company, upon certain conditions therein set forth, was entered into by the two companies on the 13th of May, 1881. And a meeting of the shareholders of the Toronto, Grey, and Bruce Railway Company, was thereupon called for the 28th June, 1881, for the purpose of considering

and confirming the agreement. At this meeting the holders of 1561 registered bonds, the interest upon which was in arrear, tendered their votes against the confirmation of the agreement. These votes were rejected, and by reason thereof the confirmation of the agreement was declared to be carried at the meeting. Had they been received it was admitted they would have been sufficient to have negatived its confirmation.

By the Act incorporating the Toronto, Grey, and Bruce Railway Company, 31 Vict. ch. 40, sec. 21, O., it is provided as follows: "Sec. 21. The directors of the said company, after the sanction of the shareholders shall have been first obtained at any special general meeting to be called from time to time for such purpose, but limited to the terms of this Act, shall have power to issue bonds made and signed by the president or vice-president of the said company, and countersigned by the secretary and treasurer, and under the seal of the said company, for the purpose of raising money for prosecuting the said undertaking, and such bonds shall without registration or formal conveyance be taken, and considered to be the first and preferential claims and charges upon the undertaking and the property of the company, real and personal, and then existing, and at any time thereafter acquired, and each holder of the said bonds shall be deemed to be a mortgagee and incumbrancer *pro rata*, with all the other holders thereof, upon the undertaking and the property of the company as aforesaid: Provided, however, that the whole amount of such issue of bonds shall not exceed in all the sum of $3,000,000, nor shall the amount of such bonds issued at any one time be in excess of the paid up instalments on its share capital, together with the amount of paid up municipal and other bonuses, and which have been actually expended in surveys and in works of construction upon the line; and provided also, further, that in the event at any time of the interest upon the said bonds remaining unpaid and owing, then at the next ensuing general annual meeting of the said company, all holders of bonds shall have and

possess the same rights and privileges, and qualifications for directors, and for voting as are attached to shareholders, provided that the bonds and any transfers thereof shall have been first registered in the same manner as is provided for the registration of shares."

By the 38 Vict. ch. 56, sec. 13, (O.) it is provided as follows: "13. In the event at any time of the interest upon the loan capital remaining unpaid and owing, whether the same be held in bonds or debenture stock, then at the next general annual or special meeting of the company all holders of bonds or debenture stock shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to ordinary shareholders; Provided that the bonds, debenture stock, and any transfers thereof shall have been first registered in the same manner as is provided for the registration of ordinary shares."

By the 44 Vict. ch. 74, sec. 14, (O.) the Toronto, Grey, and Bruce Railway Company were empowered to enter into any agreement with any other railway company or companies for the leasing or working of the Toronto, Grey, and Bruce Railway, on such terms as the directors of the respective companies may agree upon; "Provided that assent be given thereto by at least two-thirds of the shareholders present, or represented by proxy at any meeting specially called for the purpose according to the by-laws of the company."

*C. Robinson*, Q. C., *D. McCarthy*, Q. C., and *E. Martin*, Q. C., for Hendrie and the Toronto, Grey, and Bruce Railway Company. The question for the Court is, whether the registered bondholders had a right to vote at the meeting called for the consideration and confirmation of the agreement in question. This point is really concluded by authority. The other side, however, will probably contend that only shareholders have this right. But the Legislature could never have intended to exclude bondholders from voting, as they were practically the real owners of the road, and most deeply concerned in any such question as is involved by this agreement. The proper construction of

the statute 44 Vict. ch. 74, sec. 14, requires that the word "shareholders" should be read and construed as including all who are entitled to vote as shareholders; and that of course, under 31 Vict. ch. 40, sec. 21, (O.) and 38 Vict. ch. 56, sec. 13, (O.) includes registered bondholders whose interest is in arrear. If these votes which were improperly rejected had been received, the agreement would not have been confirmed. The directors had opposed the registration of the bonds in question, and the registration had been enforced by mandamus shortly before the meeting called to consider the agreement, and for the purpose of enabling the bondholders to vote thereat: *Re Osler* v. *The Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 506; *Re Johnson and Toronto, Grey; and Bruce R. W. Co.*, 8 P. R. 535. *Re Thomson and The Victoria R. W. Co.*, 8 P. R. 423, is a decision to the same effect. The right of registration involves the right of voting, and is only required for the purpose of enabling the bondholders to vote. The 44 Vict. ch. 74, sec. 14, does not limit the right to vote to shareholders. It is not now open to the other side to contend that these bonds could not properly be registered; they had in fact been registered before the meeting pursuant to the order of the Court, from which there has been no appeal. But that decision was clearly right. The confirmation of the agreement would seriously prejudice the rights of the bondholders, and diminish their security to the extent, it is said, of $360,000. The Legislature could never have intended to permit shareholders to confirm an agreement which would have the effect of practically robbing the bondholders of this sum. Private rights are not considered to be interfered with except by express words in an Act: *Vernon* v. *Vestry of St. James's, Westminster*, L. R. 16 Ch. D. 449; *Managers of Metropolitan Asylum District* v. *Hill*, L. R. 4 Q. B. D. 433, in Appeal, 5 App. Cas. 582; *Western Counties R. W. Co.* v. *Windsor and Annapolis R. W. Co.*, 7 *Ib.*, 178. At all events this is not a contract which the Court should order to be specifically performed; *Re Mercantile and Exchange Bank, Ex parte London Bank*

*of Scotland*, L. R. 12 Eq. 268, 276, 279. The Grand Trunk Railway Company could not be compelled to perform it: *Wilkinson* v. *Clements*, L. R. 8 Ch. 96; *The South Wales R. W. Co.* v. *Wythes*, 1 K. & J. 186, S. C., 5 D. M. & G. 880; *Greenhill* v. *Isle of Wight R. W. Co*, 19 W. R. 345; *Jones* v. *The Victoria Graving Dock Co.* 25 W. R. 348; *Fry* on Specific Performance, 2nd ed., sec. 81. Even if the contract were binding, the injury which would result to bondholders who are most deeply concerned in the road is a reason why the Court should not specifically enforce it: *Ib.*, sec. 393. The plaintiffs are entitled to a rescission of the contract: *Turner* v. *Harvey*, Jac. 169; *Panama & South Pacific Telegraph Co.* v. *India Rubber, &c., Co.* L. R. 10 Chy. 515; *Dickson* v. *McMurray*, 28 Gr. 533.

*E. Blake*, Q. C., and *W. Cassels*, for the Grand Trunk Railway Company. So far as the bill seeks a rescission of this contract, it should be dismissed with costs. Even if the contract has not been validly confirmed, it is still good as an inchoate arrangement, and is susceptible of confirmation. But it is submitted the agreement has been confirmed. *Re Osler* v. *The Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 506, does not decide that registered bondholders may vote on questions of the kind in controversy. It decides that a bondholder is entitled to have his bond registered without the production of the *mesne* transfers, if any. This determines nothing as to the class of subjects upon which bondholders may vote whose bonds are registered. That depends solely on the statutes which confer the right of voting on bondholders in addition to their ordinary rights which they have as holders of bonds. The 31 Vict. ch. 40, sec. 21, says that the bondholders may vote at "the next ensuing general annual meeting." The meeting at which this agreement was confirmed was "a special meeting" called expressly for the purpose of considering and confirming the agreement; this statute, therefore, does not give the bondholders the right which they claim. The 38 Vict. ch. 56, sec. 13, (O.,) entitles them to vote at "the next general annual or special meeting." But this does not confer on bondholders the right to vote at

every successive meeting without reregistration of their bonds. When that right is intended to be conferred, it is given in express terms: See 43 Vict. ch. 66, sec. 15. The intention of the Acts is simply to give the bondholders power to vote for and to be eligible for election as directors.

When conferring the power of voting on bondholders, the Legislature could have had no intention of giving them a right to vote on the question of the confirmation of agreements of the kind in question, because the Toronto, Grey, and Bruce Railway Company had then no power to enter into any such arrangements. It was not until the 44 Vict. ch. 74, that the company had that power, and we find that notwithstanding the right of voting had been conferred on bondholders by previous statutes, the latter Act nevertheless expressly provides that agreements entered into under its provisions are to be valid and binding if they receive the assent of at least two-thirds of the "shareholders," and the concurrence of the bondholders is not required. There is nothing inequitable in this construction of the statute; the bondholders are protected by the power which they have to elect directors, and by this means their nominees would have a voice in concluding any such agreement. It would be inconvenient to give every individual who may have an interest a vote in executive matters, but the rights of the individual are protected by his having a voice in selecting those to whom the executive control of affairs is committed. In this case it must be presumed that the directors of the Toronto, Grey, and Bruce Railway Company sufficiently represented the bondholders. If the bondholders were rightly excluded from voting, then the agreement has been validly confirmed and should be specifically enforced: *Great Western R. W. Co.* v. *Birmingham and Oxford Junction R. W. Co.*, 2 Phil. 597; *Blackett* v. *Bates*, L. R. 1 Chy. 117; *Paxton* v. *Newton*, 2 S. & G. 437; *Mosely* v. *Virgin*, 3 Ves. 184; *Mayor and Corporation of London* v. *Southgate*, 17 W. R. 197; *Storer* v. *Great Western R. W. Co.*, 3 Rail. and Canal Cas. 106.

*C. Robinson*, Q. C., in reply. We do not care for a rescission of the agreement if we get a declaration that it has not been confirmed. It ought, however, to be taken out of the way, as it has been in fact rejected. The meeting for confirmation was "the next special meeting" held after the registration of the bonds, and therefore the bondholders were within the strict terms of the 38 Vict. ch. 56, sec. 13. If the agreement were ordered to be specifically performed the bondholders might, nevertheless, immediately apply for a receiver, which would in effect annul it, and under such circumstances specific performance should not be ordered. *Fry* on Specific Performance, 2nd ed., secs. 72 and 385.

January 10, 1883. PROUDFOOT, J.—As it was admitted that if the votes of the registered bondholders that were rejected had been allowed to be counted, the agreement of the 13th May, 1881, would not have been ratified, and the plaintiffs in the first suit and the defendants in the second suit would be entitled to a decree, I shall first examine whether these bondholders had the right to vote.

That they had a right to be registered, has been determined by Wilson, C. J., in *Osler* v. *Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 506, and *Re Johnson and Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 535, and these being decisions of a Court of co-ordinate jurisdiction, and of a Judge of such long experience, I shall follow them without discussion. But it was contended that the right to be registered did not include the power to vote on such a question as the ratification of this agreement, but was limited to voting for directors; and that the registration gave power to the bondholders to be elected as directors.

The 31 Vict. ch. 40, sec. 21, which authorized the issue of bonds by the Toronto, Grey, and Bruce Railway Company, to the amount of $3,000,000, provided that in the event at any time of the interest upon the bonds remaining unpaid and owing, then at the next general annual meeting of the company all holders of bonds shall have and possess the

same rights and privileges, and qualifications for directors and for voting as are attached to shareholders, provided that the bonds and any transfers thereof shall have been first registered in the same manner as is provided for the registration of shares.

This section gives the power of voting at the next general annual meeting of the company. I should suppose that was intended to indicate the earliest period at which the bondholders might vote, but did not intend to require a new registration, so long as the interest remained unpaid. There does not seem to be anything to limit the matters on which they might vote to the election of directors. I think it gave them the power to vote on any subjects that properly came before a general annual meeting, and upon which shareholders might vote.

The 38 Vict. ch. 56, sec. 13, enacted that in the event of the interest remaining unpaid, then at the next general annual or special meeting, the holders of bonds shall have the same rights and privileges and qualifications for directors, and for voting as are attached to ordinary shareholders.

This 13th section extends the occasions on which the bondholders might vote to *special*, as well as to general annual meetings, and although directors might in certain events be voted for at special meetings, yet, as a general rule, the matters to be brought before special meetings comprise much more than the election of directors, involving questions of varied character arising upon emergencies occurring in the management and working of the road, and in negotiations for matters supposed to be for the benefit of the company, not occurring in the ordinary course of business. There is no limitation of the matters upon which the bondholders might vote, but everything properly before a special meeting would seem to be within their voting power, as well as in that of the shareholders.

The Act 44 Vict. ch. 74, sec. 14, which gives the power of entering into agreements with other companies, provides that assent thereto is to be given by at least two-thirds of

the *shareholders* present or represented by proxy at any meeting specially called for the purpose; but I apprehend that the words *shareholders* here must be interpreted to include all who could vote as shareholders could. The previous acts had given bondholders such power to vote at special meetings as was attached to shareholders upon all such matters as might be brought before such meetings, and it could not have been intended to deprive them of this power without an express prohibition. The bondholders besides were assured that they had the right to vote, and not only so, but they were permitted to vote if they were original owners or claiming under a registered title. This was the only objection (want of registration of intermediate transfers) made to votes of bondholders who had acquired their votes by delivery, and that has been held to be an ineffectual objection.

It was said not to be inequitable to confine the voting on such a matter strictly to shareholders, as the bondholders had the power to elect directors, and that it must be assumed that they had exercised it, and that it was their nominees who made the contract which was to be approved by the shareholders. I do not think it appeared that the bondholders had elected the directors, but if they had they had a right to assume that their directors would be impartial and see that their interests were not sacrificed through any partizan determination of the directors. When that was found to exist, as there is no doubt it did exist in this case, when the president and those acting with him were determined at all hazards to carry out an arrangement on which they had set their hearts, and without regard to the wishes of the bondholders, who were more interested in the road than the shareholders, there could be nothing more unjust and inequitable than to prevent the expression of their wishes, and deprive them of any voice in the disposition of the property: *Morawetz* on Corporations, sec. 243.

Having come to this conclusion, it is unnecessary to consider the other questions that were argued.

I think the plaintiffs in the first suit entitled to a declaration that the agreement of 13th May, 1881, has not been properly confirmed, with costs; and that the bill in the second suit for specific performance of that agreement be dismissed, with costs.

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[CHANCERY DIVISION.]

## THE MERIDEN SILVER COMPANY V. LEE AND CHILLAS.

*Fraudulent preference—Pressure—Collusion—R. S. O.* 118.

Where certain persons who were liable as endorsers of certain promissory notes not yet due, knowing the maker's insolvent circumstances, under threat of suit, induced him to give a cognovit actionem, whereon they entered judgment and issued execution,

*Held*, not such pressure as exempted the cognovit and subsequent proceedings from being collusive, fraudulent, and void within R. S. O. c. 118.

A mercantile firm obtained from their debtor promissory notes for the amount of his indebtedness which notes they endorsed to third parties: before the notes were due and while they were still outstanding in the hands of third parties they applied to the debtor to give a cognovit actionem, knowing at the time that he had recently given a chattel mortgage on his stock in trade and was hopelessly insolvent—and under threat of suit the debtor gave the cognovit, upon which judgment was entered and execution issued.

*Held*, a fraudulent preference and that the judgment and execution were fraudulent and void under R. S. O. c. 118.

*Held*, also, that the transaction could not be supported on the ground of pressure *Ex parte Hall*, 19 Ch. D. 580 followed.

THIS was an interpleader issue directed to be tried to determine the validity of an execution by Lee & Chillas as against subsequent executions by the Meriden Silver Co. and others.

The issue came on to be tried before the Chancellor, at Toronto, on the 1st and 2nd December, 1882.

It appeared from the evidence that Lee & Chillas were creditors of Leamington Atkinson, who carried on business as a jeweller at Newmarket: that they had learned that Atkinson had executed a chattel mortgage to one of his creditors on the 30th March, 1882, upon all his stock in

trade, and that they knew that he was in a hopeless state of insolvency.

On the 4th April, 1882, they applied to him for security for his indebtedness, and finally, under threat of suit, induced him to give a *cognovit actionem*.

At the time the *cognovit* was given, Lee & Chillas were liable as endorsers on three notes made by Atkinson—one due 18th April, 1882, for $367.59; one for $144.92, due 9th June, 1882; one for $104.11, due 26th May, 1882; one for $224.22, due 16th June, 1882. All the notes were then in the hands of a bank, under discount, and were subsequently taken up by Lee & Chillas. Lee & Chillas were also the holders of a bill of exchange for $100.38, due April 7th, 1882.

Judgment was entered on the *cognovit* on the 6th April, 1882, and on the 11th April, 1882, Lee & Chillas's execution was delivered to the sheriff. The execution of the Meriden Silver Company was delivered to the sheriff on the 23rd May, 1882.

It also appeared that the defendant Lee, when applying to the debtor to execute the *cognovit*, had asked him to name a solicitor before whom he would execute it, and that the latter had said he would prefer a Mr. Robertson: that Lee and the debtor Atkinson then went to Mr. Robertson, who explained to him the nature of the *cognovit* and attested its execution, but made no enquiry into the circumstances under which it was being given.

Mr. Robertson's fees were paid by Lee & Chillas, and afterwards debited by them in their books against Atkinson.

After Lee & Chillas's judgment and execution, but before the Meriden Silver Co.'s execution was delivered to the sheriff, Atkinson, the debtor, made an assignment for the benefit of creditors.

*D. McCarthy*, Q.C., for the plaintiffs. The *cognovit* was given under circumstances which cannot stand. I refer to the common law rule 26, and note *j* to that rule, in *Harrison's* C. L. P. Act.

THE CHANCELLOR.—Is that an objection that a third party can take advantage of?

*D. McCarthy*, Q.C. I submit that it is. If this were a mere irregularity, no doubt a third party could not object, nor if it were void. Here I contend that the judgment is a fraud upon the Court, and therefore any person may object to it. The rule of Court requires not merely an attorney to attend and explain the nature of the instrument, but that the attorney should be a person in whom the person executing the *cognovit* had confidence, and who would inquire into the circumstances under which it was being given, and advise him. Here, at the time the *cognovit* was given, no part of the debt for which it was given was actually due. Had the attorney known this, it would have been his duty to advise his client that he was under no obligation to execute it. But he did not: he was, in effect, the appointee of the creditor, by whom he was paid; and although in his books the creditor has debited the fees to his debtor, that does not alter the fact. But, apart from this, I submit the judgment ought not to be allowed to stand. At the time the *cognovit* was given Lee was not a creditor: he was merely the indorser of notes outstanding in the hands of third parties, and the bill of exchange was not due. The *cognovit* provided for entry of judgment forthwith. No part of the debt was then, in fact, due. This was a collusive judgment within the meaning of R. S. O. c. 118; *White* v. *Lord*, 13 C. P. 289. This transaction was a fraudulent preference, and cannot be supported on the ground of pressure: *Ex parte Hall*, L. R. 19 Ch. D. 580.

*J. Roaf*, for the defendants. There was a sufficient nomination of the attorney by the debtor. He was asked who was his solicitor and who he would prefer to see him execute the *cognovit*. He himself named Mr. Robertson, and, in pursuance of this nomination the parties went to Mr. Robertson. He referred to the cases collected in note *k* to rule 26, in *Harrison's* C. L. P. Act. The payment of the costs by Lee does not affect the question: the *cognovit* expressly pro-

vided that the debtor should pay them. The fact that the creditor was merely in the position of a surety for a debt not then payable, at the time the *cognovit* was given, does not invalidate it. *Swayne* v. *Ruttan*, 6 C. P. 399, shews that it is merely a question of whether or not the transaction was *bonâ fide*. I also refer to *Parker* v. *Roberts*, 3 U. C. R. 114. The judgment may be supported on the ground of pressure: *Campbell* v. *Barry*, 31 U. C. R. 279; *McWhirter* v. *Thorne*, 19 C. P. 302. I submit that the other execution creditors are not in a position to object to the validity of Lee's judgment: the objection is, that Lee's execution intercepts their own execution: see *Davis* v. *Wickson*, 1 O. R. 369; *Stuart* v. *Tremaine*, 2 C. L. T. 549. No benefit is going to result to the Meriden Co. and other creditors from removing the Lee execution. Here, if Lee's execution were removed, the judgment for the general benefit of creditors would prevail, and not the subsequent executions: *Ferrie* v. *Cleghorn*, 19 U. C. R. 241; *Surr* v. *Waddell*, 24 U. C. R. 165.

*D. McCarthy*, Q. C., in reply. *Swayne* v. *Ruttan* and *Parker* v. *Roberts* were decisions under the common law, and before the statute R. S. O. c. 118, and therefore have no application. *Ex parte Reader*, L. R. 20 Eq. 763, is applicable. There must be *bonâ fide* conduct on the part of the creditor. Here, the creditor knew that the debtor had made a chattel mortgage, and was in a hopeless state of insolvency, and told him so.

December 6, 1882. BOYD, C.—There is nothing in the facts of this case to support the confession of judgment, unless the doctrine of pressure avails, as argued by the defendants.

It is very clearly proved that the debtor was insolvent, unable to pay his debts, and *that* to the knowledge of the creditor. He had just executed to another creditor a chattel mortgage, covering the whole of his stock-in-trade (with some small exceptions, not discovered, however, till after litigation had arisen), and had nothing in the way of

security to offer except the equity of redemption of house and lot, which were mortgaged to about their value. The creditor demanded a confession of judgment, or, as he said, he would shut him up. The debtor assented to the demand, and it was given the same day.

As a matter of fact, no part of the creditors' claim was due and payable. The notes by which it was represented had been discounted and were in the hands of the bank, and the first of the number was not payable till three days after the date of the confession, and one day after judgment was signed thereon. This is a material element to be taken into account: *Strachan* v. *Barton*, 11 Ex. 647. Another is the fact that both parties knew that the state of the debtor was financially hopeless. The creditor clearly recognized this, and put it very pointedly to the debtor that such was the case. The pressure in such circumstances resolves itself into this: that the creditor suggested an evasion of the policy of the law which would enable him to obtain priority and preference over the other creditors, and the debtor acquiesced in and adopted that suggestion.

This is, to my mind, a joint act of such a character as to come within the term "collusion," used in the statute: R. S. O. c. 118, sec. 1. The manner in which the confession was given, and the employment of the solicitor, all indicate that both parties were acting in concert. Collusion usually imports a secret agreement for a fraudulent purpose: *Batterbury* v. *Vyse*, 2 H. & C. at p. 46, and *White* v. *Lord*, 13 C. P. at p. 292; although it would appear from the language of Bramwell, B., in *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. at p. 337, that the fraudulent or unlawful character of the agreement is not of the essence of its meaning. The facts of this case also bring it within the language of Jessel, M. R., in *Ex parte Hall*, L. R. 19 Chy. D. 585. He says: "It is plain that it was the voluntary act of the bankrupt. It appears to me that it would be absurd to call it pressure. A man says to his creditor: "I am about to become bankrupt, or I shall stop payment in a week;" the creditor says: 'Pay me my debt, or I will sue you for it.' Can

that be called *bonâ fide* pressure by the creditor? * * Of course it would be an entirely different matter if the creditor did not know the state of his debtor's affairs."

The issue is found for the plaintiffs; and this all the more readily because the goods seized under defendants' executions will thus be intercepted by the assignment for the benefit of all creditors, and so be ratably distributed.

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[CHANCERY DIVISION.]

## RE WOODHALL—GARBUTT V. HEWSON ET AL.

*Administration—Reckless litigation—Costs.*

When it appeared that administration proceedings had been instituted without any shew of reason, or proper foundation for the benefit of the estate, and that they had not, in their results, conduced to that benefit, the decision of Proudfoot, J., ordering the plaintiff to pay the costs of all parties, was affirmed in appeal.

THIS was an appeal from the order of Proudfoot, J., made on further directions in the above administration proceedings.

The proceedings were instituted on March 18th, 1881, by motion of one Susannah Garbutt, one of the residuary legatees named in the will of William Woodhall, deceased, under the following circumstances:

By his will the testator gave and devised to his executors certain lands in trust for certain of his grandchildren, nine in all, in equal shares, and proceeded as follows: "And should my executors be unable to make a satisfactory division thereof among them," (the said grand-children,) "I authorize and empower my said executors to sell and dispose of the said lands as soon as they may deem best after my decease, and divide the proceeds equally among the said last-named grand-children, retaining the shares of those who are not of age, and investing the same for their benefit until they arrive at twenty-one years of age, when

the same is to be paid over to them." Then, after making certain devises and bequests, the testator gave and bequeathed the residue of his property to the said grandchildren, share and share alike.

It appeared that the executors disposed of the real estate, and got in the personal. The lands were sold from time to time, as opportunity offered, and mortgages taken back from the purchasers. As the executors became possessed of the proceeds from time to time, they made division. In April, 1879, the accounts were passed before the Surrogate Court, and found correct. The present plaintiff, however, though duly notified, did not attend these proceedings in the Surrogate Court. Before this time the executors had made two distributions, retaining in their hands the shares belonging to those of the grandchildren who were infants, in the shape of mortgages. In November, 1879, the plaintiff served a notice on the executors, asking for an account. Nothing, however, was done. On March 6th, 1880, another demand on the executors was made requiring them to wind up the estate; and again a third, in February, 1881. It was also shewn that the executors, at the time of making a payment to the plaintiff, had told her that she would get no more till the youngest child attained 21. It appeared, however, that after this, another payment was made to her by the executors.

The defendants to the present proceedings, some of whom were infants, were the executors under the will, and the above named grandchildren, other than the plaintiff. It appeared from the affidavits of the said grandchildren that they were all opposed to these proceedings, and were satisfied with the conduct of the executors.

By her affidavit the plaintiff stated that the executors had accepted the trusts reposed in them by the said will, and had sold all the testator's real estate other than that specially devised, and, as she was informed and believed, made certain investments out of the proceeds thereof: that she was entitled to a portion of the proceeds of certain

of the real estate mentioned in the said will, and that she believed she had not been paid the full amount to which she was entitled: that she was one of the residuary legatees mentioned in the will, but could not say how much, if any, had been paid to her on account of her share of sach residue: that the said executors and trustees had not wound up the said estate, although more than five years had elapsed since the decease of the said testator: that she had frequently applied to the said executors for an account of their dealings and transactions with the said estate, but they had neglected and refused to fully inform her as to the position of the said estate and as to her share thereof: that she was informed and believed that all the debts of the said testator had been long since paid by the said executors, and that they had a large sum of money in their hands available for distribution amongst herself and the other beneficiaries under the will of the said testator.

By his report, dated April 19th, 1882, the Master found that the personal estate of the testator which came into the hands of the executors, wherewith they were chargeable, amounted to $32,030.98: that the rents and profits of the real estate received by the executors, and with which they were chargeable, amounted to $2,065.16: that the executors had sold all the real estate over which they had power of disposal, pursuant to the will: that each of the adult persons entitled under the trusts of the will had been paid $2,617 thereunder, and each of the said persons named as infant defendants was entitled under the will to have a corresponding sum with interest laid aside for such infant previous to distribution of the estate, which sum, with interest at six per. cent., compounded annually, amounted to $3,231.38 for each; and that, deducting the costs, as in the report computed, and the sums of which the said infant defendants were entitled, from the sum found to be due from the executors, left the sum of $1,303.24 to be distributed among the residuary legatees named in the will.

The rest of the material facts are stated in the judgment of Boyd, C.

On May 22nd, 1882, on application by the plaintiff to confirm the Master's report, and for payment of amount pursuant thereto, Proudfoot, J., directed that the plaintiff should be deprived of her share of the costs, and should pay the defendants' costs, on the ground that the proceedings were a reckless plunging into litigation.

The present motion, by way of appeal from the above order, was heard before Boyd, C., and Ferguson, J., on June 10th, 1882.

*H. P. Sheppard*, for the adult defendants, took the preliminary objection that this was an appeal for costs only.

*E. Stonehouse*, for the plaintiff. A residuary legatee is entitled to have a statement of account delivered to him by the executors on application. The plaintiff here was a residuary legatee, and also a legatee of a special legacy. Moreover the infants have been benefited, because the Master in computing their share has allowed them compound interest. The plaintiff had no means of knowing what was coming to her. The executors refused to tell her, and they told her she would get no more until the youngest child attained the age of 21. The plaintiff has been misled by the executors not investing the money for the infants at the time they should have done.

[BOYD, C.—It was no benefit to you that compound interest was ordered to be paid.]

Again, these proceedings benefited the estate by bringing it to a close.

[BOYD, C.—But the report does not contain findings to justify all this. There should have been an appeal from the report.]

The executors did not proceed with due diligence to press matters forward and settle the estate up, as they should have done: *Jarvis* v. *Crawford*, 21 Gr. 1. He also cited *Farrow* v. *Austin*, L. R. 18 Ch. D. 58; *Taylor & Ew.* Jud. Act p. 256, 264, 266, Ch. O. 643.

[BOYD, C.—This does not throw any light on whether the executors were blameworthy for not proceeding to sell sooner.]

*J. Hoskins*, Q.C., for the infant defendants. The result of these proceedings has been that the estate has been put to the expense of from $400 to $500 in order to ascertain that the plaintiff was entitled to $144.

[BOYD, C.—But were the executors justified in selling and taking mortgages, so as to postpone the distribution of the plaintiff's share?]

There is nothing to shew this was postponed. There is nothing shewing any benefit resulting to the parties from these proceedings. This is the critical point. The mortgages have had to be realized at a loss, for they could not be divided up with advantage. The authorities are very plain: *Morgan and Davey*, p. 114 states the exceptions to the general rule of allowing costs out of the estate: See also *Bartlett* v. *Wood*, 9 W. R. 817.

[BOYD, C.—The only thing is, the plaintiff gets her share sooner than she would have done.]

[FERGUSON, J., referred to *Clayton* v. *Clarke*, 1 W. R. 718.]

But why should we suffer for that? The parties before the institution of this suit had all they were entitled to except $114. The report shews this. Parties should not rush into Court without good grounds: *McKenzie* v. *Taylor*, 7 Beav. 467; and even if a plaintiff succeeds, yet if his proceedings are vexatious he is not entitled to get costs: *Millington* v. *Fox*, 3 My. & Cr. 338; *Sullivan* v. *Bevan*, 20 Bea. 399; *Parsill* v. *Kennedy*, 22 Gr. 417; *Rosebatch* v. *Parry*, 27 Gr. 193. We were not bound to furnish a copy of the accounts without payment for such copy being tendered: *Ottley* v. *Gilby*, 8 Bea. 602. This was a wicked application, and should be condemned in the strongest language. It was bringing the Court into ill repute. The plaintiff should not only be deprived of his costs, but should pay the additional costs we have been put to. The executors have done their duty diligently and prudently, and have very improperly been brought here. There has been a case, though unreported, where, under much the same circumstances as these, the solicitor has been ordered to pay the costs.

[BOYD, C.—There was a case of that kind at Ottawa in which a solicitor was ordered to pay the costs, though I doubted the jurisdiction.]

*H. P. Sheppard.*—I refer to *Taylor* v. *Dowlen*, L. R. 4 Ch. 697, and to *Taylor* v. *Popham*, 15 Ves. 78, as to there bring no appeal for costs.

*E. Stonehouse*, in reply. The best answer to the charge that this suit was brought recklessly is the demands served on the executors. The executors could have calculated and told the plaintiff the amount of her share and promised payment of it. It is true the report appears defective, but the Master refused to report differently.

June 29, 1882. BOYD, C.—This is an administration proceeding instituted by one residuary legatee against the desire of other six of the same class, who are adults, and in which the plaintiff's claim to costs is opposed by the executors, two infant residuary legatees, and the others, who objected to the proceedings at the outset. The aggregate of the estate was some $32,000. It has all been realized, and distribution was made before suit to all the adults; so that only a small balance is found payable to them each of $144, as the last dividend. The shares of the infants have been safely invested, and no objection arises on this score. Some complaints were made against the conduct of the executors in the affidavits, but none of them appear to be substantiated. Their accounts were passed before the Surrogate Court in April, 1879, and are altogether found by the Master to be correct. In November, 1879, the plaintiff served a demand on the executors for an account in detail of their dealings, but not offering to pay the expense of it. In March, 1880, another demand was served requiring the executors to wind up and distribute the estate; and again a similar demand in February, 1881. There was no evidence of a refusal to exhibit the account on the part of the executors. The plaintiff, in one of her affidavits, gives as a reason for taking proceedings, that the executor told her, when he paid a dividend of $150, that

there was a little more money coming to her, but that no more would be paid out to her till the youngest child came of age, and that she could make the best of it. From the account it appears that this payment of $150 was made in October, 1880, and subsequently to this, in February, 1881, another dividend was paid her of $220. And in the executor's affidavit of 10th March, 1881, he states that he is ready and willing to distribute [the balance] as soon as sufficient moneys come in to make a division.

I think the decision complained of, requiring the plaintiff to pay the costs, is well founded. No case is made out to onerate the executors personally with the costs. They have acted fairly and properly throughout. Then the costs should not be given out of the estate unless it appears that the litigation has been, in its origin, directed with some shew of reason and a proper foundation for the benefit of the estate, or has, in its result, conduced to that benefit: Westbury, C., in *Bartlett* v. *Wood*, 9 W. R. 817. No benefit is shewn to anyone by this proceeding, as the same result would have been secured without suit if the plaintiff had not acted so precipitately; and it is taken against the will of all the adults, who may well complain if their shares are lessened to pay the plaintiff's costs. The litigation has been caused by the plaintiff, and the expense to which the other parties have been put should be paid by her, according to the rules laid down in *Mackenzie* v. *Taylor*, 7 Beav. 467, as explained in *Hilliard* v. *Fulford*, L. R. 4 Ch. D. 389, and *Rosebatch* v. *Parry*, 27 Gr. 193.

*Farrow* v. *Austin*, L. R. 18 Ch. D. 58, decides that this question of the residuary legatees' costs is an appealable matter.

If no moneys can be made out of the plaintiff, the infants' costs should be paid out of the fund coming to them.

The order complained of will be affirmed, with costs. (*a*)

FERGUSON, J., concurred.

(*a*) See *Croggan* v. *Allan*, L. R. 22 Ch. D. 101.—Rep.

[COMMON PLEAS DIVISION.]

## THE CORPORATION OF THE TOWN OF DUNDAS V. GILMOUR ET AL.

*Trial of questions between defendant and third party—Delaying plaintiff—Rule* 112.

Under Rule 112, where in an action the plaintiff is entitled to recover against the defendant, against whom the action is brought, the defendant is precluded from trying questions arising between himself and a third party added at his instigation under rule 108, in the trial of which the plaintiff has no interest, and which has the effect of delaying the plaintiff in his recovery.

Defendants, sued by the plaintiffs for the amount due under a lease of a toll-gate, brought in W. as a defendant, alleging that an agreement to commute tolls payable by W. had been made by the plaintiffs, and claiming as a set off, the difference between such commutation and the tolls otherwise payable by W. This agreement having been disproved the parties proceeded to try the question as to the liability of W. to the original defendants, in which the plaintiffs had no interest, and judgment was given in favour of the original defendants.

*Held*, that such judgment must be set aside.

THIS was an action brought against William Gilmour, William Gilmour, the younger, and John Frederick, on a bond made by them for the payment of the rent due upon a lease of one of the toll gates belonging to the plaintiffs, leased to the defendant, William Gilmour, to recover the balance due by the defendant William Gilmour, under such lease. The defendants brought the defendant Webster before the Court under the provisions of the Judicature Act, Rule 108.

The cause was tried before Sinclair, Co. J., without a jury, at Hamilton, at the Fall Assizes of 1882.

The matter in dispute between the plaintiffs and the original defendants was, as to whether an agreement had been made between the plaintiffs and the defendant Webster, whereby they had agreed to commute the tolls payable by him for a certain fixed sum; and the original defendants claimed that if such was the case they should be allowed, as a set-off, the difference between the actual amount of tolls payable by him and such commutation, amounting to the sum of $222.54.

At the trial it was proved that no such agreement existed, and the learned Judge gave judgment for that sum, with costs against the original defendants.

The defendant Webster had been brought in under Rule 108, the original defendants asserting that if it was shewn that no agreement for commutation had been made they were entitled to a verdict against him for the said sum of $222.54.

At the trial, after the non-existence of any agreement between the plaintiffs and Webster had been settled, the parties as between the original defendants and Webster proceeded to try the question as to his liability under the provisions of Consol. Stat. C. ch. 28, sec. 84, and as to the amount of tolls due by him, matters in which the plaintiffs had no interest, and which had the effect of tying up their undoubted right to recover from the original defendants.

The learned Judge, at the trial, gave judgment in favour of the original defendants against Webster on both points, and directed judgment to be entered in their favour for the sum of $222.54.

During Michaelmas sittings of the Court, *E. Martin*, Q. C., on behalf of the defendant Webster, moved on notice, that the verdict rendered in favour of the defendants by original action against the said Joseph Webster by the learned Judge be set aside, and judgment entered for the defendant Webster as against the defendants by original action; or for a new trial as between these parties on the ground that the verdict is contrary to evidence, &c.

During Hilary sittings, February 6, 1883, *Martin*, Q.C., supported his motion.

*Victor Robertson*, contra.

The arguments and cases cited were directed to the mode of measurement to be pursued in ascertaining the distance between the property in question and the plaintiffs' line of road; but as the judgment proceeds on other grounds the arguments are not given.

March 9, 1883. GALT, J.—We regret to say that there

has been a great deal of expense improperly incurred in this case, and that the decision of the learned Judge directing judgment to be entered in favour of the original defendants against Webster must be set aside.

Webster was brought before the Court under the provisions of rule 108 of the Judicature Act, and a notice was served upon him, as therein provided, which, so far as any matter then in litigation between the plaintiffs and the original defendants in which he was interested might preclude him from subsequently disputing the right of the original defendants in any future action by them, as in this case, the existence or non-existence of an agreement to commute the tolls, but it gave no right to the original defendants to claim damages against him.

The case of *Treleven* v. *Bray*, referred to in 1 Ch. D. 176, but reported in 45 L. J. N. S. Ch. D. 113, is clear on this point.

Mellish, L. J. says: "The meaning of section 24, sub-sec. 3," (sec. 16, sub-sec. 4 Ontario Act) "was very carefully considered by the Judges. We came to the conclusion that it was not advisable to make any rules which would enable one defendant to obtain relief against his co-defendant without an independent action against him. We considered that we had power to do so, but we thought that it would be intolerable that a plaintiff who might have a good case against the original defendant should be compelled to wait for his remedy while the defendants were fighting *inter se*. The only object of the rules was, to bind the third party conclusively by the judgment given as between the plaintiff and the original defendant. But if he wants to get an indemnity or other relief against the third party he must bring an action of his own."

The wisdom of the learned Judges in the course they adopted is manifest in the present case. The action was simply to recover payment of a sum of money. The defence was an agreement made by the plaintiffs to commute with one Webster. This was the sole question between the original parties; but the defendants brought

in the defendant Webster, and seek now not only to settle the question of the agreement to commute, but also the amount of tolls due, and also as to whether Webster is or is not entitled as a matter of right to commute under the provisions of the statute, or to have the amount settled by arbitration, or by compensation, and in the meantime the proceedings of the plaintiffs are stayed, which is contrary to the express provsions of Rule 112, which orders that: "A plaintiff is not to be unnecessarily delayed in recovering his claim by reason of questions between defendants in which the plaintiff is not concerned; and the Court or Judge is to give such direction as may be necessary to prevent such delay of the plaintiff, where this can be done, on terms or otherwise, without injustice to the defendants."

Mr. Martin gave notice of motion notifying the defendants that the Court would be moved: "that the verdict rendered in favour of the defendants by original action against the said Joseph Webster by the learned Judge be set aside, and judgment entered for the defendant Webster, as against the defendants by original action, or for a new trial as between these parties, on the ground that the verdict is contrary to evidence," &c.

In the view which we take of the proceedings in this case we consider this motion should be made absolute to set aside the verdict against the said Joseph Webster, irrespective of the grounds taken by Mr. Martin; and we direct that the plaintiff be at liberty forthwith to enter judgment against the original defendants pursuant to the judgment of the learned Judge; and we direct that no further proceedings in this action be taken by the said defendants against the said Joseph Webster; and we direct that the said defendants do pay the costs of the said Joseph Webster; and we direct that the defendants be at liberty to take such proceedings as they may be advised against the said Joseph Webster, in which proceedings, of course, the said Joseph Webster will be concluded from averring the existence of any agreement between the present plaintiffs and himself for a commutation.

Having considered the question argued before us as to the mode of measurement to be pursued, I am prepared to express my own opinion upon it in order to avoid future litigation, but it forms no part of this judgment.

*Judgment accordingly.*

[COMMON PLEAS DIVISION.]

## REGINA v. GOODMAN AND WILSON.

*Criminal law—Committal on one charge, conviction on another—42 Vic. ch. 44 (D.)—Consent—Error.*

The prisoners were committed for trial on a charge of gambling on a railway train. On the case coming before the County Judge for trial, an indictment was preferred, under 42 Vic. ch. 44, sec. 3, D., for obtaining money by false pretences. The prisoners' counsel objected to the prisoners being tried on a different charge from that on which they had been committed. The objection was overruled, and the charge read over to the prisoners, and, on its being explained that they could be tried forthwith or remain in custody until the next sittings of Oyer and Terminer, &c., they pleaded not guilty, and said they were ready for trial. The case then proceeded, and the prisoners were convicted; no question being raised as to their having been tried without their consent, although their counsel took other objections to the proceedings. A writ of *habeas corpus* having been issued, and the prisoners' discharge moved for, on the ground of the absence of such consent:

*Held*, that the motion must be refused.

*Per* WILSON, C. J. It was unnecessary to decide whether the prisoners' remedy was by *habeas corpus* or writ of error, because, on the facts, they were not entitled to either remedy.

*Per* OSLER, J. The prisoners having been imprisoned under the conviction of a court of record, an objection of error in the proceedings must be by writ of error: the writ of *habeas corpus* was therefore improvidently issued, and should be quashed.

IN this case writs of habeas corpus and *certiorari* were granted, and on the return thereof an application was made herein to Mr. Justice Cameron for the discharge of the prisoners, on the ground that the County Court Judge who tried the case, did so not only without, but against the consent of the prisoners.

Mr. Justice Cameron decided that the proceeding should have been by writ of error, and so discharged the motion without entering into the merits of the case.

An appeal from such decision was thereupon made to this Court.

*T. S. Jarvis*, for the prisoners.

*Delamere*, for the Crown.

March 9, 1883. WILSON, C. J.—We are not called upon to decide whether in the present case the prisoners can proceed as they have done, or whether the only remedy is by writ of error, because the prisoners are not entitled upon the facts before us to take either of these remedies.

The facts are, the prosecutor, George Crawford, laid an information before the police magistrate at the town of Niagara Falls, in the county of Welland, for that the prisoners on the 19th of December, 1882, "in a certain railway car used as a public conveyance for passengers, upon the Great Western Division of the Grand Trunk Railway, between St. Catharines, in the county of Lincoln, and Niagara Falls, in the county of Welland, by means of the game commonly called 'three card monte,' did obtain from him, the said Carpenter, twenty dollars, the property of him, the said Carpenter, the said railway car running in the course of the journey during which the said offence was committed through the said town of Niagara Falls, contrary to the statute in that case made and provided."

An investigation was made into the charge by the police magistrate, when it appeared from the evidence that the prosecutor had not paid or lost the $20 by means of any game or gambling whatever; but that he lent the money to one of the prisoners, who were gambling together, or rather who pretended to be gambling, the one who borrowed the money pretending he had his money in the baggage car, and promising to repay it when they crossed the Suspension Bridge. The prisoners were committed to the County Gaol in the town of Welland upon the charge in the information contained.

The County Crown Attorney drew an indictment for obtaining money by false pretences under 42 Vic. ch. 44, sec. 3, D. which provides that "the County Attorney or Clerk of the Peace may, with the consent of the Judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried at a Court of General Sessions of the Peace other than the charge or charges for which he has been committed to gaol

for trial, although such charge or charges do not appear or are not mentioned in the depositions upon which the prisoner was so committed."

The Judge's notes returned on the *certiorari* shew the proceedings that were then taken on that indictment:

"Mr. Raymond moved for leave to prefer charges in his indictment under sec. 3, of 42 Vic. ch. 44, (1879.)

"Mr. Jarvis, for prisoners, objects, that the prisoners having been committed by Mr. Hill, Police Magistrate at Niagara Falls, on a charge of having obtained money from the prosecutor Carpenter by means of the game of three card monte, they cannot now be tried on this indictment. Objections over-ruled and leave granted to prefer charges as in indictment. Mr. Jarvis did not ask for a postponement to enable him to meet the charges as now made, and said he would go on. I informed him that I would grant a postponement if asked for. The indictment being read the prisoners plead not guilty, and said they were ready for trial."

At the foot of the indictment the following note is made and signed by the County Court Judge: "E. W. Wilson and John Goodman above named, upon the above charge being read to them by the Judge in open Court, and being informed by the Judge that they have their option either of being forthwith tried without the intervention of a jury upon the said charges, or of remaining untried until the next sittings of the Court of Oyer and Terminer and General Gaol Delivery of the County, consent to be now tried upon the said charge by the said Judge without a jury, and the prisoners plead not guilty to the said charge."

The cause was then tried, and the prisoners' counsel cross-examined the Crown witnesses, and at the close of the evidence took several objections to the proceedings, but made no objection to the cause being or having been tried by the Judge without their consent and without a jury.

The Judge over-ruled the objections, and sentenced the prisoners to twelve months' imprisonment.

It is now argued by the prisoners' counsel that the

Judge tried the case not only without, but against the consent of the prisoners, and that he is at liberty to shew that upon this motion.

If the facts above stated are true, and we presume they are, it is clear the prisoners, if they can aver matters of fact against the proceedings of a Court of record after judgment, either on error or on *habeas corpus*, can make nothing by suggestion or assignment of the matter of fact upon which they rely, because the prisoners' counsel did not object to the prisoners being tried by the Judge without a jury, but objected that as they had "been committed on a charge of having obtained money from the prosecutor by means of the game of three card monte, they cannot now be tried on this indictment:" that is, they must be tried upon the charge upon which they were committed, and upon no other, and that the Judge had not the *power* to alter the charge. But that is the very *power* which the Act of 1879 has conferred upon the Judge. There was no objection that the charge, whether the original or the substituted one, could not be tried by the Judge because the prisoners would not consent to be tried without a jury. On the contrary, when the Judge decided he had the *power* to try upon the new charge, the prisoners consented to be tried upon it, and said they were ready for their trial, and pleaded not guilty, and so assented to and submitted to the jurisdiction of "The County Judge's Criminal Court."

These are the facts submitted, and they are opposed to the case and contention of the prisoners.

We have looked into many cases upon the subject, but it is not necessary to refer to them, as they are of no use upon the facts which have been returned upon the *certiorari*.

We dispose of the motion upon the ground that the objection is disproved by the proceedings which have been filed to maintain it.

We discharge the application, and remand the prisoners to the custody of the keeper of the central prison. Or, as the said prisoners have not been actually brought into

Court, we direct that they be detained in the custody in which they now are, upon and in pursuance of the terms of their original commitment to the said central prison.

OSLER, J.—I think the appeal should be dismissed for the reasons given by the learned Judge, whose judgment is appealed from, in the case of *Regina* v. *St. Denis*, 8 P. R. 16. The defendants are imprisoned under the conviction and sentence of a Court of Record. If the proceedings are erroneous, the proper way to object to them is by writ of error. They cannot be enquired into upon the return to the writ of *habeas corpus*, which was granted *improvide*, and must be quashed and the prisoners remanded.

GALT, J., concurred.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## ADAMS AND THE CORPORATION OF THE TOWNSHIP OF EAST WHITBY.

*Closing travelled road—Other convenient access to roads—Onus of proof—Dedication.*

The power of a municipal council to close up a road under section 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed.

The onus of shewing that another convenient road is open to the applicant is upon the corporation.

The corporation of East Whitby by by-law closed up an old travelled road, whereby the applicant was shut out from ingress to his lands except by a short road leading to the original road allowance, which was now for the first time opened. For some years prior to 1844 the short road was used as a private road for the convenience of persons going to one F.'s place, mills, brewery, and distillery. In 1844 F. conveyed the land on each side of it to his son and son-in-law, but no mention was made of it in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road might be closed up. F. replied that they would still have the short road leading to the road allowance, which would still be opened if the old travelled road were closed.

*Held*, that the latter statement, in connection with the facts of the former user of the road, and of its not having been disposed of when F. disposed of the lands on each side thereof sufficiently shewed the intention to dedicate the short road to the public: that the applicant had therefore another convenient way to his lands, and that the by-law should not be quashed; but, under the circumstances, without costs.

THIS was a motion, on behalf of one Joshua Adams, to quash By-law number 366, passed 23rd October, 1882, to close up part of the old travelled road on lots 2 and 3, in the first concession of the township of East Whitby, on the ground that if such part was closed the applicant would be excluded from ingress and egress to and from the lands over said road, and the council had not provided for his use any other convenient road, or any way of access to his said lands.

*Robinson*, Q. C., and *Dow*, supported the order *nisi*.

*Kerr*, Q. C., and *Farewell*, shewed cause.

May 1, 1882. OSLER, J.—The 504th section of the Municipal Act enacts that no council shall close up any public road or highway, whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence.

In *Re Thurston and Verulam*, 25 C. P. 593, the question was, whether the substituted road or way of access which the council had provided in lieu of that which had been closed by the by-law was a convenient one in fact, the applicant contending that it was a bad and dangerous road, and the council that it was a good and passable one. Wilson, C. J., said: "I do not think a by-law must be set aside, because no provision is made in it for compensation to, and provision by some other convenient road made for, those whose ingress and egress to and from their lands will be interrupted by the change. The compensation may be made in money or by some other means outside of the by-law. So, a way, as a convenient road, may be already in existence and use, so that no further access has to be provided; or another by-law may, if necessary, be passed for the purpose."

This construction of the section was substantially followed and elaborated by the Court of Appeal, in the case of *McArthur* and *Southwold*, 3 A. R. 295.

Clearly the council have no power to close a road such as the one in question, which is for all practical purposes the only one by which the applicant has access to his lands and residence, unless there is another convenient road or way of access already in existence, or unless by that by-law or by another by-law passed at the same time, or at all events before the time fixed for closing the road, or moving to set aside the former by-law, some other convenient road or way of access is provided for the land owner. The power of the council to close the road is a conditional one only, and if the conditions necessary to its

exercise do not exist, any by-law under which they attempt to act may be quashed. There is nothing in either of the cases I have cited to the contrary.

By the by-law moved against the applicant is, as he contends, practically excluded from ingress and egress to and from his lands and place of residence over the road intended to be closed, and the only question is, whether there is not already in existence another convenient road or way of access open to him, which warranted the council in passing the by-law without making any special provision on the subject.

On the part of the council it is contended that there is a short straight road of some three or four chains in length, leading directly from that part of the old road which has not been closed, at a place between five and six chains southerly of where the lands of the applicant abut thereon, to the original road allowance, now for the first time opened by the by-law. It is said that this short road was, in fact, expressly dedicated to the public by the former owner of the land, one Aikens Moody Farewell, or, if not expressly dedicated, that it has acquired the character of a highway by long user as such, acquiesced in by the owner.

If there is such a road (which is denied), the by-law cannot be complained of, as it undoubtedly affords the applicant a sufficiently convenient road or way of access to his lands, and in that case any special loss or inconvenience he may suffer by closing the old road is matter for compensation merely.

The onus of proving that there was a dedication of the road rests upon the corporation. A great number of affidavits and depositions in answer and reply have been filed. Most of them have nothing to do with the real point in dispute, but relate to the comparative merits and convenience of the old road and the new one.

In *Dunlop* v. *The Township of York*, 16 Grant 216, Spragge, C., said, at p. 222: "In a new country like Canada it would never do to admit user by the public too

readily as evidence of an intention to dedicate. Such user is very generally permissive and allowed in a neighbourly spirit, by reason of access to market or from one part of a township to another being more easy than by the regular line of road. Such user may go on for a number of years with nothing further from the mind of the owner of the land or the mind of those using it as a line of road, than that the rights of the owner should be thereby affected."

So in *The Queen* v. *Plunket*, 21 U. C. R., Sir J. B. Robinson, C. J., says, at p. 540: "We must have some regard to what has been the usual course of things in this country, for that bears materially on the question of the intention to dedicate."

See also *Grand Hotel Co.* v. *Cross*, 44 U. C. R. 153.

From the evidence before me I am of opinion that the short road had not acquired the character of a public highway up to the year 1844. It was then, and had been for many years previously, the easterly terminus of a road or track leading from lot No. 4 across lot No. 3 into the old travelled road, now in part closed by the by-law, the user of which appears to have been confined to the owner of those lots, one William Farewell, and of persons having occasion to resort to his distillery, brewery, and mills on lot No. 4, and the grist mill of his brother, A. M. Farewell, on lot No. 2. It was not a thoroughfare to, and did not lead into, any other open and public highway, a circumstance material to be looked at in considering whether there was in fact an *animus dedicandi*, or a mere license to a particular person or class of persons, although by no means conclusive, inasmuch as there may be a public highway which is not a thoroughfare: *Bateman* v. *Black*, 21 L. J., Q. B. 406; *Bailey* v. *Jamisoa*, L. R. 1 C. P. D. 329; *Regina* v. *Spence*, 11 U. C. R. 31.

It was of no defined width, and that part of it on lot No. 2, which is the short road in question, was not different in character or appearance from the rest. The evidence adduced to establish the existence of what I have called the short road as a highway at the date I have referred to

applies with as much force to the other part of the road over lots No. 3 and 4, which it is plain the owner, William Farewell, never for a moment supposed he was dedicating as a public highway, and which ceased to be used when the distillery and brewery, &c., were no longer in operation and the little settlement which had sprung up about them on William Farewell's land had disappeared.

I do not find in the evidence that at the time I am speaking of any persons other than Farewell had acquired interests in lots 3 and 4, who might have had a right to use the road on his land. At all events, when lot 3 was sold to John Mothersell, in 1852, it was not supposed, and it is not now and never has been asserted, that any public highway or continuation of that road existed on either of the lots 3 and 4.

The most that can be said of the short road at this time I think is, that A. M. Farewell may have permitted his brother William Farewell, as the owner of lots 3 and 4, and subsequently his nephew Cornwall Farewell, who afterwards sold lot No. 3 to J. Mothersell, to acquire an easement or private right of way over it as a means of ingress or egress to and from his farm to the old travelled road, so long as the original road allowance was not opened.

Something has been said of the short road having been used as a means of approach to a school house on the south side of it. The evidence as to this is very indefinite, it rather appearing that the school house stood in an open space accessible from all sides, and not specially by means of this road.

If indeed it could have been shewn that A. M. Farewell had conveyed any part of his land on lot 2 fronting on the road for school purposes, that might have been a circumstance to shew that he intended to dedicate the road to the public. All that appears is that school was taught in a house on his land which was afterwards used as a dwelling house, and which for aught that is shewn has always belonged to him.

The fact that no public money or statute labour was

ever expended on any part of this road is, in the circumstances, strongly against the fact of dedication: *Davis* v. *Stephens*, 7 C. & P. 571; *Shelford* on Railways, p. 23, 3rd ed., 1865; *Regina* v. *Yorkville*, 22 C. P. 431.

I think then that the evidence rather shews that up to the year 1844, at all events, the owner of lot 2 meant only to give to the owner of lots 3 and 4 for himself, and persons dealing with him or having occasion to go to those lots, permission to use the short road as a means of access thereto from the old travelled road, than that he had any intention of dedicating it to the public.

Such a permission, limited to a particular class of persons, a part only of the public, would not create a public highway: *Barraclough* v. *Johnson*, 8 A. & E. 99; *Park* v. *Huskinson*, 11 M. & W. 827.

Then has anything occurred since to alter the character of the short road and convert it into a public highway? There is nothing to prevent the owner of the soil from dedicating it to the public as a highway, though originally there may have been nothing but a private way or occupation road over it: *Regina* v. *Bradfield*, L. R. 9 Q. B. 552.

In 1844 A. M. Farewell conveyed the north part of lot number 2 to his son-in-law Reuben Hudson, and the south part to his son Isaac Farewell. From the courses and descriptions of the property comprised in the deeds, it appears that a strip of land one chain wide, corresponding in length and position to the short road, lies between the two parcels conveyed. No reference is made to it in either of the deeds, either as being a road or way, or as bounding either of the parcels: *The Queen* v. *Donaldson*, 24 C. P. 148.

It is simply a piece of land undisposed of, and is said to have been the only part of the lot which A. M. Farewell had not then conveyed.

If the original road allowance had then been open this action on A. M. Farewell's part, taken in connection with even a slight subsequent user of the way, would have been evidence of an intention to dedicate it to the public, on

the principle stated by Lord Ellenborough in *Rex* v. *Lloyd*, 1 Camp. 260: "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public."

But in the then existing state of things such a presumption would not necessarily arise merely from the fact that this strip of land then used for a private way was left unsold and open. The road allowance had not been opened, nor did it appear probable that it ever would be, and there would therefore be no reason to presume that A. M. Farewell intended to do more than to leave the strip in question as a private way for the owners of lots 3 and 4 as they had been accustomed to use it.

Still the fact is an equivocal one, and but little further evidence of the owner's intention to dedicate the land to the public would be sufficient.

Mrs. Maria Scott deposes that after her husband bought from Hudson a part of the land now owned by Leonard (which adjoins the applicant's land), some dispute arose as to Farewell's title to the land he had sold Hudson, and it was said that the old travelled road might be closed up. Mrs. Scott and her husband thereupon saw A. M. Farewell about it, and he told them that his title was all right, and that if this old travelled road should be closed the short road to the road allowance would still be open and could not be closed up, and if the old travelled road was closed up the road allowance would be opened up, and they would have a way out that way.

This statement is not impeached in any way, and is entirely consistent with the rest of the evidence, and I therefore see no reason for not accepting and acting upon it. I think that, taken in connection with the facts of the former user of the road and of its non-conveyance by Farewell when selling the adjoining lands to Hudson and Isaac Farewell, it fairly establishes the fact of A. M.

Farewell's intention to dedicate the road to the use of the public.

The applicant, therefore, in my opinion, fails to make out a sufficient case for quashing the by-law. I have not, in arriving at this conclusion, at all considered a conviction (said to be among the papers handed in) of one Mothersell for an alleged obstruction of the road in question, and made while this motion was pending. Even if it was regularly obtained, as to which I express no opinion, I think it not evidence against the applicant.

I give no costs because I think it was not unreasonable that the council should be compelled to prove the existence of and to accept the road in question as a public road, with all the responsibility which it entails upon them as such. The whole of this litigation might have been avoided, if they had chosen to assume the road by by-law, or to acquire the land from the heirs of Farewell, if they had any doubt of the existence of the road.

*Rule discharged, without costs.*

[QUEEN'S BENCH DIVISION.]

## THE FIRE INSURANCE ASSOCIATION (LIMITED) AND THE DOMINION FIRE AND MARINE INSURANCE COMPANY V. THE CANADA FIRE AND MARINE INSURANCE COMPANY.

*Re-insurance—Statutory conditions—Chattel mortgage.*

The Dominion Insurance Company insured one H. against loss by fire to the amount of $5,000, and under a contract of re-insurance made between the defendants and the Dominion Company, the latter company re-insured $2,500 with the defendants. Subsequently the Dominion Company entered into an agreement with the Fire Association, whereby, after reciting that the Dominion Company desired to be relieved from and guaranteed against loss on existing risks, and that the Fire Association had agreed to do so and to re-insure said risks, the company transferred all their business and the good will thereof to the association, who thereby re-insured all the existing risks, subject to the terms of the policies, &c.; the association to take and accept all re-insurances made with other companies, with power to use the company's name. A loss occurred on H.'s policy which was adjusted and paid by the association. In an action against the defendants to recover the amount of the re-insurance:

*Held*, that the defendants could not escape liability for either one or the other of the plaintiffs was entitled to recover; and that there was nothing in an objection raised as to double indemnity.

*Held*, also, that the statutory conditions could not be imported into and read with either the agreement between the plaintiffs, or that between the Dominion Company and the defendants.

*Held*, also, that the defendants' contract of re-insurance did not prevent the plaintiffs from assenting to any reasonable and proper waiver of conditions made in good faith, and not shewn to influence the loss or increase the burden of the re-insurers: and therefore an assent given by the Dominion Company to a chattel mortgage on some of the insured goods, without the defendants' knowledge and assent, did not release the defendants.

ACTION tried at the last Toronto Winter Assizes before Wilson, C. J., without a jury.

By a policy dated 24th March, 1880, the Dominion Company insured one Haaz in $5,000 on certain chattel property, all contained in a building at Kingston, for one year—loss payable to the Federal Bank. The statutory conditions, with certain variations, were printed on the back.

On March 23rd, 1881, the policy was renewed for one year. A memorandum endorsed, dated 31st May, 1881, declared that a second chattel mortgage for $1,230, dated 14th May, 1881, in favour of W. McRae and J. Machar, had been given by the assured, and was thereby allowed.

A pencil memorandum underneath said that a preceding one had been nearly paid off, and the last mortgage was on new material.

On the 1st September, 1880, an instrument under seal was executed between the defendant company and the Dominion Company. It was declared that defendants agreed to re-insure the Dominion Company against loss by fire to such amounts and on such properties as might from time to time be entered by the Dominion Company in a book to be kept by them for that purpose, liability not to commence until such entry should be signed by the defendant company's manager, or other authorized officer: that the defendant company should be bound in respect of liability on all such amounts so reinsured as above stated by the terms and conditions of adjustment and settlement made by the Dominion Company, and that payment of losses or damage should be made by the defendant company to the Dominion Company, when and so soon as the latter should furnish to them duly attested reinsurance proofs of loss and adjustment, or, if required, duly attested copies of the original proofs of loss or adjustment, together with duly certified evidence of payment.

A commission of 25 per cent. was to be allowed by the plaintiffs' company to the Dominion Company on all premiums for reinsurance so effected as aforesaid.

It was admitted that this re-insurance as to Haaz was duly entered in the book of re-insurance under the contract.

On the 9th of November, 1881, a loss by fire occurred, which was ultimately adjusted and paid to Haaz, amounting to $2,800, and expenses $119.14.

Articles of agreement, dated 1st November, 1881, were made between the two plaintiff companies, whereby—after reciting that the Dominion company had determined to discontinue the business of fire insurance, and desired to be relieved from and guaranteed against loss on their risks under existing policies from the 1st of November following, and had agreed to transfer all their business and good-will of

the business to the association; and that the latter had agreed to relieve them, and to accept a transfer of the business and good-will, and to re-insure the risks of the company—it was declared that the association agreed to and did re-insure all and every the risks of the company, as shewn by the books of the company delivered to the association, subject to the terms of the company's policies, and bound themselves to pay all losses to the policy holders, and for which the company would be liable; and to pay all expenses of adjusting losses, and to hold harmless the company from all liability whatever for loss or expense under the policies.

The company agreed to pay the association the whole of the unearned premiums, less a commission of 25 per cent. on the risks thereby re-insured, calculated from a day named. They agreed to hand over all books, &c: the association to have the benefit of, and take and accept all re-insurances affected by the company with any other company, with all the powers and rights of the Dominion Company; the premiums paid by said company for said re-insurances to be deducted *pro rata* from the unearned premiums so to be paid to the association.

The good-will was assigned to the company, and the latter covenanted not to do business for five years, and to execute all further deeds, &c., to completely carry out this agreement. Power was given to use the company's name in disputing losses, &c.; and the latter appointed the general manager of the association, or such other person as the latter might appoint in writing, as attorney for the company, to use its name and seal for any of the purposes of carrying out the terms of the agreement.

At the trial the necessary formal proof was given. The loss was finally adjusted at $2.800, and $119.16 expenses connected therewith. The defendants were required to pay half the amount on their re-insurance contract.

The learned Chief Justice found as follows:

WILSON, C. J.—After hearing the case argued, and without being able to look into the case more particularly than I have so far had the time to consider it, in the course of the trial, I find as follows, and at present I do not think that further consideration would change my opinion:

1. That the contract for re-insurance between the Dominion Fire and Marine Insurance Company, the original insurers, and the defendants may be called a contract of insuance, and probably with sufficient correctness a policy of insurance.

2. And the like as to the re-insurance between the Dominion Fire and Marine Insurance Company and their co-plaintiffs the Fire Insurance Association, (Limited.)

3. That whatever called such contracts are not within the terms or provisions of the Fire Insurance Act containing the statutory conditions.

4. That after the re-insurance contract between the Dominion Fire and Marine Insurance Company and the defendants, the Dominion Fire and Marine Insurance Company had the right to make the re-insurance contract with their co-plaintiffs without notice to and without obtaining the consent of the defendants.

5. That, as at present advised, the Dominion Fire and Marine Insurance Company, the original insurers, should not have given the consent to Haaz, the original party insured, to make the mortgage in question without the consent of the reinsurers; but I do not think the effect of the Dominion Fire and Marine Insurance Company giving such consent without notice to and without the assent of the reinsurers, was to discharge the reinsurers from their contract, but at most to give them a cause of action against the Dominion Fire and Marine Insurance Company for having given such consent without such notice, and in case damage resulted to the reinsurer in consequence of such act of the Dominion Fire and Marine Insurance Company, and no such damage has ever resulted from the act.

6. The effect of the reinsurance contract between the Dominion Fire and Marine Insuarance Company and their

co-plaintiffs was not to make a further insurance on the property, but was in effect a reinsurance for or of the half risk still remaining with the Dominion Fire and Marine Insurance Company, and operated, as to the other half claim against the defendants, as an assignment by the Dominion Fire and Marine Insurance Company of their right or claim upon the defendants.

7. The Dominion Fire and Marine Insurance Company were not by their contract with the defendants bound to retain the other half risk themselves, and therefore they could transfer that by way of re-insurance or otherwise to their co-plaintiffs.

8. It appears to me that the Fire Insurance Association (Limited), by the assignment of the claim which the Dominion Fire and Marine Insurance Company had against the defendants, had and have the right to sue for that amount in their own name and in their own right.

9. And that the plaintiffs the Fire Insurance Association (Limited) are entitled to recover for the amount sued for in this action, and that the Dominion Fire and Marine Insurance Company are not necessary parties.

The learned Judge accordingly found a verdict for the plaintiffs The Fire Insurance Association (Limited), with costs.

During Hilary Sittings, February 16, 1883, *Osler*, Q. C., moved on notice to set aside the judgment for the plaintiffs, and to enter judgment for the defendants.

During the same sittings, *Osler*, Q. C., supported the motion. The plaintiffs the Fire Insurance Association (limited) cannot recover in this action. There is no privity between them and the defendants. Nothing which took place between the Dominion Company and the Fire Association can affect the defendants. The Fire Association rely on the clause in their agreement with the Dominion Company under which the Fire Association were to take and have the benefit of all re-insurances. This does not amount to an assignment, and would not have the effect of

vesting the claim in the Fire Association: *May* on Insurance, 2nd ed., pp. 9, 10, 11. The agreement also amounted to an assignment of the total liability of the Dominion Company, and the defendants should have been notified and their assent to the assignment obtained. By the agreement, the Fire Association re-insured the Dominion Company, and agreed to indemnify and hold them harmless against all loss under Haaz's policy. The defendants' contract was one of indemnity and not of suretyship, and the Fire Association having in accordance with the terms of their agreement paid the loss, and thereby relieved the Dominion Company from all liability, the Dominion were in no way damnified by the loss, and therefore they could have no claim against the defendants on their indemnity. The Fire Association can stand in no better position than the Dominion Company. The re-insurance by the Fire Association amounts in fact to a double insurance. The following illustration may be given: A. indemnifies B. and C. indemnifies B. against loss. A loss occurs, and C. under his indemnity pays the loss. Clearly C. has no remedy over against A. If the Fire Association are entitled to recover here, then there is nothing to prevent a company re-insuring the same risk in several companies, and on a loss occurring recovering from all them: *May* on Insurance, 2nd ed., pp. 9, 10, 11; *London Fire Ins. Co.* v. *Northern Fire Ins. Co.*, 2 App. 373. There is also the further objection that the Dominion Company's contract of re-insurance with the defendants was avoided for the breach of the statutory conditions. The Fire Insurance policy enacts that the statutory conditions shall be deemed to be part of every policy of insurance. The learned Chief Justice at the trial held that this was a policy of insurance. It clearly was a policy. It was what might be termed an open policy, the properties and amounts insured from time to time to be ascertained by the entry in the books as therein mentioned. The learned Chief Justice was also of opinion that it was not such a policy the statutory conditions would be applicable to. The Act, however,

is most general in its terms, and is expressly made to apply to every policy. There is no reason, therefore, why the contract or policy in question should be excepted from its operation. Assuming therefore the Act applies, the re-insurance effected between the Dominion Company and the Fire Association was a further assurance of the same property, and as it was made without the assent of the defendants, the contract was avoided under the eighth statutory condition. The contract was also avoided under the fourth statutory condition, by reason of the chattel mortgage having been made by the insured, Haaz, without the defendants having been notified thereof, and given their assent thereto by endorsement on the policy. Under the general law also, the defendants were entitled to a notice of the mortgage. The law is clearly laid down, that the re-insured is bound to communicate all facts within their knowlege, and to conceal nothing material to the risk: *May* on Insurance, 2nd ed., pp. 11-12. The learned Judge at the trial was of opinion that the defendants should have been notified and their assent obtained, but he held that it was not a material matter, and therefore formed no defence. The matter, however, was most material, as the defendants might not have desired to remain on a risk on which such an incumbrance had been placed.

*Robinson*, Q.C., and *George Harman*, contra. In dealing with this matter the real nature of the transaction must be looked at. The Dominion Company were desirous of retiring from business and of being relieved from all their existing risks, and therefore made the arrangement with the Fire Association that, in consideration of their undertaking to thus relieve them, they would pay over to the Fire Association the whole of the unearned premiums, less a commission of 25 per cent., and also transfer to the Fire Association all the business and good will, &c. In cases where the Dominion Company had effected re-insurances with other companies, and for which re-insurances the Dominion Company had paid the premium, the Dominion Company were to only pay the unearned pre-

miums on the amounts not re-insured, because it was expressly made part of the agreement that the Fire Association were to have the benefit of and take the re-insurances so made, and as on such amounts the Fire Association would in substance incur no liability, it was very properly agreed they should be paid no premiums. The agreement was not so much a contract of re-insurance, but was rather a transfer of the Dominion Company's business with all their rights and liabilities. The clause as to the re-insurances constituted a valid assignment of such re-insurances to the Fire Association, under the Choses in Action Assignment Act, R. S. O., ch. 116, secs. 6, 7: *Bank of Hamilton* v. *Western Assurance Co.*, 38 U. C. R. 609, 612; *May* on Insurance, p. 563, secs. 377, 379; and the effect was to vest the re-insurances in the assignees, who must sue in their own names. It cannot be said, therefore, that there was no privity. There was no necessity to notify the defendants of the agreement, and obtain their assent. Our Act differs in this respect from the English Act, or rather from the section on the subject in the English Judicature Act, 1873, sec. 25, sub-sec. 3, which requires the assignor to give notice in writing, &c. See also the Imperial Act, 30 and 31 Vic. ch. 144, sec. 3, providing for the assignment of life policies. Then as to the defendants' contract being one of indemnity. It is in one sense a contract of indemnity, but it is also one of suretyship. It is an indemnity not as opposed to suretyship, but as opposed to profit. The Dominion Company were clearly damnified by the fire. Nothing which took place between them and the Fire Association had the effect of relieving the Dominion Company from liability so far as Haaz, the original insured, was concerned, and when the loss occurred Haaz had the right to look and did look to the Dominion Company for payment, and payment having been made on behalf of the Dominion Company, the Dominion Company, or what is the same thing, the Fire Association, standing in their place, are entitled to recover the amount of the re-insurance from the defendants. The

payment however was in substance a payment by the Dominion Company, as it was made out of the moneys of the Dominion Company, namely, the unearned premiums paid over. Even if looked upon as a double insurance, the insured may recover the whole from one of the insurers, and leave them to recover satisfaction from the others. Then as to the statutory conditions. They clearly do not apply to a re-insurance contract, or policy. The very form of the conditions shew that they are inapplicable. The agreement made between the Dominion Company, and the Fire Insurance Association, in no way comes within the eighth condition as to further insurance: *Parsons* v. *Standard Ins. Co.*, 5 Sup. Ct. R. 233; *Lowson* v. *Canada Farmers' Ins. Co.*, 6 App. 512. The giving of the chattel mortgage also was not a breach of the fourth statutory condition as to assignments, as it has been expressly held that the condition does not apply to an assignment by way of mortgage, but to an absolute transfer: *Sands* v. *Standard Ins. Co.*, 27 Gr. 167. The learned Judge also held that the giving of the chattel mortgage was not a matter material to be made known to the defendants. Moreover the plaintiff had nothing to do with performance of conditions. By the terms of the defendants' contract the defendants were to be bound by the plaintiffs' settlement, and were to make payment on being furnished with re-insurance proofs of loss, &c., and it has been admitted that the settlement was duly made and proofs of loss furnished. In *Emerigon* on Insurance, p. 276, in speaking of a similar provision to that contained in this contract, it is said, that if the first insurer finding the demand of the original insured to be just pays to him the loss, from that moment, on producing the acquittance, the re-insurer must pay the sum re-insured without a right to oppose exceptions of any kind, because of the unconditional power he has conferred on his assured. It suffices that the latter has acted in good faith. Their payment honestly made forms the title of the re-insured. And at p. 280, it is said, that it is seen, therefore, how dangerous it is to subscribe to re-insurances. One

runs the risk of becoming the victim of too great a facility on the part of the re-insured, who neglecting all examination and discussion pays sometimes losses that he might properly have contested, and there remains to the re-insurer only the feeble resource of an action *in debiti* against the original insured. See also *Consolidated Real Estate and Fire Ins. Co.* v. *Cashow*, 41 Md. 59; *Sansum's* Ins. Dig., p. 1180, *et seq.*; *May* on Insurance, 2nd ed., p. 10-12, where a number of cases are collected. There are very few English cases on the law of re-insurance, because the 19 Geo. II. ch. 37, which made re-insurance illegal, was not repealed until the year 1864, by the Imp. Act, 31 Vic. ch. 23.

March 10, 1883. HAGARTY, C. J.—As I understand the objections, they are: That the Dominion Company could not recover, as they were not damnified, the Association having paid the loss; nor could their co-plaintiffs, as they were not legally the assignees of the company; and that the latter could not assign to the Association without defendants' consent, and that they had in substance insured half with the defendants and the whole with the Association, and if they now recover they are more than paid or indemnified.

There is the further objection that the company consented to Haaz assigning some of the insured property without the defendant company's assent or knowledge, and that we must consider the statutory conditions imported into the re-insurance instrument between the co-plaintiffs.

I agree with the learned Chief Justice that there must be sufficient cause of action in one or other of the plaintiffs. I think there was a good aassignment by the Dominion Company to the Association of all their interest in the Haaz insurance for a good consideration. They had also full power to use the name of the Dominion Company in carrying out the purposes of the agreement, one of such purposes being as to the Association realizing the benefit of all re-insurances effected by the company.

Therefore, either in their own name or using the Dom-

inion Company's name for their own benefit, I cannot see how the defendants can escape liability. The Association, in effect received fifty per cent. of the unearned premium in this case, less twenty-five per cent. commission.

I am unable to see any objection as to double indemnity. If the defendants pay their proportion of half the adjusted loss, the Association will have received the whole premium, less twenty-five per cent. commission.

I think it impossible to hold that our statutory conditions are to be "read into" either of the instruments between the defendant company and the Dominion Company, or between the latter and the Association.

By merely calling the defendants' contract a policy of insurance, it cannot in my judgment be brought within the statute as to uniform insurances.

R. S. O. ch. 162, sec. 3, requiring these conditions as against the insurers to be deemed a part of every policy of fire insurance hereafter entered into or renewed, or otherwise in force in Ontario, with respect to any property therein, cannot, I think, apply to defendants' contract, and the statutory conditions would be meaningless.

The law does not seem to have settled any particular form for a reinsurance contract.

In many cases, as in *Joyce* v. *Realm Marine Ins. Co.*, L. R. 7 Q. B. 580, there is a reinsurance policy declared to be "a reinsurance subject to all clauses and conditions of the original policy."

In *Imperial Marine Ins. Co.* v. *Fire Ins. Corporation (Limited)* L. R. 4 C. P. D. 166, there was a general reinsurance policy on coal cargoes, subject to the same clauses and conditions as the original policies.

In *Mackenzie* v. *Whitmouth*, L. R. 10 Ex. 142, and in App. 1 Ex. D., 36, it was held that the underwriters may reinsure on a marine risk, and the policy need not be expressed as a reinsurance.

Lord Blackburn, in 1 Ex. D., 36, at p. 39, points out that it has been only since 1864, when 19 Geo. II. ch. 37, sec. 4, was repealed, that reinsurance was allowed, and that no

sufficient time had elapsed for a custom to spring up in England as to the form of insurance.

The subject is treated in *May* on Insurance, 2nd ed., pp. 9, 10, 11.

It appears that in the United States the reinsurance contract is generally made subject to the terms of the original contract of insurance. See *New York Bowery Fire Ins. Co.* v. *New York Fire Ins. Co.*, 17 Wend. 359; *Consolidated Real Estate Fire Ins. Co.* v. *Cashow*, 41 Md. 59—cases cited in *May* on Insurance, 2nd ed., p. 10.

As to the point of the Dominion Company having allowed Haaz to give a chattel mortgage shortly after the renewal of the policy, there is the memorandum of the chattel mortgage by the Dominion Company. This was in May, 1881; the transfer to the Fire Association was in September, 1881, and the fire was on the 9th November, 1881.

It will be observed that the reinsurance contract with these defendants makes no reference to the terms or conditions of the original policies of insurance. They agree to be bound to the amounts stated by the terms and conditions of adjustment and settlement made by the Dominion Company. The reinsurers are entitled to be furnished with reinsurance proofs of loss and adjustment, or they may require copies of the original proofs of loss or adjustment. The words used are not that the defendants agree to reinsure the risks taken by the company, but to reinsure them against "loss or damage by fire" to be specified and entered in a book.

*New York State Marine Ins. Co.* v. *Protection Ins. Co.*, 1 Story C. C. Rep. 458, was an action on a special policy of reassurance on a ship.

Story, J., says, at p. 46: "This is a case of reassurance, and nothing is clearer, upon principle and authority, than that, in such a case, the reinsurers are entitled to make the same defence, and to take the same objections which might be asserted by the original insurers in a suit upon the first policy." He assents to the right of the original insurers

to require full proofs of liability or to stand a suit to decide it.

He adds: "It was to avoid this inconvenence and delay as well as peril, that the French policies of reassurance, as mentioned by *Emerigon*, and *Pothier* usually contain a clause, allowing and authorizing the original insurers to make, *bonâ fide*, a voluntary settlement and adjustment of the loss, which shall be binding upon the reassurers."

In the case before us we may concede for the argument that the defendants have a right to urge any defence which the original insurers could have urged against Haaz.

But the evidence shews nothing whatever as to any defence which they could have urged. The objection is that because they assented to the chattel mortgage they therefore released the re-insurers.

To this it may be answered (1) that they had the right to make any *bonâ fide* arrangement as to the property insured, or waive any condition which an insurance company is in the habit of doing in the reasonable exercise of their discretion; and (2) that if they had refused a reasonable request to allow a mortgage on part of the property, either Haaz might have given up the idea of making such a mortgage, or they might have arranged to cancel or abandon the insurance, refunding the unearned premium.

It may be safely conceded that where an existing risk is re-insured nothing should be done to substantially alter the nature or extent of that risk to the prejudice of the re-insurer or the substantial increase of his burden.

Nothing was shewn in this case that the risk was materially increased or the defendants' burden altered by the allowance of the chattel mortgage.

I think it would be a most mischievous doctrine to lay down, that because an insurance company re-insures its risks it thereby is bound to waive no condition or give no assent to any the most trivial or ordinary matter falling technically within the letter of its conditions—in other

words, that it must insist on any slip, and refuse every assent that is daily made by underwriters, and adopt any line of defence however disgraceful or unworthy of a respectable insurance company.

I think the contract entered into by the defendants to re-insure them "against loss or damage by fire" does not necessarily prevent the plaintiffs from assenting to any reasonable or proper waiver of conditions made in good faith, and not shewn to be in any way calculated to influence the loss or increase the burden of the re-insurer.

I think the plaintiffs, the Fire Insurance Association, are entitled to recover.

ARMOUR and CAMERON, JJ., concurred,

*Judgment accordingly.*

[COMMON PLEAS DIVISION.]

## THE FIRE INSURANCE ASSOCIATION (LIMITED) AND THE DOMINION FIRE AND MARINE INSURANCE COMPANY V. THE CANADA FIRE AND MARINE INSURANCE COMPANY.

*Re-insurance—Assignment of—Statutory conditions.*

Under a similar state of facts as stated in the Q. B. D. case, *ante* p. 481. except that the insurance was of one C.'s property :

*Held*, that the plaintiffs were entitled to recover, for treating the agreement between the plaintiffs as a re-insurance, (though more properly a transfer of business with its liabilities and collateral securities,) if it was of the whole amount of the Dominion Company's liability, the association having paid the whole loss to the company, or which was the same thing, to C., were entitled irrespective of any assignment to contribution from defendants : if, however, it was only of the residue of C.'s risk the defendants were still liable to the company on their policy, and by the very terms of the agreement it was effectually assigned to the association, who acquired all their co-plaintiff's rights and interest in it.

*Held*, also, that the statutory conditions were not applicable to such a contract of re-insuraance as in this case.

ACTION upon a contract of re-insurance, dated the 1st September, 1880, made by the defendants with the plaintiffs, the Dominion Fire and Marine Insurance Company, re-insuring that company against loss, under a policy for $2,500 made by them in favour of one Carter. The plaintiffs, the Fire Insurance Association, were assignees of the re-insurance contract, but both companies were made parties plaintiffs to meet any defences that might be raised on the ground that it had not been effectually assigned.

The facts were the same as in the case in the Queen's Bench Division between the same parties, *ante* p. 481, except that the question of the giving of the chattel mortgage did not arise here.

The learned Judge directed judgment for the plaintiffs for the amount re-insured by the defendants' policy.

In Michaelmas sittings, *Osler*, Q. C., moved, on notice to set aside the judgment for the plaintiffs and to enter judgment for the defendants.

During the same sittings *Osler*, Q.C., supported his motion.

*Robinson*, Q. C., and *George Harman*, contra.

The arguments were substantially the same as in the case in the Queen's Bench Division between the same parties, except, as before stated, as to the giving of the chattel mortgage.

March 9, 1883. OSLER, J.—When the facts are stated, the case appears to be a plain one for the plaintiffs.

The grounds on which the defendants resist payment may be briefly stated thus:

1. The contract of re-insurance made between the defendants and the Dominion Insurance Company was subject to the conditions of the Fire Insurance Policy Act, one of which is, that the company shall not be liable for loss if, without their consent, any subsequent insurance is effected in any other company.

2. The plaintiffs, the Fire Association, have paid the loss of the original insured under their contract with their co-plaintiffs; but, there being no privity between them and the defendants, they do not thereby acquire any right to recover on the policy written by the latter for the Dominion Company.

3. Nor can the plaintiffs the Dominion Company recover, because the defendants' contract with them was one of indemnity only, and they have not sustained and never can sustain any damage, the entire loss having been paid by their co-plaintiffs.

We think none of these objections are tenable.

As to the first, we agree with the learned Chief Justice, that the Fire Insurance Policy Act does not apply to a contract or policy of re-insurance: "Re-insurance is merely insurance applied in a special way, and to cover the whole or part of a risk already assumed. * * It is a contract of indemnity to the re-insured, whatever be the subject matter, and binds the re-insurer to pay the re-insured the loss

sustained on the subject insured to the extent for which he is re-insurer:" *May* on Insurance, 2nd ed., pp. 9, 10. It is true that such a contract is in one sense a policy of insurance with respect to property, and the description of the subject of the re-insurance may be the same as that contained in the original policy, and it need not be expressed to be a re-insurance: *Mackenzie* v. *Whitworth*, 1 Ex. D. 36.

So far therefore it is apparently within the terms of the 2nd section of the Act as "a Policy of Fire Insurance entered into or in force in Ontario with respect to any property therein." But when the conditions mentioned in the schedule to the Act, which by the same section are to be deemed part of such policy, are examined, they are seen to be in many instances wholly inapplicable to a policy of re-insurance, as, for instance, the 4th, with regard to change or assignment of the property insured; the 5th, as to partial damage and abandonment and salvage; the 12th, as to proofs of loss; and the 18th, which gives the insurer the option of repairing, replacing, or re-building the property damaged or lost.

I think our law reports will be searched in vain for any cases upon re-insurance policies up to the time of the Act, though they abound in illustrations of the oppression and injustice exercised by insurance companies towards the original insured. It is well known that the Act was introduced to remedy this state of things, and its object plainly is to protect the owners of property against the imposition of unreasonable conditions by the original insurer, not to protect the latter in any contract he may make to cover his own liability.

As to the other objections, the Dominion Company were at liberty to re-insure their whole risk on the Carter policy, They re-insured $1000 thereon with the defendants, and they afterwards re-insured the whole, or the residue, it matters not which, with their co-plaintiffs. I call the latter a re-insurance although the contract may perhaps be more accurately described as a transfer of their business with its

liabilities and collateral securities. If they re-insured the whole by their contract with the Fire Association, treating it as a contract of re-insurance, then as to $1000 of the risk there was, so to speak, a double re-insurance, being another insurance on the same risk and the same interest: and the Fire Association having paid the whole $2500 to the Dominion, or, what is the same thing, to Carter at their request, are entitled, irrespective of any assignment, to contribution from the defendants to the extent of the policy of re-insurance subscribed by them: *Marshall* on Marine Insurance, (Ed. 1865) p. 103; *Godin* v. *London Assurance Co.* 1 Burr 490.

On the other hand, even if the re-insurance with the Fire Association was only of the residue of the Carter risk, the defendants were still liable to the Dominion Company on *their* policy, and by the very terms of the contract of the 1st November, 1881, it was effectually assigned to the Fire Association, who acquired all their co-plaintiffs' rights and interest in it.

The Dominion Company could have brought an action against the defendants on this policy and recovered the whole sum re-insured thereby, before payment of the loss, had it happened before the assignment: *May* on Insurance, 2nd ed., p. 10; *Consolidated Real Estate and Fire Ins. Co.*, 41 Md. 60-74; *Eagle Ins. Co.* v. *Lafayette Ins. Co.*, 9 Ind. 443; and their co-plaintiffs, as their assignees, could have done the same after the assignment. The fact that before doing so they paid the original insured can make no possible difference.

We think the motion to enter judgment for the defendants must be dismissed, with costs.

WILSON, C. J., and GALT, J., concurred.

*Motion dismissed, with costs.*

## CUMMING V. LOW.

*Reference—C. L. P. Act, sec. 189—O. J. Act, secs. 47-49—Appeal.*

An action for an account and delivery up of a trust estate was referred at the trial to the Master at Picton, by an order drawn up on reading the pleadings and hearing counsel: the Master to have all the powers of a Judge as to certifying and amending pleadings, &c., and to enquire and report as to the plaintiff's right to bring an action: the defendant to have the right to claim all such allowances for his care, &c., as in the Master's opinion he should shew himself entitled to: costs to be in the Master's discretion, and the whole report to be reviewed or appealed from, according to the statute in that behalf.

*Held*, a reference under sec. 189 of the C. L. P. Act, (not under sec. 47, or 48 of the Judicature Act,) and that an appeal from the finding of the Master was therefore regularly set down under the provisions of that Act to be heard before a single Judge in Court.

Remarks as to the effect and application of secs. 47 and 48, above referred to, and as to the proper form of the order of reference.

THE question was, whether this case had been properly set down as an appeal under the provisions of the C. L. P. Act relating to appeals from the award, report or certificate of an arbitrator or referee, or whether the reference was one of those mentioned in sections 47 and 48 of the Ontario Judicature Act, in which case it was contended the finding of the referee could not be reviewed by such a proceeding as the present.

The action was brought against the defendant as a trustee for an account and delivery of the trust estate, and was entered for trial at the Picton Fall Assizes of 1882, before Wilson, C. J.

On the transcript of the pleadings was the following memorandum signed by him: "Action referred according to the terms in the order hereto annexed 21st October 1882."

The order, which was drawn up on reading the pleadings and hearing counsel for the parties, directed: "That it be referred to the certificate of Samuel S. Lazier, Master of the Chancery Division at Picton, with all the power as to certifying and amending pleadings, &c., of a Judge of the High Court, and to enquire and report as to the plaintiff's right to bring this action." The order went on to provide

that the defendant should "have the right to claim before the Master all such fair and reasonable allowance for his care, pains, and trouble, which he is entitled to, if he can shew he is entitled to such allowance in the opinion of the Master. Costs to be in the Master's discretion, and the whole report subject to be reviewed or appealed from, according to the statute in that behalf."

Evidence was given by the parties in relation to the facts set up in the statements of claim and defence.

The Master refused to allow the defendant to make any claim for "just allowances," and gave a written judgment, in which, after reviewing the evidence, he found "that the defendant has satisfactorily and properly accounted for the whole estate, and that he is entitled to a nonsuit, or a certificate from me that nothing is due by him to the plaintiff in this action; and that he is entitled to his full costs of defence."

January 30, 1883. *Watson*, for the plaintiff.
*McNee*, for the defendant.
The arguments sufficiently appear from the judgment.

February 13, 1883. OSLER, J.—In *Cruikshank* v. *Floating Swimming Baths Co.*, 1 C.P.D. 260, it was pointed out by the Court, p. 262, that "the powers of reference given by the Judicature Act are not by way of repeal of or in substitution for, but in addition to the former powers of reference, and that the intention was to give any Division of the Court the power to refer any question or questions which may arise in the course of a cause * * and not for decision by the arbitrator, but for a report on which the Court may afterwards pronounce the decision."

In *Longman* v. *East*, 3 C. P. D. 142, the effect of sections 56 and 57 of the English Judicature Act, which correspond to secs. 47 and 48 of ours, was very fully considered by the Court of Appeal, and as in several orders of reference which have come under my notice there seems to have been a misapprehension of the proper application of

those sections, I will make some extracts from the judgments in that case, which set the matter in a very clear light.

Bramwell, L. J., said at p. 149: "I am of opinion, and I speak with confidence, that there is no power under either of these sections to refer an action to on official referee. * * He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties; if there are facts disputed—for instance, if one of the parties asserts that a building is 20 feet high, and the other that it is 25 feet—the referee, in such a case as that, must determine the fact and report it; his duty is, instead of determining issues of fact or of law, to find the materials upon which the Court is to act. Clearly under section 56" (O.J.A., sec. 47,) "an action cannot be referred to him to decide facts and law. In the like way, under section 57" (O. J. A. sec. 48,) "all that can be done is, in a case where there is no consent, the Judge can refer issues of such a character as are mentioned, that is is to say, where they require any prolonged examination of documents or accounts, scientific or local investigation which could not conveniently be made before a jury. Then the Judge may without consent order any issue of fact involving any such matters to be tried by an official referee. Where there is a consent his power is still confined, that is, he has no jurisdiction to order the action to be determined, but he may order any question or issue of fact to be tried; therefore the order would not be limited to such cases as before described, but would include any question or issue of fact, or any question of account arising therein. But there is no power to refer the action, only questions or issues of fact."

Brett, L. J., "Before the Judicature Acts there were several modes in which disputes were remitted to the decision of third persons, and which might be called references. There was the common law reference to an arbitrator constituted by the consent of the parties. There was the compulsory reference to an arbitrator under the provisions of the C. L. P. Act, 1854. There was the reference

to the Master to report in the Common Law Courts as to matters of discipline and similar questions, and in the Court of Chancery there was the reference into Chambers.

"It was not intended by the Judicature Acts to interfere with these references, and they at present exist with all their incidents. But it was thought that further powers ought to be given to the Divisional Courts, and I think that sec. 56, (O. J. A. sec. 47) gives to the Chancery Division a new tribunal, that is to say, instead of referring certain questions for a report into Chambers, that Court may, if they think fit, refer questions to an official referee—an officer newly appointed with limited duties, and also with defined powers. It (also) gives to the Common Law Divisions a new power as well as a new tribunal; it gives them power to do what the Court of Chancery had done in a suit or cause. The Common Law Courts had no power previous to the passing of section 56, (O. J. A., sec. 47), to refer matters in a cause for report, but only to refer for report of the Master matters of discipline. * * This section, however, gives them power to remit questions in a cause for report in the same way as a question was referred in the Court of Chancery into Chambers, and afterwards the report was brought back from Chambers to the Court.

"Sec. 57, (O. J. A. 48) gives powers both to the Chancery Division and to the Common Law Divisions which neither of them possessed before. It gives power to either Division to send certain questions or issues in causes to an official referee, or to a special referee, * * not for report, but for trial." The Lord Justice then refers to the different cases provided for by sec. 57, (O. J. A. sec. 48), and continues: "Where the reference is by consent of the parties, I think that all issues of fact may be sent before an official referee, but that questions of law cannot be sent to him even by consent of the parties. * * If (it is) without consent, I think that he is only to try the issues which may be sent to him; not to report the evidence upon which he found each issue, but to state the result of each issue, and then the Court will have to give judgment as they think

right upon the findings, it being possible that there may be several other issues in the same cause to be tried in another manner. Then the whole result must afterwards be brought before the Court, and the Court must give a decree or a judgment accordingly, as is done in the Chancery Division. There is, I think, an appeal from the findings of the official referee on such issues.

"The next question is, what is the nature of the appeal which is given? That will be found at the end of sec. 58, (sec. 49 O. J. A.) The words are, 'and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.' I should say that, in the case of a report to the Court or a Judge under sec. 56 (O. J. A., sec. 47) the Court or Judge may differ from the official referee as to any finding which is an inference from the facts that the referee has reported. * * But with regard to the finding of a referee of issues of fact sent to him under sec. 57 (O. J. A. sec. 48) either by consent of the parties or without consent, I think the appeal is of the same nature as the appeal from the finding of a Judge when he tries without a jury, or as the appeal from the finding of a jury: that is to say, the Court must accept the finding of the referee, unless they can set it aside, according to the ordinary rules which would be applicable to the finding of a jury, or to the finding of a Judge trying a cause without a jury."

It was held also that the rules of Court (O. J. A. Rules, 266-281) do not enlarge the effect of the Act.

I refer also to *Ward* v. *Pilley* 5 Q. B. D. 427, in which it was held that any question of account which might be referred compulsorily under the C. L. P. A., might also be referred compulsorily to an official referee under sec. 57 (O. J. A. sec. 48), and (2) that in any case in which the Court had jurisdiction to refer compulsorily a question of account to an official referee, it had also jurisdiction to refer all the other issues in the action. And see *Sullivan* v. *Rivington*, 28 W. R. 372, *Re Brook*, 29 W. R. 821; *Guardians of Mansfield Union* v. *Wright*, 9 Q. B. D. 683, at p. 686, per Jessel, M. R.; *Miller* v. *Pilling*, 9 Q. B. D. 736.

The question now before me is, what is the nature of the order under which the Master has proceeded?

Under the C. L. P. A., sec. 189, there is the compulsory order of reference before trial of matters of mere account to certain officials named, or to any other referee appointed by the parties who consent in writing to accept the reference. The report or certificate of the referee becomes absolute, without any order confirming the same, at the expiration of fourteen days from the filing thereof, unless appealed from, and when so confirmed may be enforced by the same process as the finding of a jury.

Under sec. 195 there may also be a compulsory reference at the trial of all issues of fact in actions involving the investigation of long accounts, a verdict being entered generally on all or any of the issues subject to the reference; or the reference may be directed, if the Judge sees fit to do so, as under section 189. If a verdict is taken the award or finding would be enforced under it, and if not, it would be enforced as on a reference under section 189.

An appeal is given by sections, 192 and 195, subsec. 2, from the report or certificate of the referee under section 189, and from the "award or report," under section 195, the practice on the appeal being the practice now observed on appeals from the report of a Master in Chancery. On the appeal the report or certificate may be amended in any way the Judge thinks proper, or it may be referred back with directions, or confirmed.

This right of appeal from the decision of the referee on the whole action, under the C. L. P. Act, is similar to, though more extensive than, the appeal from his findings under section 48 O. J. A.

As no verdict was in fact taken here, it may be assumed that the reference was intended to be directed as under section 189, unless it necessarily appears to have been one under secs. 47 or 48 of the Judicature Act.

I think it was not made under either of those sections. It does not purport to be so made, and by the terms of the order the cause, and not merely a question or issue therein,

is referred to the certificate of the Master, who is to enquire and report as to the plaintiff's right to bring the action. His report is subject to be reviewed or appealed from, and the whole of the costs are in his discretion.

The substance of the order must be looked at, and from this it appears that it was a reference of the whole action for the decision of the referee. It is not brought within sections 47 and 48 merely because it speaks of his "certificate" and "report," for he makes a certificate or report on a reference under the C. L. P. A., from which there is an appeal.

As I am of opinion that this was such a reference, it follows that the present appeal was regularly set down. I think an appeal under sections 48 and 49 might also be set down to be heard before a single Judge in Court. The form of order which has given rise to this difficulty is not one to be followed. If it is intended that the action shall be referred to arbitration, either compulsorily or by consent, the ordinary and well known terms should be adopted. If the order is made by consent of parties, the right to appeal, if it is desired, must be expressly conferred. If, however, the parties, for any reason, wish to proceed under the 47th or 48th sections, the order should, as the Court intimated in *Longman* v. *East*, 3 C. P. D. 142, at p. 133 (*a*), point out whether it is an order under section 47 for a reference for report, or an order under section 48 of issues to be tried; and further, if under section 48 it should state whether all the issues are to be tried, or only certain issues, and if only certain issues the order should state by some sufficient description what those issues are.

As there may be a doubt whether under the form of the reference in this case and the terms of the report, See *Lloyd* v. *Lewis*, 2 Ex. D. p. 7,) judgment can be entered without a formal motion for judgment, the defendant may have leave to serve short notice of motion for judgment in the action, to be brought on for hearing with the appeal. The defendant is to have the costs of

the day incurred by the postponement, which I fix at $20.

*Judgment accordingly.*

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[COMMON PLEAS DIVISION.]

## McCann v. Chisholm.

*Easement—Lateral support—Action by tenant.*

*Held*, that an action against the proprietor of adjoining land for damage done to a building by removal of the lateral support afforded by such adjoining land, may be maintained by the tenant of the building.

The statement of claim was, that the plaintiff was and is possessed of a house and of the lands on which the house is erected, being No. 101 on James street north, in the city of Hamilton, the adjoining lands belonging to the defendant. The plaintiff's house was erected in 1854, the southerly wall adjoining the northerly limit of the defendant's land. From the time of the erection of the plaintiff's house up to the happening of the grievances herein stated, the house had openly, publicly, and uninterruptedly the support of the soil and sub-soil of the defendant's lands adjoining the plaintiff's house. In the summer of 1881, the defendant caused his land adjoining the plaintiff's house to be excavated to a great depth, and by reason thereof the support afforded by the soil and sub-soil of the defendant's land to the plaintiff's house was withdrawn, by reason whereof the plaintiff's house was greatly injured, the foundation adjoining the defendant's lands subsiding into the excavation made by the defendant, causing the wall of the plaintiff's house to crack and otherwise injuring the same. The defendant so negligently and unskilfully excavated the land adjoining the plaintiff's house, that he undermined the foundation of the plaintiff's house, causing

the same to subside, and cracking the walls, and otherwise injuring the same. The plaintiff had at the time of committing the said grievances the right to the lateral support of the said building by the soil of the defendant's land.

The defendant, by his statement of defence, denied the material allegations of the statement of claim.

The action was tried by the learned Judge of the County Court of the county of Wentworth, sitting for Patterson, J. A., without a jury, at Hamilton, at the Fall Assizes of 1882.

The evidence shewed that the Honourable Samuel Mills, the owner in fee, by indenture dated the 16th of June, 1857, demised to the plaintiff the premises he now is in possession of for seven years from the 18th October, 1857, the lessor, on the expiration of the term, having the option of either continuing the lease to the lessee for a further term of seven years, and so on for each and every seven years from the date hereof, for the period of twenty-one years from the commencement, or to take the improvements then made by the lessee at a valuation; in either case the value of the rental for the further period, or of the improvements, to be fixed each and every seven years from the date hereof, by three persons indifferently chosen, one by each of the parties, and the other by the persons so named by them.

By indorsation on the lease signed by the lessor, he agreed the lessee should have the option of continuing the lease for fourteen years, instead of seven, at a valuation after seven years from the date of the lease, the improvements at the expiration of that time not to be paid by the lessor.

A new lease, dated the 21st of November, 1864, was made between the same parties of the same premises, but with a greater depth for seven years from the 18th October, 1864. There was a provision that the lessor might take the improvements at a valuation to be fixed by arbitration provided he gave notice three months before the expiration of the term, and if not that the lessor should renew for other seven years at a valuation rent, including the like

covenant for renewal, "it being intended by the parties to these presents that the lease shall be renewed in perpetuity from time to time at the expiration of each septennial period."

By indenture, dated the 31st of August, 1880, between F. H. Mills, devisee of the late Hon. Samuel Mills, and the said John McCann, after reciting the lease of 21st November, 1864, the said F. H. Mills demised to John McCann the same premises for seven years from the 18th October, 1878, with the like provision for valuing the improvements or renewing the lease for other seven years at a valuation rent.

The evidence was very fully taken, but the questions for decision turned chiefly upon matters of law.

The learned Judge decided that the fact that the plaintiff's lease had not been renewed exactly at the expiration of the respective periods of seven years made no difference to his right to the lateral support he claimed: that the plaintiff had acquired a prescriptive right to the lateral support for the building and land against the defendant; *Dalton* v. *Angus*, L. R. 6 App. Cas. 740; *Lemaitre* v. *Davis*, 19 Ch. D. 281; *Snarr* v. *Granite Curling and Skating Co.*, 1 Ont. R. 102. That there was evidence the defendant had the knowledge and means of knowledge of the user the plaintiff was making of his own land as affecting the defendant's land: *Dalton* v. *Angus*, L. R. 6 App. Cas. at p. 801; and the defendant though present in Court did not appear as a witness, and deny knowledge of such user. That if the plaintiff as lessee for a term of years could not prescribe, but such claim must be made by the freeholder, the landlord might become a necessary party to the action, to maintain the right which had been acquired; *Goddard* on Easements, 2nd ed., 126, 127.

The learned Judge concluded: "I have no doubt as a matter of fact that the plaintiff's building was injured by the excavation of the defendant's land. Not only is this clearly shewn by the testimony given on behalf of the plaintiff, but by the evidence of the witnesses Thomas and

Balfour called for the defence. I was asked to take a look at the building (as was done in *Snarr* v. *Granite Curling and Skating Co.*, 1 Ont. R. 102, 105,) before forming an opinion on the question of damages. I have done so with the consent of the parties, and the best conclusion I can come to is, that the plaintiff is entitled to recover against the defendant $160 damages, including the loss of occupation, together with full costs of suit."

At the Hilary Sittings, November 27, 1882, *James Reeve* moved to set aside the judgment for the plaintiff, and enter it for the defendant.

During the same sittings, February 6, 1883, *Moss*, Q. C., supported the motion. The plaintiff as tenant for years can prescribe only for the benefit of the owner of the freehold, and therefore cannot maintain an action himself. The defendant had the right to excavate. The plaintiff, at the most, could only have a claim for damages caused by the carelessness of the defendant. The evidence here does not disclose any negligence. He referred, in addition to the cases cited by the learned Judge, to the following: *Doe dem. Baddeley* v. *Massey*, 17 Q. B. 373; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *American Law Review*, July, 1882, p. 513.

*Osler*, Q. C., contra. The evidence shews that the plaintiff was a tenant in perpetuity of the land, and his tenancy could only be terminated by the landlord giving the proper notice before the expiration of one of the septennial periods, that the buildings would be taken at a valuation, and the lease determined. The plaintiff therefore had such a prescriptive right as entitled him to maintain the action. But even if the action is only maintainable by the landlord, the learned Judge at the trial granted leave, if necessary, to add him as a party to the action. But apart from any prescriptive right, the plaintiff is entitled to recover the actual damage sustained by the defendant's negligence. There was clearly evidence of negligence. The learned Judge at the trial was clearly of opinion, not only from

the evidence, but also from the view he took of the premises, that the excavation was the cause of the damage. He referred, in addition to the cases already referred to, to *Percival* v. *Hughes*, L. R. 9 Q. B. D. 441.

March 9, 1883. WILSON, C. J.—The right to the support of buildings as against the adjoining proprietor "must be founded upon prescription or grant, express or implied:" per Willes, J., in *Bonomi* v. *Backhouse*, E. B. & E., in Ex. Ch. 622, at p. 655. There is no doubt an action of this kind will lie at the instance as well of the reversioner as of the person in possession: *Jesser* v. *Gifford*, 4 Burr. 2141.

So in *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322 *e*, it is said: "The question in all cases of this kind seems to be whether the injury complained of is not a damage to the inheritance as well as to the lessee. * * In many cases the reversioner may bring an action as well as the tenant." *Battishill* v. *Reed*, 18 C. B. 696, and at p. 717, per Willes, J.; *Frewen* v. *Philipps*, 11 C. B. N. S. 449; *Chitty* Junior's Precedents, 512, 513.

In the case of a special plea by the tenant for years before the Imperial Act 2 & 3 Wm. IV ch. 71, it was necessary he should shew a derivative title from the owner of the fee, but that did not apply to the tenant as plaintiff in the action.

In a declaration, it was sufficient to declare upon possession—in a plea the strict legal right must be shewn: *Grimstead* v. *Marlowe*, 4 T. R. 717.

The whole style and manner of such pleading must be altered since the Judicature Act.

The finding of the learned Judge is satisfactory, and we have no doubt according to the very truth and merits of the case.

The motion must be dismissed, with costs.

GALT, J., concurred.

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

*Motion dismissed, with costs.*

[QUEEN'S BENCH DIVISION.]

## REGINA V. MALCOLM ET AL.

*Trespass—Fair and reasonable supposition—C. S. U. C. ch. 105—25 Vic. ch. 22—33 Vic. ch. 27, sec. 2—Conviction—Certiorari.*

The defendants were convicted of a trespass under C. S. U. C. ch. 105, as amended by 25 Vic. ch. 22. They appealed to the Sessions, which affirmed the conviction. The conviction was then brought into this Court, and a motion was made to quash it on the ground of want of jurisdiction in the convicting Justice, inasmuch as it appeared by the evidence, and by affidavits filed, that the defendants acted under a fair and reasonable supposition that they had the right to do the acts complained of within the meaning of the above statutes.

*Held*, that that was a fact to be adjudicated upon by the convicting Justice upon the evidence, and, therefore, that a *certiorari* would not lie for want of jurisdiction.

THE defendants were convicted under the Consol. Stat. of U. C. ch. 105, as amended by 25 Vic. ch. 22, of unlawfully breaking into, coming upon, and trespassing upon the lands of the prosecutor, such lands being wholly enclosed, and being a part of lot number 1, in the first concession of the township of Oakland, without a fair and reasonable supposition that they had a right to do the act complained of. From this conviction the defendants appealed to the Court of General Sessions of the Peace for the county of Brant, which Court affirmed the conviction.

February 9, 1883. *Clement* moved to quash the conviction, on the ground that the defendants acted under a fair and reasonable supposition that they had a right to do the act complained of, in support of which affidavits were filed, tending to establish that they so acted, and he contended that this was established and that the convicting Justice had therefore no jurisdiction to convict, nor had the Court of General Sessions of the Peace any jurisdiction to affirm, and that by reason of such defect of jurisdiction this conviction was removable by *certiorari*, notwithstanding its affirmance by the Court of General Sessions of the Peace, and notwithstanding 33 Vic. ch. 27, sec. 2, D.

*Aylesworth*, contra.

May 16, 1883. ARMOUR, J.—The Consol. Stat. of U. C. ch. 105, as amended by 25 Vic. 22, provides that: "Any person who unlawfully enters into, comes upon, or passes through, or in any way trespasses upon any land or premises whatsoever, being wholly enclosed, shall be liable to a penalty, &c. * * But nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of."

In the Imperial Act 24 & 25 Vic. ch. 97, sec. 52, similar to our Act 32-33 Vic. ch. 22, sec. 60, it is provided that whoever shall wilfully or maliciously commit any damage, injury, or spoil to any real or personal property, shall, on conviction thereof before a Justice of the Peace, be subject to imprisonment or fine, "provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of."

Under this Imperial Act the case of *White* v. *Feast*, L. R. 7 Q. B. 353, was decided, and Cockburn, C. J., there said. "By the proviso such *primâ facie* wrongdoer is not entitled to call upon the magistrates to hold their hands, unless he gives them sufficient evidence to convince them that he acted under a fair and reasonable supposition that he had a right to do the act, although he may have honestly believed that he was justified in doing the act."

Blackburn, J., said: "The real substance of the enactment is, the power given to the Justices to award compensation to a small amount, and that power ought to be given and exercised whether the act causing the injury be done under a *bonâ fide* claim of right or not, if not founded on a fair and reasonable ground. The words are, that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of; and, whether the person charged did so act or not, it must be for the Justices to decide on a due consideration of the evidence brought before them. As the proviso expressly says that

the claim of right must be founded on reasonable grounds, the ordinary proviso, usually implied as to mere *bona fides*, is superseded."

Quain, J., said: "The appellant must bring himself within the proviso by shewing that he acted under a fair and reasonable supposition that he had a right to do the act."

It is clear from this decision that whether the defendants in this case acted under a fair and reasonable supposition that they had a right to do the act complained of, was a fact to be adjudicated upon by the convicting Justice upon a due consideration of the evidence brought before him. Such evidence was brought before him, and he adjudicated upon it, and found that the defendants did not act under a fair and reasonable supposition that they had a right to do the act complained of. The jury at the Court of General Sessions of Peace found as the Justice had found, and so his conviction was affirmed. The question now is, have the defendants the right under these circumstances to have this conviction removed to this Court, and to have it again tried whether they acted under a fair and reasonable supposition that they had a right to do the act complained of?

This question appears to me to have been determined adversely to the defendants in The *Colonial Bank of Australasia* v. *Willan*, L. R. 5 P. C. 417. The Judicial Committee, in giving judgment in that case, said, p. 442: "There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*; but some of these authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it. * * And as these two points, want of jurisdiction in the Judge, and fraud in the party procuring the order, are essentially distinct, it will be well to consider them

separately. In order to determine the first it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction.' There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject matter, or on the absence of some essential preliminary, must obviously in most cases depend upon matters which, whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that a Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter, he properly entered upon the inquiry, but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to re-try a question which the Judge was competent to decide."

It was also contended that inasmuch as the Court of General Sessions of the Peace had amended the conviction by adding after the adjudication of fine and costs the words, "to be be paid in ninety days from the date hereof," this was an amendment of the sentence of the convicting Justice which that Court could not make, and that would entitle the defendants to their *certiorari;* but it appeared on the papers returned that this amendment was made to make the conviction conform to the sentence of the convicting Justice.

The second or amended conviction was abandoned on

the argument, and it may be quashed, but the rule *nisi* so far as it relates to the first conviction will be discharged, with costs, and a procedendo will issue.

*Judgment accordingly.*

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[QUEEN'S BENCH DIVISION.]

## TROTTER V. CHAMBERS ET AL.

*Married woman—Separate property.*

The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land and had it conveyed to his wife, the plaintiff; who with the rents and profits thereof, she and her husband not living on the land, with money raised by mortgage thereof, and with money borrowed from her sons, purchased the chattels in question herein, which were seized under execution against the husband.

*Held*, that the chattels were her separate property within the meaning of R. S. O. ch. 125, sec. 1, and free from the debts of her husband.

THIS was an interpleader issue between the plaintiff, Maria Trotter, and Isabella and Cora Chambers, to try whether certain goods seized by the sheriff of the county of Wentworth, under an execution against James Trotter, the plaintiff's husband, were the property of the plaintiff or her husband.

The action was tried at Hamilton, before Sinclair, County Judge, (sitting for Wilson, C. J.,) without a jury, on the 14th November, 1882.

The plaintiff had been married in the year 1853 to James Trotter, who then lived in the village of York. James Trotter kept a tavern, and having been successful in business bought a farm in the neighbourhood. In July, 1870 James Trotter conveyed the farm to one Duggan, who at once conveyed it to the plaintiff without consideration.

On the 5th July, 1873, James Trotter bought from the defendants a tavern in Caledonia, a short distance from York, and shortly afterwards the household was removed there, the farm being worked part of the time on shares, and part of the time being leased to tenants by Mr. and Mrs. Trotter.

Mrs. Trotter received all the income both of the tavern and the farm.

Shortly before the seizure the family had removed to Hamilton, Mr. Trotter having leased a tavern there, the license being taken in a son's name, in consequence of the refusal of the authorities to grant one to James Trotter. Before leaving Caledonia most chattels had been sold, and the Hamilton tavern was furnished partly with the proceeds of the sale, partly with money raised on mortgage of the farm, and with a small loan from a son.

The execution was for the purchase money of the Caledonia tavern.

The learned County Judge, on 18th November, 1882, delivered judgment, finding that the settlement was a perfectly legal transaction: that on the evidence Trotter was then clear of debt, and intended to make provision for his wife and children: that the furniture had been bought by the wife, from the proceeds of the farm: that it did not appear that any portion had been bought with the proceeds of the husband's business, and that there must be a verdict for the plaintiff.

February 10, 1883. *Rae* moved to enter the judgment for the defendants.

*Forlong*, shewed cause. The Judgment debtor being free from debt, doing a prosperous business and with no intention of changing that business or contracting debts, the deed of the farm lot from him to his wife, the claimant herein, cannot be impeached: *Goodwin* v. *Williams*, 5 Grant 539; *Jenkyn* v. *Vaughan*, 3 Drewry 424, 425; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglas*, L. R. 14 Eq. at p. 121. The property claimed was pur-

chased with moneys received from rents of this farm, moneys borrowed from the plaintiff's two sons, and moneys raised by mortgage on the farm; and as the deed is unimpeachable property purchased with the moneys received as rents and profits of the property so conveyed is the property of the plaintiff, and cannot be reached by execution against the husband. This is a post nuptial settlement, and is not within any of the Acts relating to married women's property, and is her separate estate, and will be protected in favour of the wife against the claims of subsequent creditors of the husband if he was in a position to make a voluntary settlement: per Osler, J. in *O'Doherty* v. *Ontario Bank*, 32 C. P. 285; and although Mr. Justice Osler's judgment is a dissenting one, yet as to this point the Court was unanimous. See judgment of Wilson, C. J., at p. 299. The husband was in a position to make a voluntary settlement. He was free from debt, was not contemplating debt, or change of business, nor did he divest himself of all his property, for he retained a village lot and his prosperous business. The wife has the *jus disponendi* of the settled farm without her husband's consent or concurrence: *Adams* v. *Loomis*, 22 Grant 99, affirmed on rehearing, 24 Grant 242. Product of settled property is the property of the wife as against the husband, even though he actually reduces such product into his possession: *Darkin* v. *Darkin*, 17 Beav. 578; *Scales* v. *Baker*, 28 Beav. 91. But there was no taking possession of the product in the present case, rather the contrary. The husband in this case contributed nothing to the purchase of the goods seized herein, and therefore *Lett* v. *Commercial Bank*, 24 U. C. R. 552; *Harrison* v. *Douglas*, 40 U. C. R. 410, and that class of cases are distinguishable. Here husband and wife lived together, but not on the settled farm, and this case is stronger than *Plows* v. *Maughan*, 42 U. C. R. 129, or *Ingram* v. *Taylor*, 7 A. R. 216. See also *Lawson* v. *Laidlaw*, 3 A. R. 77; *Townsend* v. *Westacott*, 2 Beav. 340, 343, 344 and 345.

*Rae*, contra. The goods in question are claimed by the

plaintiff as her own, and as being the proceeds of the rents and profits of her own farm. The plaintiff was married before 1859, without a marriage settlement, the farm was in 1870 the husband's, who, on the 14th July, 1870, conveyed to one Duggan, who on the same day conveyed to the plaintiff, and it is admitted without consideration. If these conveyances failed to operate either as a good post-nuptial marriage settlement or under the Act, as pointed out by Osler, J., in *O'Doherty* v. *Ontario Bank*, 32 C. P. 285, then the proceeds of the farm could not be followed by the plaintiff, and claimed to be her own as against her husband's creditors. The class of cases in our own Court of Chancery, beginning with *Buckland* v. *Rose*, 7 Gr. 440, 446, 447, and ending with *Campbell* v. *Chapman*, 26 Gr. 240, in which the intervening decisions are reviewed, shew that such a settlement is bad in equity as against creditors. The judgment of Osler, J., in *O'Doherty* v. *Ontario Bank*, 32 C. P. 285, contains all that can be said as to this not being a good settlement under the Married Woman's Act, that Act expressly excepting the claims of creditors. The conveyance from Duggan to the wife gives the husband a common law right in the land; the necessary inference from which is, that everything which is the result of the rent and profits of the land goes to the husband. The depositions of the plaintiff put in at the trial, and the evidence at the trial shewed that the plaintiff did not reside on the farm, that the husband was the real director and controller, the wife being at most the purse-bearer, and the funds not being kept separate: *Harrison* v. *Douglas*, 40 U. C. R. 410; *Plows* v. *Maughan*, 42 U. C. R. 129; *Lett* v. *Commercial Bank*, 24 U. C. R. 552; *Ingram* v. *Taylor*, 7 A. R. 216. The sums alleged to have been paid by the plaintiff from the proceeds of the farm are incredible, and with the rest of the evidence shew that the wife mixed up these proceeds with the money made by the husband in tavern keeping, and with the proceeds of the farm and the household furniture; and as against creditors at any rate this mixing cannot be separated in the plain-

tiff's favour, the money became the husband's, was used in carrying on the business and the household, and that was done by him and credit given to the husband.

May 22, 1883. HAGARTY, C. J.—The plaintiff and her husband were married before 1859. In 1870 he purchased a farm, and had it conveyed to his wife by an ordinary statutable deed.

He was then free from debt, and no evidence seems to have been adduced to impeach the transaction. By the Act of 1859 he thus made a post nuptial settlement on his wife. The property, therefore, under the first section of the Act of 1859, as copied in R. S. O. ch. 125, being "in any way acquired by her after marriage," is to be held and enjoyed by her free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

Both the marriage and the acquisition of the property were before any of the Acts of the Provincial Legislature.

The question before us is, whether certain furniture and articles purchased with the rents and profits of this farm were seizable under execution against the husband, at the suit of defendants, for a debt incurred after the conveyance of the property to the wife.

She and her husband never lived on the land, but he kept tavern in another place. The land was generally under lease, she receiving the rents. For a time there was no tenant, and she and her husband worked the land; he hired men, and she paid them.

As they did not live on the land and farm it together, the husband in such case being naturally regarded as the managing farmer, the case is free from many of the difficulties that had to be dealt with in *Lett* v. *Commercial Bank*, 24 U. C. R. 552 (1865.) Even in that case I find myself (while still trammelled by the dark superstitions of the old fashioned notions as to husband and wife) reported as saying "she is allowed to have and enjoy her personal

property, in this case being moneys arising from the rents and profits of certain real estate, as fully as if she were a *feme* sole. These moneys could not be seized for her husband's debts; he could not give them away, &c., without her consent."

If with these rents and profits she purchased furniture and articles, which they used in their dwelling house, I think they would not be seizable for the husband's, and a Court of Equity would have, and has before now, interfered to protect such property from execution as being her separate estate. I refer to such cases as *Scales* v. *Baker*, 28 Beav. 91; *Duncan* v. *Cashin*, L. R. 10 C. P. 554.

If she chose to give any money from the rents to her husband to enable him to buy furniture for his own use and that of the family, the articles so purchased would be considered as his property.

As to the property purchased for the Hamilton business, it appears that she raised money by mortgage of her farm, and borrowed other money from her sons, and she purchased these chattels with the money so obtained. If so, they must be considered to be her property.

It was hardly disputed on the argument that the facts were as the learned Judge Sinclair has found them. We think he has drawn the right conclusion from them in point of law. See also *O'Doherty* v. *Ontario Bank*, 32 C. P. 285; *Plows* v. *Maughan et al.*, 42 U. C. R. 129.

ARMOUR and CAMERON, JJ., concurred.

*Judgment for plaintiff.*

[QUEEN'S BENCH DIVISION.]

## JACKSON V. CASSIDY.

*Promissory note—Attachment.*

*Held*, affirming the judgment of Armour, J., that a negotiable promissory note, not yet due, is not a debt which may be attached within the meaning of Rule 370 of the Ontario Judicature Act.

THIS was an interpleader to try whether a certain promissory note, dated the 23rd day of August, 1882, made by Joseph Foltz, payable to the order of James Hennessy, and endorsed by James Hennessy, was the property of the plaintiff as against the claim of the defendant under an attaching order made by the local Judge of this Court at Cornwall, in asuit between the defendant judgment creditor and Isaac Nelson, judgment debtor, and James Hennessy, Joseph Foltz, and the Molsons Bank, at Trenton, garnishees.

The cause was tried by and before Armour, J., at the last Assizes at Belleville, when the learned Judge delivered the following judgment: "I find the following facts: That Joseph Foltz, on the 23rd day of August, 1882, made his promissory note, payable three months after the date thereof, to the order of James Hennessy, at the Molsons Bank, at Trenton, for the sum of $380.94: that the said James Hennessy endorsed the said note: that the said note fell due, and was protested for non-payment on Monday, the 27th day of November, 1882: that the judgment debtor, Isaac Nelson, was, on the 25th day of November, 1882, the holder of the said promissory note, and continued to be such holder thereof until between nine and ten of the clock in the forenoon of the 27th day of November, 1882, when the said Isaac Nelson made an assignment of all his estate and effects to the plaintiff (who then accepted the same) for the general benefit of all his creditors without preference or priority, and the said promissory note was then handed over to the said

plaintiff, and was thereupon by him duly presented for payment, and was dishonoured: that one at least of the creditors of the said Isaac Nelson, on the said 27th day of November, 1882, consented to the said assignment, and agreed to accept his proportion of the proceeds of the said estate, and to hold the assignee for the same, and some others of such creditors thereafter consented thereto: that the said attaching order was served on the said Joseph Foltz and on the said James Hennessy on the 25th day of November, 1882, and while the said Isaac Nelson was the holder of the said promissory note; and I find that the said Isaac Nelson was never served with the said attaching order.

"In my opinion, a negotiable promissory note not yet due, is not a debt or such a debt as may be attached within the meaning of Marginal Rule 370 of the Ontario Judicature Act. It has been held over and over again that such a promissory note was not a debt or such a debt as could be attached under sec. 288 of the Common Law Procedure Act, and I do not think that the Judicature Act has made any difference in this respect. If it were held that such a promissory note was attachable as a debt under this rule it would cause great trouble, inconvenience, and embarrassment in dealing in negotiable notes. I think the verdict should be for the plaintiff."

May 29, 1883. *Arnoldi* moved to set aside the judgment of the learned Judge, and enter judgment for the defendant, citing *Pyne* v. *Kinna*, 11 Ir. R. (C. L.) 40; *Jones* v. *Thompson*, 27 L. J. Q. B. 234; *Mellish* v. *Buffalo B. & G. R. W. Co.*, 2 P. C. 171; *Rapier* v. *Wright*, L. R. 14 Ch. D. 643; *Tapp* v. *Jones*, L. R. 10 Q. B. 591.

*Aylesworth*, contra.

THE COURT, after argument, dismissed the motion, with costs, agreeing with the judgment of Armour, J.

*Motion dismissed, with costs.*

[QUEEN'S BENCH DIVISION.]

## REGINA V. CLARK.

*Conviction—House of ill-fame—32-33 Vic. ch. 32.*

*Held*, that a conviction under 32-33 Vic. ch. 32, sec. 2, sub-sec. 6, for being an *unlawful* (instead of an *habitual*) frequenter of a house of ill-fame, and which adjudged the payment of costs which is unauthorized by the statute, must be quashed.

That section makes the being such habitual frequenter a substantial offence, punishable as in sec. 17, and does not merely create a procedure for trial and punishment.

The defendant was on the 9th day of January, 1883 convicted by the Police Magistrate of the City of Hamilton, for that he the said defendant on the 31st day of December, 1882, at the city of Hamilton, did unlawfully frequent a house of ill-fame kept by one Jane Shepherd; and was adjudged for his said offence to forfeit and pay the sum of sixty dollars, and to pay the complainant, Alexander D. Stewart, the sum of two dollars for his costs in that behalf, and if the said several sums should not be paid forthwith the same were ordered to be levied by distress and sale of the goods and chattels of the said John Clark, and in default of a sufficient distress the said John Clark was adjudged to be imprisoned in the common gaol of the County of Wentworth for the space of three months, unless the said several sums and all costs and charges of the said distress should be sooner paid.

This conviction, and the information and the warrant issued thereon, and the depositions and evidence upon which the same was made, were brought into this Court by *certiorari;* and on the 9th day of February, 1883 Clement obtained a rule on behalf of the defendant calling upon the complainant and the Police Magistrate to shew cause why the said conviction should not be quashed, on the grounds:—

1. That it nowhere appeared by the said conviction, or by the evidence returned therewith, that the defendant was

asked to give a satisfactory account of himself in connection with the said charge.

2. That the adjudication of punishment in said conviction contained was unwarranted by any law or statute in that behalf.

On the return of this rule, on the 20th day of February, 1883, *Clement* supported the rule, but no one shewed cause either for the complainant or for the Police Magistrate.

Judgment, May 16, 1883. ARMOUR, J,—The conviction in question was made under 32-33 Vic., ch. 32, and the defendant was charged or intended to be charged with the offence of being an habitual frequenter of an house of ill-fame, under section 2, sub-section 6, of that Act, which makes it an offence to be an habitual frequenter of a house of ill-fame, punishable in the manner prescribed by the 17th section.

It was contended that this Act, 32-33 Vic., ch. 32, created no offence, but that the offence of which the defendant was convicted, was created by the Act 32-33, ch. 28, and that the Act 32-33 Vic., ch. 32, merely created a procedure for the trial and punishment of the offence; but I cannot agree in this contention. I think the Act 32-33 Vic., ch. 32, made the being an habitual frequenter of a house of ill-fame a substantive offence punishable in the manner and as therein prescribed, and that *Regina* v. *Levecque*, 30 U. C. R. 509, which was relied on, is no authority against this conviction, for the conviction in that case was under 32-33 Vic. ch. 28.

The conviction must however be quashed, for the defendant was not convicted of being an *habitual* frequenter, but only of being an unlawful frequenter, and he was adjudged to pay costs, which the statute does not authorize.

The order *nisi* will therefore be absolute to quash the conviction.

*Judgment accordingly.*

[QUEEN'S BENCH DIVISION.]

## O'BRIEN ET AL. v. CLARKSON.

*Assignment in trust for creditors—Trustee's powers.*

An assignment in trust for creditors contained a clause which, amongst other things, empowered the trustee to sell for cash or on credit, and *with or without security* for the unpaid purchase money.

*Held*, that the introduction of the words "with or without security" was immaterial, and did not invalidate the assignment, there being no proof of any design on the part of the debtors to so enable the trustee to unfairly delay the realization of the assets.

INTERPLEADER, to try whether certain goods seized by the sheriff of Welland under writs of *fi. fa.* issued by the plaintiffs, against William Bull & Co., were the goods of the plaintiffs as against the defendant.

The case was tried at the last Winter Assizes, at Toronto, before Wilson C. J., without a jury, when judgment was given in favour of the defendants.

May 22, 1883. *Gibbons* moved to set aside the judgment on the law, evidence, and weight of evidence.

*W. A. Reeve*, shewed cause.

The facts and arguments appear in the judgment.

May 26, 1883. HAGARTY, C. J.—The only point in dispute before us is this. An assignment for the benefit of creditors, admitted to be valid and binding in all other respects, is objected to as invalidated by the following clause, empowering the trustee "to collect, realize, and sell in whole or in portions, as he shall from time to time think proper, and in such manner, whether by auction, tender, or private sale, as he shall from time to time think advisable, and for such price and upon such terms and conditions as to title, price, payment of purchase money, and with or without security for the unpaid purchase money, if any, and otherwise in every respect as he, the said trustee, shall think advisable, with power to rescind any contract of

sale, and to buy in and resell for the purposes of the trusts without being responsible for any loss or deficiency on the re-sale."

It was argued most strenuously by Mr. Gibbons that the debtors had no right to authorize the trustee to sell on credit, and "with or without security;" and that his clients, the execution creditors, could not reasonably be expected or required to execute or accept such an assignment.

He relied almost wholly on some decisions in the State of New York.

The late case of *Badenach* v. *Slater*, in our Court of Appeal (*a*), is, we think, decisive of his objection.

There the assignee was allowed to sell "for cash or credit." The only difference here is, the introduction of the words, "with or without security." These words appear to us to be unimportant.

If the trustee can sell on credit, it must be either with or without security that the credit is given.

We are, of course, bound by the decision of the Appellate Court, and hold that it governs this case.

We should have arrived at the same conclusion, as it seems to us to be carrying the objection to an admittedly fair general assignment for creditors beyond what has ever yet been decided in England or in this country.

If it could be shewn that there was any design or understanding on the part of the debtors to frame the assignment in this way so as to enable the trustee to delay the realization or distribution of the assets, either for the benefit of the assignors, or to delay the creditors, then it might become a question of fact to be decided by the jury, or Judge without a jury, whether it was an assignment to defeat or delay creditors.

The learned Chief Justice who heard the case was satisfied both as to the facts and the law of the case, and decided after full consideration in favour of the assignment.

It must be observed that this deed gives no special

(*a*) Not yet reported.

powers to the trustee to carry on the business, or to buy new goods, or to do anything putting it in his power to frustrate or delay unfairly the realization of the assets, as in such cases as *Gallagher* v. *Glass*, 32 C. P. 641, and some of the casesthere cited. It is merely a reasonable and common power given to carry out, in the best manner possible or customary, the main and only apparent object—viz., the realization of assets and distribution of the proceeds.

As is pointed out in the appeal case, we must read into the assignment the provisions as to the powers and liabilities of the trustee, contained in our R. S. O. ch. 107, sec. 2. The American authorities relied on by Mr. Gibbons are also disposed of.

We think the appeal must be dismissed, with costs.

ARMOUR and CAMERON, JJ., concurred.

*Judgment accordingly.*

[COMMON PLEAS DIVISION.]

## EMERSON v. THE NIAGARA NAVIGATION COMPANY.

*Carriers by water—Refusal of passenger to pay fare—Assault and imprisonment by purser—Liability of master for act of servant—Summary conviction—Civil remedy.*

The plaintiff who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured.

*Held*, OSLER, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act.

It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid.

*Per* WILSON, C. J.—This, under 32-33 Vic. ch. 20, sec 45, D., through a release to the purser, did not constitute any bar to the present action against the company.

*Held*, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it.

The statement of claim set out that the plaintiff was, on the 20th of July, 1882, lawfully on board the steamer *Chicora*, the property of the defendants, on her way from Niagara to Toronto, when a servant of the defendants detained him against his will in a room on board the steamer, and also seized hold of him in a violent and rough manner by the hands and wrists in order to obtain possession of a valise in the hands of the plaintiff. The valise was seized hold of and violently wrenched from the plaintiff's possession, and the plaintiff was thereby much bruised in his hand and wrist, and endured much pain, and was thereby rendered unfit to attend to his business, and was compelled to incur a large expense for medical attendance.

Statement of defence. The defendants deny the detaining or seizing hold of the plaintiff.

If there was any such detaining and seizing, the servant did not act within the scope or in the course of his employment as the defendants' servant or with their authority. The plaintiff was a passenger from Niagara to Toronto, and on being requested by the defendants' servants, authorized to collect the fares of passengers, for his fare, wrongfully refused to pay the same, and the servant of the defendants afterwards, in order to secure payment of the said fare, retained in his custody a piece of luggage belonging to the plaintiff, who received the injury [if any] complained of in attempting, before paying the fare, to recover the said luggage from the custody of the defendants' servants.

The plaintiff afterwards, on the 20th of July, 1882, laid a complaint for assault before Neil C. Love, one of her Majesty's Justices of the Peace in and for the city of Toronto, against one Alexander Leatch, employed by the defendants as their purser on board the said steamer, which said assault is the same assault as in the plaintiff's statement of claim mentioned, and thereafter the said complaint was heard before the Police Magistrate in and for the city of Toronto; and thereupon the said Leatch was convicted for such assault by the said Police Magistrate, who imposed a fine upon the said Leatch for such assault of $3, and $2 85 costs, which said fine and costs the said Leatch then and there paid. That by the conviction of the defendants' servant Leatch, and payment of the said fine and costs, the plaintiff's right to maintain this present action is barred by the statute 32 & 33 Vic. ch. 20, sec. 45, D.

Issue.

The cause was tried before Osler, J., and a jury, at Toronto, at the Winter Assizes of 1883.

The facts were that on the 19th of July last there was a special afternoon excursion trip from Toronto to Niagara and return the same day by the *Chicora* at the reduced price of 50 cents, and tickets were issued to that effect.

The plaintiff bought such a ticket, and when the purser came round collecting the tickets, which were in two parts,

one part for the out trip and the other part for the return trip, the plaintiff said this conversation took place between him and the purser: "I said to the purser I was going over expecting to meet some friends, but might not. If I did I would like to lay over until the following day, and could he endorse my ticket to return. He said he could not do that, but he would know me, and it would be all right, and he took up the whole ticket. I went to tear it in two, to give him part—'Never mind,' said he, 'I will take the whole of it. I will know you—it will be all right'—he took the whole ticket up."

In cross-examination, he said:

Q. "Then the purser declined, or at all events did not make any extension of the ticket?" A. "No sir; he took it up and said he would remember me coming back—he did not allow me to detach it, but took both." Q. "And that is all that passed?" A. "He said it would be all right—he would recollect me, and it would be all right. I told him I expected to come back next day if I met my friends. He said he would remember me: that is all he said. I did not endeavour to defraud the company by endorsing my ticket." Q. "Being a cheap excursion with a ticket limited to that day, you were trying to get the limit extended, so as to make it a regular ticket?" A. "I did not know but he ran the boat. If a conductor endorse the ticket, you can get off, and with a strange conducter it will be all right,—if he endorsed it the ticket would be so good." Q. "You have travelled enough on the cars to know when you get a special holiday excursion ticket that it will not be endorsed or extended?" A. "Well, if it is going and returning."

On that part of the case the evidence for the defendants of Leatch, the purser of the boat, was: "The plaintiff had a special afternoon excursion ticket, good only on the date of it, which was stamped on the back. I asked him for his ticket, and on his presenting it, I asked him if he was returning that afternoon. He said he did not know, but he thought he might. I told him I would take the ticket,

and if he returned that afternoon I would recognize him. He did not say anything about returning the next day. He came to me a little while after and asked how would I remember him. I told him I would easily do so if he came that afternoon." Q. "What was your reason for taking up the ticket?" A. "Simply, we have had such tickets scalped on the Niagara boat. Such tickets have been sold to ordinary passengers who were coming over, and who would naturally pay a dollar on the boat. That is my only reason. I positively say I did not consent to pass him on the following day. I did not promise he could return the next day. I had no power to do that."

On cross-examination the purser said: "The plaintiff understood the ticket was an excursion ticket as well as I did. He did not ask or mention about coming back the next day. He may or may not have asked if he could come back the next day."

The next part of the case was the alleged imprisonment of the plaintiff by the purser in his office, upon the day the plaintiff came back to Toronto. The plaintiff swore the door was bolted on him, and that he wanted to get out, and tried to get out, but the purser would not allow him to go out.

Then followed the chief matter of complaint, the injury done to the plaintiff's hand by the purser in forcing the plaintiff's valise away from him. The principal question connected with it was, whether the plaintiff or the porter first got hold of the valise. The plaintiff swore he did. The porter and purser both swore the porter had first hold of it.

The jury found:

1. The plaintiff was detained against his will in the purser's office, for which they gave $50 damages.

2. That the porter had not placed his hand on the plaintiff's luggage before the plaintiff had it.

3. That the plaintiff did not hear the purser tell the porter to take possession of the luggage. And they assessed the damages for the assault at $400.

The learned Judge gave judgment for the plaintiff for the $400, but for the defendants for the $50 for the detention of the plaintiff in the purser's office on the ground that the defendants were not responsible for the purser's act.

The question as to the conviction of the purser for the assault the learned Judge said was a matter to be disposed of elsewhere.

At the Hilary Sittings in February, 1883, *Boulton*, Q. C., obtained an order *nisi* calling on the plaintiff to shew cause why the findings of the jury and the judgment of the learned Judge thereon should not be set aside, and a nonsuit entered, or a new trial ordered, on the ground that there was no evidence to sustain the said findings of the jury, and that they are against evidence, and the weight of evidence, and the damages are excessive.

A notice of motion was given to the like effect.

During the same sittings, February 15, 1883, *Boulton*, Q. C., supported his order *nisi* and notice of motion. If the purser did what is alleged against him he did it without authority from the defendants, and he was not acting at the time within the scope of his authority, and the defendants are not liable, *McManus* v. *Crickett*, 1 East 106; *Goff* v. *Great Northern R. W. Co.*, 3 E. & E. 672; *Eastern Counties R. W. Co.* v. *Broom*, 6 Ex. 314; *Limpus* v. *General Omnibus Co.*, 1 H. & C. 526; *Godefroi* and *Short* on Railway Companies, 458, 459; *Addison* on Torts, 5th ed., 104, 105; *Roscoe's Nisi Prius*, 14th ed., 1089. The purser was justified in taking the valise as a lien for the fare which the plaintiff refused to pay, and the finding of the jury that the plaintiff had hold of it before the porter of the boat took it is contrary to the evidence. It was proved plainly, and not denied, that the purser had not power to extend the time for the plaintiff's return on the cheap and special excursion trip. If the defendants be liable at all for the act of the purser, they are discharged by the prosecution of the purser by the plaintiff for the assault upon him, and by the conviction of the purser: *Wright* v. *London General Omnibus Co.*, 2 Q. B. D. 271.

*J. K. Kerr*, Q. C., and *William Roaf*, shewed cause. The acts of the purser were not done beyond the scope of his employment while on the boat: *Seymour* v. *Greenwood*, 6 H. & N. 359, in Ex. Ch. 7 H. & N. 355; *Bayley* v. *Manchester, &c., R. W. Co.*, L. R. 8 C. P. 148. The jury found properly on the evidence the plaintiff had first hold of his valise, in which case the purser and porter were plainly in the wrong in taking it from him: *Thompson* on Carriers of Passengers, 352; *Moore* v. *Metropolitan R. W. Co.*, L. R. 8 Q. B. 36; *Bryan* v. *Rich*, 106 Mass. 180; *Sherley* v. *Billings*, 8 Bush. Ky. R. 147; *Angell* on Carriers, 4th ed., 502, 503; *Cooley* on Torts, 533 to 541; *Merrill* v. *Curtis*, 57 Maine 152. The imprisonment of the plaintiff by the purser in his office is a separate charge, and for that there was no excuse. The defendants ratified the acts of the purser, for they kept the valise in lien, and did not give it up until the plaintiff, a day or two after, paid the fare of $1 under protest. The damages are not excessive. The plaintiff was badly used, and badly injured, and was for a long time out of employment. As to the conviction of the purser. If it can be used in an action against the defendants, it is not sufficient to bar the action because the prosecutor did not pray the Police Magistrate to proceed with the case, and the charge made was for an aggravated assault, and the plaintiff could not pray such a case should be summarily dealt with.

*Boulton*, Q. C., in reply. The magistrate could not have proceeded as he did if he had not been prayed to try the case, and it is not necessary the proceedings should show the magistrate was requested to proceed summarily: *Regina* v. *Shaw*, 23 U. C. R. 616. There was no ratification by the defendants of the purser's acts, because they had no knowledge of what had happened until after the plaintiff got his valise and paid his fare. The letter of the plaintiff's solicitor demanding the valise, and offering to pay the fare under protest, was delivered to the purser who had the valise at the time, and not to any manager or member of the company.

March 9, 1883. WILSON, C. J.—It was laid down by Holt, C. J., in *Middleton* v. *Fowler*, 2 Salk. 282, as a general proposition, that "no master is chargeable with the act of his servant, but when he acts in the execution of the authority given by his master," and that is the principle which has governed all the later decisions, although there has been much discussion and some fluctuation of opinion in determining what acts of the servant will be deemed to be within the line and scope of his authority and employment.

It will be necessary to refer to some of the decisions upon the subject to ascertain what acts have been determined to be within the scope of the servant's authority, and for which the master will be held responsible, and what acts are not within the scope of that authority.

The case of the *Eastern Counties R. W. Co.* v. *Broom*, in Ex. Ch. 6 Ex. 314, has not been altogether approved of, and *Roe* v. *Birkenhead, &c., R. W. Co.*, 7 Ex. 36, has been distinguished from some of the later cases, and I shall not rely very much upon them.

The case in 6 Ex. 314, is important, however, as respects the question of ratification by the company. It was there held that the attendance of the company's attorney on the enquiry into the charge preferred against the plaintiff, was no evidence of ratification by the company of the act of their servant.

And the case in 7 Ex. 36, I quote from as follows, because the language is consistent with all the later decisions.

Parke, B., said, at p. 41: "The arrest not having been effected by the defendants themselves, but by a third party, in order to render the defendants liable the plaintiff was bound to shew that the act of which he complained was by an authority express or implied given by the defendants, or that it had been subsequently ratified by them. * * * There was no proof that he had ever received any general authority from the company to arrest any person who did not pay his fare, nor was there any evidence of any

course of dealing to shew that as a servant of the company he was authorized to make any arrest on their behalf, much less that he had any direct authority to take the plaintiff into custody."

In *Seymour* v. *Greenwood*, 6 H. & N. 359, and in the Ex. Ch. 7 H. & N. 355, the plaintiff was forcibly removed by the guard from an omnibus and thrown on the ground and seriously hurt, under the mistaken belief that he was drunk or troublesome.

In the Ex. Ch. Williams, J., who gave the judgment of the Court, said at p. 358: "Although it cannot be denied that the defendant authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibus, and he puts the guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible."

In *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, at p. 529, the Judge directed the jury that a master was responsible for the reckless and improper conduct of his servant in the course of the service; that if the jury believed the defendant's driver, being dissatisfied and irritated with the plaintiff's driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and doing that which he believed to be for the interest of the defendants, they were responsible. That if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible. That the instructions given to the

defendants' driver were immaterial if he did not pursue them; but if the act of the defendants' servant was an act of his own, and to effect a purpose of his own, the defendants were not responsible.

In *Goff* v. *Great Northern R. W. Co.*, 3 E. & E. 672., *Held*, that, inasmuch as the exigency of deciding whether or not a particular passenger shall be arrested by a railway company's servants under the statute must be naturally expected to arise frequently in the ordinary course of the company's business, and is of such a nature that it must be made promptly on the company's behalf, it is a reasonable inference that the company have on the spot at their stations officers with authority to make the decision promptly for them.

In *Stevens* v. *Woodward*, 6 Q. B. D. 318, the defendant's clerk went into his master's room to wash his hands, where he had no right to be, and left the tap running, and did injury to the plaintiff, who had rooms below: *Held*, the master was not answerable for that act of his clerk. It was intimated by Grove, J., that if a housemaid whose business it would be to be in that room in the course of her employment had left the tap running, the master would have been responsible.

Where a servant, not on his master's business, drives on his own account and for his own purpose, and does an injury by his driving, the master is not responsible: *Mitchell* v. *Crassweller*, 13 C. B. 237; *Storey* v. *Ashton*, L. R. 4 Q. B. 476; *Rayner* v. *Mitchell*, 2 C. P. D. 357.

If a carman of the defendants in delivering coal for his employer, removes an iron plate in the footway to put the coal into the cellar, and a passer by is injured without any want of care on his part, by falling into the opening, the master is liable. "It is the common case of negligence by a servant in the scope of his employment, for which the master is responsible:" *Whiteley* v. *Pepper*, 2 Q. B. D. 276.

A porter of the defendants, acting under rules, was directed expressly to prevent persons, if possible, from

travelling in the wrong carriage; he removed the plaintiff violently from the carriage in which he was, under the erroneous impression that the plaintiff was not in the right train for the place to which he had booked. *Held*, he was acting in the due performance of his duty: *Bayley* v. *Manchester, &c., R. W. Co.*, L. R. 8 C. P. 148. in Ex. Ch.

The Chief Baron said, at p. 152: "The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant was actually directed to do."

A contractor who employed men, who were not permitted to go home for dinner, or to leave their horses and carts, was held liable, when one of his men did leave for dinner and left his horse during that time unattended in the street before his door; the jury being of opinion the man was at the time acting in the course of his master's employment: *Whatman* v. *Pearson*, L. R. 3 C. P. 422.

A railway company has power to take a person into custody for not paying his fare, and if an employee do that for the company, it is the act of the company; but the company has no power to take a person into custody for non-payment of the charge for carriage of his horse, and therefore the company was not liable for their employee doing so, as no power could be implied to be given by the company to do such an act: *Poulton* v. *London and South Western R. W. Co.*, L. R. 2 Q. B. 534.

The plaintiff desired a railway ticket clerk to take back two sous, and give him a penny for them. The clerk refused. The plaintiff reached his hand to the till where the copper coin was. The clerk seized the plaintiff, and gave him in charge of a policeman. The charge was afterwards dismissed. In an action against the company: *Held*, the action would not lie; that the clerk had no power to give a person into custody who had made an attempt which did not succeed; there had been neither a felony nor a

misdemeanor committed. "The charge was that the plaintiff had attempted to rob the till—not that he was attempting it. It could not be needful to give him into custody to prevent it, for he had ceased to make the attempt, if he ever was guilty of it. The property of the company not being in danger, the clerk had no authority to act as he did." Per Lush, J., at p. 72: *Allen* v. *London and South Western R. W. Co.*, L. R. 6 Q. B. 65; *Edwards* v. *London and North Western R. W. Co.*, L. R. 5 C. P. 445.

In the last case Keating, J., said, that in all the cases in which railway companies have been held liable, the offence for which the person aggrieved has been given in charge has been an infringement of the company's by-laws.

In *Moore* v. *Metropolitan R. W. Co.*, L. R. 8 Q. B. 36, the defendants' station inspector gave the plaintiff into custody upon the charge of refusing to give up his ticket or pay his fare, thereby defrauding the defendants. The charge was dismissed. *Held*, that as by statute the defendants were empowered to arrest persons committing frauds, and as the inspector was their representative, it must be presumed, in the absence of evidence to the contrary, he had authority from the defendants to arrest persons supposed to be guilty of committing offences against the statute, and that the defendants were liable for the mistake.

Upon these cases the alleged imprisonment of the plaintiff by the purser in his office was not an act which the defendants themselves could legally have done for the alleged non-payment by the plaintiff of his fare, or to enforce the payment of it. And the learned Judge rightly disposed of that at the trial by directing a finding thereon for the defendants, which has not been moved against.

As to the lien on the valise for the steamboat fare. It appears there is such a right: *Wolf* v. *Summers*, 2 Camp. 631; *Higgins* v. *Bretherton*, 5 C. & P. 2.

The jury have found, however, that the porter did not place his hand upon the valise before the plaintiff took it; and if that be such an act of personal possession of it by the plaintiff which would prevent the purser from taking

it or having a lien upon it for the fare, just as if it had been an overcoat or a watch which the plaintiff had on his person, then the purser was a wrong-doer in taking it forcibly from the possession of the plaintiff.

I think the purser could not lawfully take the valise out of the personal possession and hands of the plaintiff to acquire a lien upon it. A lien is in the nature of a detainer and the right of detainer; it is a right to possess until some claim or charge is paid. The right of stoppage *in transitu* does not exist where the goods have come to the possession of the vendee. The right of lien, in like manner, does not exist while the person against whom it is claimed has the actual custody of the property.

The fact that the plaintiff may have seized his valise to prevent the lien from attaching will not, in my opinion, confer upon the defendants or upon their servant any right to take it.

Then, are the defendants liable for the act of the purser in violently wrenching the valise from the hands of the plaintiff so as to obtain a lien upon it?

The case of *Ramsden* v. *Boston and Albany R. W. Co.*, 104 Mass. 117 (1870), is a decision quite in point in favour of the plaintiff.

But it appears to me, that although the purser was acting in the interest and for the benefit of his employees, he was not acting in the due course of his employment, and within the line of his authority. He was committing an assault, and he might as well have seized the watch from the person of the plaintiff, or put his hand into the plaintiff's pocket and held the watch, or paid himself by force from the plaintiff's money, as wrest the valise from the plaintiff's hands.

The company and the purser for them had the right, if, in possession of the valise, to keep it for the unpaid fare, assuming it to have been unpaid, but neither the company nor the purser had the right to commit an assault for the purpose of acquiring a lien, and in my opinion the company are not liable for the unauthorized act of the purser.

There remains for consideration the effect of the conviction of the purser for the assault committed by him upon the plaintiff, in taking the valise from the plaintiff's hands.

The complaint was made apparently under the 32 & 33 Vic. ch. 32, sec. 2, sub-sec. 3, for that the purser "did commit an aggravated assault upon the complainant, thereby inflicting (not alleging it, however, to have been by unlawfully and maliciously inflicting) upon him grievous bodily harm." And the conviction was, for that the purser "did commit an assault upon one Philip Emerson, against the form of the statute in such case made and provided," in the form under the Justices Summary Conviction's Act, ch. 31, schedule I, 1. The offence in the conviction being apparently on a prosecution under ch. 20, sec. 43, which enables the magistrate to proceed summarily at the instance of the party aggrieved, against any person who "unlawfully assaults or beats any other person."

Section 44 applies to "any case of assault or battery."

Then sec. 45 enacts that, "If any person against whom any such complaint, as in either of the last two preceding sections mentioned, has been preferred by, or on the behalf of the party aggrieved, has obtained such certificate, or, having been convicted, has paid the whole amount adjudged to be paid. * * In every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

And by section 46: "In case the Justice finds the assault or battery complained of to have been accompanied by an attempt to commit felony, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same."

The information in this case need not have been on oath: 32 & 33 Vic. ch. 31, sec. 24, D.

The information here was not effectually made under

the act of 1869, ch. 32, because the essential words, that the aggravated assault had been committed by "unlawfully and maliciously" inflicting the grevious bodily harm was not contained in the information, and could not from the facts have been intended to be charged.

The information charged in law an assault only of an aggravated kind, and would I think upon such charge be under the Act of 1869, ch. 20, sec. 43.

By sec. 19 of that Act, "unlawfully and maliciously inflicting grievous bodily harm," is a misdemeanor. Inflicting grievous bodily harm, by means of an aggravated assault, but not alleged to have been done "unlawfully and maliciously" must be a charge of a lower kind than when the act is done *maliciously*.

In *Blake* v. *Beech*, 1 Ex. D. 320, the information was laid under one Act, and the conviction was under a different Act, and the conviction was held irregular.

Cleasby, B., in giving the judgment of the Court said, at p. 333: "Such an irregularity may be waived, as appears by several cases, particularly *Turner* v. *Post Master General*, 5 B. & S. 756; but in that case the Lord Chief Justice says (at p. 763,) 'In strictness the appellant was entitled to insist that there should be an information and summons, but they waived that,' &c. And in *Regina* v. *Shaw*, 34 L.J.N.S. M.C. 169, which was an indictment for perjury, it appeared that in the proceedings in which the perjury was said to have been committed there was no proper information, but a regular summons issued purporting to be founded on a proper information, and the defendants appeared, and the case was tried without any objection; the Court thought the irregularity (if any) was waived, and the jurisdiction sufficiently appeared by the summons. The irregularity in the present case was not waived, but on the contrary, the objection taken, and the question is, whether there was a proper information."

When the Magistrate proceeds summarily he is to "abstain from any adjudication thereupon," in case "he finds the assault or battery complained of to have been accom-

panied by an attempt to commit felony, or is of opinion the same is, from any other circumstance, a fit subject for prosecution by indictment," 32-33 Vic. ch. 20, sec 46.

That being the rule and direction to the Magistrate in summary trials, it seems to me clear he had authority to proceed with the trial and adjudication of the charge in question, as it is laid in the information.

Section 43 of that Act does not speak of a *common* assault, but generally of an assault, and an *aggravated* assault is but an assault with aggravating circumstances. I may refer to *Re Thompson*, 6 H. & N. 193, and to *The Queen* v. *Elrington*, 1 B. & S. 688. This last case shews a conviction of, or acquittal for a common assault under the statute is a bar to an indictment on the same facts charging assault and battery accompanied by malicious cutting and wounding so as to cause grievous or actual bodily harm.

I am of opinion that on the information and conviction, which latter is for an assault merely, there is in favour of the person against whom the complaint was preferred a bar and release "from all further or other proceedings, civil or criminal for the same cause," when he has "paid the whole amount adjudged to be paid."

If anything can be said against the form of the information—but I do not think there can—it may well be assumed after the trial, conviction, and fine paid, and no objection taken to the proceedings during the trial or since, that anything objectionable in the informttion was waived, and the parties proceeded with the complaint in the manner in which the Police Magistrate afterwards disposed of it.

The case of *Regina* v. *Shaw*, 25 U. C. R. 616, shews it is not necessary the conviction should state the complainant prayed the magistrate to proceed summarily under the statute: *Regina* v. *Smith*, 46 U. C. R. 442.

The only remaining point is, whether the conviction of the purser can be pleaded by the company as a bar and release in their favour in this action? The Act of 1869, ch. 20, sec. 45, D., makes the conviction and payment of the

fine a release from all further or other proceedings, civil or criminal, for the same cause to the person against whom the complaint has been preferred. That in terms applies only to the person who has been convicted.

The only case which can be referred to on the subject is *Wright* v. *London General Omnibus Co.*, 2 Q. B. D. 271. There the driver was convicted. The Justice had the power to award *compensation* to the party aggrieved, not exceeding £10, and to order the proprietor or the driver to pay it. The driver was alone convicted, and also ordered to pay the compensation, and paid it, which compensation the party aggrieved took, saying, however, it was not enough.

He afterwards brought an action against the company for compensation and recovered £95. The Court set the verdict aside, and entered a nonsuit, because the plaintiff had elected his tribunal and had been paid once, and he could not claim to be paid again. In this case the plaintiff recovered no compensation. If he had, according to the case cited he could not now sue the company, although the conviction was only against the purser.

We think the defendants cannot claim the benefit in this action of the conviction of the purser, unless they can shew the effect of this statutory release is the same as a release given by this plaintiff himself to the purser.

The 10 Anne, ch. 15, sec. 3, recited that, "Whereas a doubt has arisen * * whether the discharge of a bankrupt, by virtue of that Act, should be construed to discharge the partners of such bankrupt from the same debt." And it enacted that the Act "should not be construed, nor was meant or intended to release or discharge any other person or persons, * * but that notwithstanding such discharge, such partner, * * shall be and stand chargeable with and liable to pay such debt, * * as if the said bankrupt and bankrupts had never been discharged from the same."

The cases of *Noke* v. *Ingham*, 1 Wils. 89, and *Bovill* v. *Wood*, 2 M. & Sel. 23 were decisions as to pleading under

that Act. The plea of bankruptcy and discharge is only a personal defence. It does not go to the cause of action. I think the section of ch. 20, of the Act of 1869, should be construed in the like way, and therefore I should hold the conviction and the satisfaction of that conviction by the purser has not discharged, and does not discharge, the defendants from responsibility for or in respect of the matters in question in this cause.

But for the reasons before given, I am of opinion the defendants are not responsible for the acts and matters in question.

The order will be absolute, with costs.

GALT, J.—After the elaborate consideration of this case by the Chief Justice, and numerous authorities cited by him, it is only necessary for me to refer to one point, namely, whether, assuming that the plaintiff had possession of the valise at the time when the servant of the defendants seized it, and forcibly wrenched out of his hands, they are responsible for his act.

It is not disputed that the defendants have a lien on the luggage of a passenger to secure payment of his fare, and, consequently, that any person appointed by them as their officer to collect such fare, has an authority derived from them to exercise such right, and that in so doing he must and should be considered as acting under such authority, and they are responsible for his acts. If, therefore, the person whose duty it is to collect the fares of the passengers should, under a mistaken belief that a passenger had not paid his fare, insist on detaining the luggage of a passenger until his fare was paid, the defendants would be responsible for his act, as he was engaged in discharging a duty specially delegated to him, and exercising a right which they possessed. But the defendants have no right or authority to exercise the power of forcibly taking possession of the passenger's luggage which is in his actual personal possession, by way of asserting a lien, and, consequently, they can confer none on their servants.

If, therefore, their officer does not act in that manner, he cannot be said to be acting under their authority, and they are not responsible.

*Poulton* v. *London and South Western R. W. Co.*, L. R. 2 Q. B. 534, in which the principal cases relied on by Mr. Kerr are considered, together with the observations made by the Judges, have, it appears to me, a strong bearing on the present question. There a station master of the defendants, under the erroneous belief that a passenger had not paid the fare for the carriage of a horse, delivered him into custody, thinking he had authority so to do. The company had power to arrest passengers for the non-payment of fares, but they had power only to detain goods; they had no right to arrest the proprietor.

Blackburn, J., in giving judgment says, at p. 538: "In the present case the station master took the plaintiff into custody, because, as he erroneously supposed, the plaintiff had improperly not paid the fare for a horse that had been carried on the defendants' railway. Had the station master given him into custody under the erroneous supposition that he had not paid his own fare for carrying himself, as an individual, then, inasmuch as there is an authority by the Act of Parliament, 8 Vic. ch. 20, secs. 103, 104, to arrest and take into custody any person who does not pay his fare, and, consequently, the act would have been an act which the railway company were authorized to do, it might be said that the station master, being the head man on the spot, had authority to take into custody those who did not pay their fares; and, if he made a mistake, it was a mistake in doing a thing which the railway company had given him authority to do, and then the railway company would be responsible. But what the plaintiff was given into custody for was the not paying of the money for carrying the horse. * * Then comes the question we have to determine: can there be said to be any evidence from which it may be inferred that the railway company authorized the station master to do an act which it appears, on every view of the facts, he would be utterly unauthorized to do? We think

not; we do not think it is within the scope of his authority, in what he was authorized to do, to bind the company. It was an act out of the scope of his authority, and for which the company would be no more responsible than if he had committed an assault, or done any other act which the company never authorized him to do. * * Having no power themselves, they cannot give the station master any power, to do the act. Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station master personally, but not against the railway company." The other Judges were of the same opinion.

I therefore concur in the judgment of the Chief Justice.

OSLER, J.—In *Poulton* v. *London and South Western R. W. Co.*, L. R. 2 Q. B. 534, Blackburn, J., says, at p. 538: "There can be no question, since the decision of the case of *Goff* v. *Great Northern R. W. Co.*, 3 E. & E. 672, that where a railway company * * have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things in their behalf which are right and proper in the exigencies of their business—all such things as some body must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs, is *primâ facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commit an excess, while acting within the scope of his authority, his employers are responsible for it."

And in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, at p. 265, Willes, J., states the Rule thus: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down

cases. It has been applied also to direct trespass to goods." After enumerating several instances of its application, he proceeds: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent, in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

See also *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 412, where the above passage is cited; and *Austin* v. *Davis*, 7 App. 478.

In this case the plaintiff had refused to pay the fare, which was legally due from him, and the defendants had a lien on his luggage therefor. It is true they lost that lien as soon as the plaintiff re-took the luggage into his personal control and possession. But what the purser did was undoubtedly done by him on behalf of and for the benefit of the company in attempting to enforce or retain the lien. It was not the case of a merely wanton assault, such as striking a passenger for non-payment of fare, or attempting to take from him as security an article worn or used about the person of the passenger, and which had never been in the control or possession of the defendants, in any sense.

I do not agree that the liability or non-liability of the defendants is to depend upon the question whether the officer or the passenger actually put his hand first on the luggage, when the object and intention of the purser in going towards the luggage was to do a lawful act within the scope of his authority. He had to make up his mind on the moment, just as one event or the other should happen, what he would do—let go, or hold on. In the movement which followed, the lien was gone. He held on, and in doing so he made a mistake, for which, as I think the company ough tto be answerable.

*Order absolute.*

[COMMON PLEAS DIVISION.]

## HILLOCK v. ELIZA SUTTON AND WILLIAM SUTTON.

*Title by possession—Lease from original owner to person having possessory title—Effect of—Fraud—Setting aside lease.*

The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the lands under the Statute of Limitations but was not aware of the effect of his possession. The defendant, who had purchased the interest of the heirs of the original owner and vendor, and his solicitor, by representing to plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years at a nominal rent, with a covenant to yield up possession at the end of the term.

*Held*, that, under the circumstances, the lease must be set aside; but even if allowed to stand, it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance.

The statement of claim alleged that the plaintiff resided on the north-easterly half of lot No. 23, in the 2nd concession, in the Township of Caledon, east of Mountain street, except those portions of it which had been sold for taxes.

2. The plaintiff is an aged and illiterate man.

3. About the 8th of September, 1865, John Prentice, then the owner in fee of the land, executed a bond to John Neely in the penal sum of £500, conditioned to be void upon Prentice, his heirs or assigns, executing a deed of the land to Neely, his heirs or assigns, which bond was duly registered.

4. In or about 1865, John Neely, for the sum of $20, paid by the plaintiff, conveyed to the plaintiff all his interest in the land under the said bond, and the plaintiff thereupon entered and took possession of the land.

5. The plaintiff, after taking possession, notified Prentice of his purchase, and Prentice executed a bond to the plaintiff in the penal sum of $600, conditioned to be void on Prentice, his heirs or assigns, conveying to the plaintiff the said land, less twelve acres which had been sold for taxes.

6. At the time of the execution of the last mentioned

bond the plaintiff paid a large portion of the purchase money to Prentice, but made no subsequent payment and did nothing thereafter to acknowledge the title of Prentice, and he had ever since been in actual adverse and undisturbed possession of the land, except the twelve acres and the sixteen acres in addition sold for taxes, until on or about the 18th of Februarary, 1880, at which time he had acquired a good title by length of possession.

7. When the plaintiff took possession the land was in a state of nature and of little value, and the plaintiff had since improved it.

8. On or about the 14th of February, 1880, the defendant William Sutton, the husband of the co-defendant, called with a stranger on the plaintiff, the stranger professing to be the heir-at-law of the said Prentice, and proposed to the plaintiff to sell his land; but the plaintiff said he had no wish to sell.

9. A few days afterwards the stranger, the defendant William Sutton, and his solicitor called on the plaintiff, and the said Sutton endeavoured to purchase the plaintiff's interest in the land or to induce him to give up possession. Upon the plaintiff refusing so to do, Sutton and the stranger began to intimidate the plaintiff by informing him he had no title to the land, but that the stranger was the owner of it, and threatened he could and would turn him out of possession. The stranger demanded possession, but the plaintiff refused to give it.

10. William Sutton, taking advantage of the plaintiff's ignorance of law and want of business knowledge, conceived the fraudulent design of obtaining possession of the land, and proposed to the plaintiff, that he, the plaintiff, should accept a lease of the land for two years at the nominal rent of $5 a year, and represented that such lease would not weaken his title but rather strengthen it, which his solicitor corroborated, who pretended to advise the plaintiff as a friendly legal adviser, but the plaintiff refused to act upon such proposition or advice.

11. Sutton then proposed the plaintiff should call on

the solicitor at Orangeville in a few days with his final answer, which the plaintiff agreed to do.

12. On or about the 18th of February, 1880, the plaintiff called on the defendants' solicitor, where he afterwards met the defendant William Sutton, who again advised him to accept the lease, and fraudulently represented the same would have no effect other than further strengthening his title to the land, in which representation he was again confirmed by his solicitor, who professed to advise the plaintiff as a friendly legal adviser, and recommended him to accept such lease.

13. Relying on such representations of the defendant William Sutton, and not knowing, as the fact was, that the solicitor was the defendant's own solicitor, and was acting in his interest, but believing the solicitor was advising the plaintiff in the plaintiff's exclusive interest, and relying upon him as a solicitor, the plaintiff believing the acceptance of the lease would have no other effect than that represented, and relying upon the assurance of William Sutton to that effect, consented to accept it, and a writing was thereupon prepared by the solicitor, which was executed by the plaintiff without being first read over to him, and which was falsely and fraudulently represented by the defendant Wm. Sutton to the plaintiff as merely a lease from the stranger to the plaintiff of the land for two years at a nominal rent of $5 per year; but the plaintiff has since, and shortly before the commencement of this suit, discovered that the writing was a lease from the defendants to the plaintiff in the statutory form including a covenant on the part of the plaintiff to deliver up possession of the land to the defendants at the end of the said two years from the 18th February, 1880.

14. Wm. Sutton purchased the interest, if any, in the land from the heir of the said John Prentice, and caused the conveyance thereof to be taken in the name of his wife, the co-defendant, who now claims to be the owner in fee simple.

15. The defendants threaten and intend to take proceed-

ings under the Over-holding Tenants Act, to recover possession of the land.

16. The plaintiff says the lease was obtained from him through the fraud and misreprentation as aforesaid of the defendant Wm. Sutton, who was acting for himself and his co-defendant.

17. The plaintiff acted throughout without independent legal advice, and says the lease and covenants were improvident and were entered into without consideration.

The plaintiff claims to have the lease declared fraudulent and void as against him, and to have it delivered up to be cancelled; and for an order restraining the defendants from taking action under the Overholding Tenants' Act.

The statement of defence denied all the allegations of the statement of claim.

The defendants alleged that neither John Neely nor the plaintiff paid the purchase money for the land. That at the end of the lease William Sutton went to take possession of the land, and the plaintiff then offered to give up possession of the land to him, and permitted him to enter with his workmen to repair fences and make improvements, and the plaintiff offered and agreed to move out of possession of the dwelling as soon as he could; and that the defendants acted in good faith throughout, and without fraud or fraudulent intent. And the plaintiff was and is quite competent to attend to his own affairs, and no advantage was taken of him: that the plaintiff did not at any time acquire a title to the land by length of possession. The defendants' prayed that an order might be made to deliver up the said bonds to be cancelled, and that a certificate to that effect might be granted for registration.

Issue.

The cause was tried before Osler, J., and a jury, at the last Fall Assizes at Orangeville.

The jury found as follows:

1. That William Sutton and Barker, the solicitor, did know at the time the lease was obtained that the plaintiff was in possession of the land for ten years and over.

2. That William Sutton and Barker did know the plaintiff, at the time they procured his signature to the lease, had acquired title by length of possession.

3. That the plaintiff did say to William Sutton and Barker he had been in possession, that is living on the place, seven years, but he did not state whether the said time had elapsed in the fall of 1879, or the spring of 1880.

4. That William Sutton and Barker did know the plaintiff was in possession or occupation longer, but they did not know perhaps how many years.

5. That the plaintiff was not on equal terms with William Sutton and Barker as regards intelligence, capacity, and business ability.

6. That the plaintiff had obtained no independent legal advice at or before executing the lease.

7. That the plaintiff did not know he had any title by length of possession.

8. That the plaintiff had not at or at any time previous to the execution of the lease, alleged or claimed title to the land in any other way than under the Neely and Prentice bonds or one of them.

9. That the plaintiff did tell William Sutton and Barker that unless he had a claim under these bonds or under some papers in his possession he had no claim to the land.

10. Q.—Did Sutton and Barker or either of them on the day the lease was signed, or previously, represent to the plaintiff that such a lease would have no other effect than to strengthen his title to the land? A.—We believe they did not use the words, *strengthen his title.*

11. Q.—If any such representation were made was it by means thereof that the plaintiff was induced to sign the lease? A.—We believe not.

On these findings the learned Judge gave judgment for the plaintiff, without costs.

During Michaelmas Sittings, November 27, 1882, *J. Reeve* obtained an order calling on the plaintiff to shew cause why the judgment ordered to be entered for the plaintiff should not be set aside and a new trial be had, upon the ground that the answers of the jury to questions, 1, 2, 3, 4, 5, are contrary to evidence, and the weight of evidence; or why the judgment should not be set aside, and a judgment entered for the defendants, or for a new trial on the ground that the Statute of Limitations would not commence to run as against the owners of the land until after default had been made in payment of the last instalment of $100, provided for by the bond or agreement entered into between the plaintiff and the John Prentice, and the evidence disclosed there had not been adverse possession of the land for a sufficient length of time thereafter to entitle the plaintiff to the land by virtue of the statute; and also on the ground that the plaintiff having only set up a claim to the land by virtue of the bond or agreement, was estopped from setting up a title by length of possession, and also that the unpaid purchase money constituted a lien on the land under a claim in respect thereof that would not be barred.

During Hilary Sittings, February 6, 1883, *Osler*, Q. C., supported the order *nisi*. The bond from Prentice to the plaintiff required payment to be made by the plaintiff of $300, in three equal yearly instalments, in December, 1868, 1869 and 1870, respectively. The plaintiff took possession of the land in 1873 or 1874, and resided on the land under the bond until 1880. Prentice left a daughter, his only child, who married one Huppell, and who claimed the land. The plaintiff said he had papers for the land. Huppell wanted the plaintiff to give up possession. The plaintiff said he had papers, and if he had not he had no title. The plaintiff at a later interview was asked to sign a lease Sutton and Huppell saying to him he had no papers for the land. He said he would think of it. In a week or so after that he signed the lease. William Sutton bought the land from Huppell and his wife, and Sutton then gave a lease

of it to the plaintiff. This action is to set aside that lease by reason of fraud and misrepresentation. The findings of the jury to the questions, 1, 2, 3, 4, and 5, are against evidence. The only ground of fraud alleged is that the plaintiff said he was told by William Sutton and Barker, a solicitor, that if he, the plaintiff, would sign the lease it would strengthen his title, but the jury negative these latter words having been used, and the jury also found that the plaintiff did not sign the lease by means of any representation that his doing so would affect his title, *Liney* v. *Rose*, 17 C. P. 186; *Jones* v. *Cleaveland*, 16 U. C. R. 9; *Cahuac* v. *Scott*, 22 C. P. 55. The purchase money may be recovered on the bond although the obligee may not be able to recover the land: *Allan* v. *McTavish*, 2 App. R. 278, It was said the plaintiff did not deal on equal terms with the defendants, and that he had no independent legal advice. As to this see *Kerr* on Fraud (Amer. ed., 1877,) 143; *Story's* Equity Jurisprudence, 12th ed., sec. 22; *Lewis* v. *Jones*, 4 B. & C. 506. This at most was a mistake in law and that is not a ground for setting aside a transaction of this kind: *Midland Great Western R. W. Co. of Ireland* v. *Johnson*, 6 H. L. Cas. 798; *Stapilton* v. *Stapilton*, 1 Atk. at p. 10; *Bullock* v. *Downes*, 9 H. L. Cas. 1; *Lord Belhaven's Case*, 3 DeG. J. & Sm. 41; *Toker* v. *Toker*, 31 Beav. 629; *Harrison* v. *Guest*, 6 DeG. M. & G. 424, 8 H. L. Cas. 481; *Re Shaver*, 3 Ch. Chamb. 679. The plaintiff cannot dispute the defendants' title, because the defendants bought from Huppell and wife after the plaintiff said if he had not papers for the land, he had no title to it, and he never produced his papers to the defendants, but took a lease from the female defendant. The plaintiff is also estopped because he took and held possession under the lease and took payment from the defendants for rails, which were upon the land when William Sutton went upon it to take possession on the termination of the lease

*Meyer* (of Orangeville), shewed cause. The plaintiff's title was acquired in 1866 by buying the right from Neely, who had a bond from Prentice for the land. The plaintiff did

not actually live on the place until 1874; he lived across the road from the land. He cropped the place from year to year, from the time he got the bond, in 1867, from Prentice to himself, and he cut wood upon it, and dealt with it otherwise as his own. He put up a house and barn upon it; cleared about twenty-five acres, and otherwise improved the lot. The plaintiff's possession counts from the year 1865. The cases shew he had a title by possession: *Doe dem. Shepherd* v. *Bayley*, 10 U. C. R. 310, 317; *Dundas* v. *Johnston*, 24 U. C. R. 547; *Davis* v. *Henderson*, 29 U. C. R. 344; *McKinnon* v. *Donald*, 13 Grant 152. There was clearly fraud and misrepresentation practiced on the plaintiff in reference to the lease; at all events the plaintiff should have obtained or have had the opportunity of obtaining independent legal advice. It is sufficient to constitute fraud, that one, with a knowledge of another's rights, conceals from that other such knowledge, and deals with such other in ignorance of his rights: *Lindsay Petroleum, Oil Co.* v. *Hurd*, 16 Grant 147; *Elgie* v. *Campbell*, 12 Grant 132; *Baker* v. *Monk*, 10 Jur. N. S. 624, 691; *Crippen* v. *Ogilvie*, 15 Grant 490. The evidence also shews that the plaintiff was mistaken as to this effect of his possession, and the Court will grant relief in case of mistake: *Lavin* v. *Lavin*, 27 Grant 567, 572.

March 9, 1883. WILSON, C. J.—The evidence fully sustains the findings of the jury. The evidence also shews that Mr. Sutton was to purchase the land from Mr. Huppell on the assumption that the plaintiff had no title to the land. If the plaintiff had a title this agreement between Huppell and Sutton was to be void. The purchase money was $410, and Sutton has since contracted to sell it for more than $900. Sutton was not certain he would get possession from the plaintiff when the lease was drawn; and as he had got the deed from Huppell before the lease was drawn, he could not have known whether the plaintiff would give him possession or not, or take the lease or not.

Mr. Barker was asked:

Q. "Did you, when drawing the lease, or at any time, represent that the lease would have any effect on his (Hillock's) title, or on his right?"

A. "I represented to him that *as he had no right*, his best plan was to come under a lease to Sutton, and Sutton to give him possession of the place for a certain time. I never represented to him that the lease was going to strengthen his title."

Q. "What was your object in having a lease entered into between the parties at all?"

A. "To get rid of *any imaginary claim* that Hillock had."

Q. "How does it come that the deed (to Sutton) was drawn out previous to his lease (to Hillock?"

A. "Because we were *satisfied that Hillock had no claim.* There was just one day's difference between them."

It appears from the evidence just referred to how necessary it was the plaintiff should have had independent legal advice: *Baker* v. *Monk*, 10 Jur. N. S. 624, 691. For notwithstanding his assertion that he had bought out Neely, whose bond was registered, and of which bond and registration Sutton, Huppell, and Mr. Barker had full notice, and notwithstanding the plaintiff had also a bond himself from Prentice, and regardless of his long possession, the parties persisted in urging upon the plaintiff he had no claim, or an imaginary one, and under persuasions and representations of that kind made to an illiterate man, and one who was wholly unaware of what his legal rights were, he was induced to take a lease for the express purpose of barring him of his rights.

The jury manifestly thought the parties did represent to the plaintiff the taking of the lease would have no effect on his rights, if he had any, although they found very properly he was not told that taking the lease would strengthen his title.

There was nothing wrong in the parties desiring to come to a settlement with the plaintiff for his giving up of the land, or for his payment of the unpaid portion of the pur-

chase money. It would have been a proper act on his part so to have arranged with them.

With that view of the case we have nothing to do. We can only say the plaintiff was not bound to give up the land on the facts found by the jury. The defendants and those concerned in the transactions complained of are to blame for dealing with the plaintiff, who was in ignorance of his legal rights, while they knew, as the jury have found, what these legal rights were, and they not only did not inform him what these rights were by possession or otherwise, but represented to him he had no right to the land.

The plaintiff's possession was of great value to him: *Turner* v. *Harvey*, Jacob 169; *Ex parte Winder*, 6 Ch. D. 696.

It is not absolutely necessary there should be "an intention actually fraudulent or corrupt, as an essential to relief by the rescission of a contract," per Knight Bruce, V. C., in *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542, at p. 577. The enquiry is, "whether the misrepresentation made to the plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprised of any such decision, but I agree with the Master of the Rolls, that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract:" *Edwards* v. *McLeay*, 2 Swanst. 289, *per* Lord Eldon.

In *Turner* v. *Harvey*, 1 Jacob 169, at p. 178, Lord Eldon said: "As in the case that has been mentioned; if an estate is offered for sale, and I treat for it knowing there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." See as to legal fraud, *Hart* v. *Swaine*, 7 Ch. D. 42.

The dealings which the parties had with the plaintiff cannot, I think, properly be maintained.

But apart altogether from that ground of objection, the plaintiff is entitled to recover by reason of his length of prior possession to the taking of his lease.

The plaintiff, about the year 1865, obtained from Neely the title Neely had to the land under the bond from Prentice to Neely. It may have been as late as 1867, but that difference of time does not affect the decision of the case. The plaintiff got a bond from Prentice for the sale of the place to the plaintiff. That bond is dated 9th of November, 1867. Neely was in possession of the land when the plaintiff bought from him. The plaintiff took possession of the land when he bought from Prentice, and put a crop on the land, and he has had a crop in, more or less, every year since. He did not actually live on the place till 1873 or 1874.

If the plaintiff were not by the terms of the bond to take possession the period of limitation will count from the time of his taking possession: *Doe dem. Roylance* v. *Lightfoot*, 8 M. & W. 553.

If he were to take possession by the terms of the bond, the period of limitation will count from the first default, which would be in December, 1868: *Jones* v. *Cleaveland*, 16 U. C. R. 9; *Prince* v. *Moore*, 14 C. P. 349, and the cases there referred to; for upon default the vendor may eject the vendee, and without demand or notice to quit.

If the lease in question were allowed to stand, it would not, I think, have any other or greater effect against the plaintiff claiming by limitation of time than if he had been the owner in fee by a perfect paper title. Because, by the statute, when the period of limitation is complete "the right and title of the person to bring an action for the land shall be extinguished." And the effect of the owner taking a lease of his own land is to conclude him by estoppel during the continuance of the demise; but not to operate against or bind in any manner his actual title after the expiration of the lease.

The lease which was taken by the plaintiff in this case would, if it had not been questioned upon the ground on

which it has been questioned, have had the like and no other or different effect.

The lease cannot be effectual as an acknowledgment under the Act to defeat the title of the plaintiff, which he had already acquired by lapse of time: *Sanders* v. *Sanders*, 19 Ch. D. 373, founded upon *Brassington* v. *Llewellyn*, 27 L. J. N. S. Ex. 297; and in *Re Alison*, 11 Ch. D. 284. The finding for the plaintiff must therefore stand.

There is no part of the defendants' statement of defence or counter claim to which we can give effect. The whole of it fails with the establishment of the plaintiff's claim.

We therefore discharge the order *nisi*, with costs.

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

*Order nisi discharged.*

[COMMON PLEAS DIVISION.]

## DUFF v. THE CANADIAN MUTUAL FIRE INSURANCE COMPANY ET AL.

*Mutual Insurance Company—Solicitor's costs—Separate branches.*

*Held*, OSLER, J., dissenting, that under the Mutual Insurance Act, R. S. O. ch. 161, the costs of a solicitor for services rendered to a Mutual Insurance Company, are chargeable not against the general assets of the company, but against the respective branches for which the services were in fact rendered, and in case of deficiency of assets of any of the branches the other branches are not liable for the claims thereon.

*Per* OSLER, J.—A creditor of the company, for a debt incurred as part of the necessary expenses thereof, though in relation to the business of some branches only, is entitled to be paid out of the company's moneys derived from assessments for losses and expenses on policy holders in other branches.

THIS was an action brought by the plaintiff on behalf of himself and all other the creditors of the defendant company.

The cause was pending in the Court of Chancery before the passing of the Judicature Act. It was transferred to this Court on the 5th of October, 1882, in consequence of Boyd, C., and Ferguson, V. C., having both been engaged in it while they were at the bar, and an appeal was desired to be brought from the decision of Proudfoot, V. C.

The plaintiff claimed to recover from the insurance company the sum of $3,343 for solicitor's costs, the amount and right to such sum not being disputed otherwise than that the amount should not be assessable against the members or policy holders generally, but against the members and policy holders of the respective branches of the company, according to the branch for and in respect of which the business charged for by the plaintiff was done.

The company carried on business under the four following branches for some time: the Hydrant, the Country, the Commercial, and Water Works. The Commercial became insolvent, and on the 1st of May, 1877, all the policies in that branch were cancelled; and the Water Works also became insolvent, and all the policies in that branch were cancelled on the 19th of September, 1878.

According to the report of the learned Master at Hamilton Miles O'Reilly, Q. C., made on the 15th of December, 1881, the plaintiff's "claim (except a trifle) accrued after the 1st of May, 1877, and before the 1st of May, 1879."

The amount strictly chargeable to the Hydrant branch was $98.03, and against the Country branch was $464.77, and these branches were willing to pay those respective sums but they disputed their liability for the debt or liabilities of the other two insolvent branches.

The report proceeded: "We must assume that it was necessary and proper in the interest of the company as a whole to defend actions brought on policies in these insolvent branches after their insolvency was known. How was the counsel, solicitor, and witnesses to be paid? If they could not according to the true intent and meaning of the statute be paid *in the first instance* out of moneys on hand derived from solvent as well as insolvent branches, all actions on these policies must go by default, and the necessary furniture, books, and even the office be sold under execution, and the business of the company even in the solvent branches, however profitable and desirable, be forcibly brought to a close.

"I am referred to the 66th section of the Act, R. S. O. ch. 66, which provides that members of any such company insuring in one branch shall not be liable for claims on any other branch."

"In my opinion the word claims in this section means claims for losses, and nothing else."

"Moreover the plaintiff's claim is not a claim on any branch, it is a claim against the company in its character, the same as office rent, taxes, fuel, stationery, &c., under the 67th section."

"The contention of the solicitors of the Hydrant and Country branches is based, as I understand, wholly on the 66th section of the Act, which contention, in my opinion, cannot be upheld or maintained. I have come to the conclusion that the law contemplates the solicitors' costs, office rent, fuel and the like shall be paid in the first instance

out of any moneys of the company which they may have on hand, and that the amount 'is to be afterwards assessed upon and divided between the several branches in such proportions as the directors determine,'" under sec. 67.

"The company were the clients of the plaintiff, and not the branches; and the company, not the branches, were the parties to be sued upon the policies.

"I hold that the plaintiff's claim, like the other expenses of the company, is to be paid out of the assets of the company generally, and afterwards apportioned between and against the several branches, according to their respective rights and liabilities."

The report of the Master on appeal was affirmed by Proudfoot, V. C., and the appeal dismissed, with costs. See 9 P. R. 292, where the judgment is reported.

During Michaelmas sittings of the Court, *Laidlaw*, on behalf of the Hydrant branch, moved on notice to reverse the decision of Proudoot, V. C.

During the same sittings November 28, 1892, *Laidlaw* supported his motion. The principal part of the plaintiff's claim is for services performed in the business of the Commercial branch. It is said the company generally must be liable for all demands made in respect of any of the branches, because those deaing with the company cannot know anything about branches; or if there is a knowledge of branches, such person cannot know whether the business or service is done for the company or for a branch, or for which branch. That cannot be said by the plaintiff, because his claim is for services rendered by him and by his co-partner or former co-partner as solicitors of the company, and while his co-partner was president of the company. The R. S. O. ch. 161, sec. 45, provides that the premium notes or undertakings "are to be assessed for the losses and expenses of the company in manner hereinafter provided." And sec. 50, that "the assessment upon premium notes or undertakings shall always be in proportion to the amount of said notes or undertakings, having regard to the branch or department to which their policies respec-

tively appertain." He referred also to secs. 47, 64, 65, 66, and 67.

The *Plaintiff* in person. The company only can be liable in this action. No other body can be sued than the company for claims payable either in respect of the general body or of any of its branches. The assessment by the directors of the company against the respective branches liable to pay any demand made on the company is a matter of internal arrangement of the general body, and does not affect or relate to those (at any rate) who are not members, stockholders, or policy holders. The policies do not shew in which branch the insurance is made. The Act says, sec. 67: "All necessary expenses incurred in the conducting and management of such companies shall be assessed upon and divided between the several branches in such proportion as the directors determine." He referred to *The Queen* v. *Town Council of Lichfield*, 10 Q. B. 534.

*MacKelcan*, Q. C., for the company, submitted to the judgment of the Court. The company was willing to pay the claim.

*Osler*, Q. C., for the Country branch. The case between these parties, 27 Gr. 391, and in appeal 6 App. 238, and the case of the *Beaver and Toronto Mutual Ins. Co.* v. *Spires*, 30 C. P. 304, determined that the different branches of a Mutual Company were liable only for the particular debts and liabilities of the branch. The Act enables branches in defined territories to be established, and if a branch of the kind were established in Toronto, and another in Hamilton, it cannot be contended the Toronto branch could be made liable for the debts of the Hamilton branch.

March 9, 1883. WILSON, C. J.—The question is, whether the plaintiff is entitled to be paid out of the general assets of the company, without regard to the division into branches, and without regard to his claim being assessable in the books of the company against the respective branches in certain proportions to the full amount of the premium notes, if necessary, which are held by the company?

That the plaintiff is entitled to a judgment against the company is not disputed, but it is contended by the defendants that the plaintiff's claim must be apportioned by the directors among the several branches in such manner that each branch shall be charged with its own particular share of it, and the plaintiff must look to the assets of the respective branches for payment of that part of his claim which has been so charged against it, and that he cannot make the members of one branch make good the deficiency of another branch, or pay more than the sum so charged to the particular branch.

As the liability of the members is restricted to the amount of their several premium notes, the company seems to be in effect one with a limited liability. The like observation applies to the stockholders of the guarantee fund.

Some of the provisions of the R. S. O. ch. 161, require to be considered.

The statute declares that "members of any such company insuring in one branch shall not be liable for claims on any other branch:" sec. 66.

What are *claims on any other branch?* "Claims" is a very comprehensive term, sufficiently large to cover any liability.

By sec. 67: "All necessary expenses incurred in the conducting and management of such companies shall be assessed upon and divided between the several branches in such proportion as the directors determine." And "the accounts of each shall be kept separate and distinct the one from the other:" sec 65.

The necessary expenses of conducting and managing the business will apply to rent, taxes, salaries, office furniture, fuel, travelling charges, legal expenses, I think, and the like.

There may, however, be other claims or demands upon members besides losses by fire: sec. 68.

One of these other claims or demands is the assessment of ten per cent. per annum, which may be made on the

premium notes or undertakings for the Reserve Fund "to pay off such liabilities of the company as may not be provided for out of the ordinary receipts for the same or any succeeding year:" sec. 53.

And others are those stated in the following sections. The directors may issue debentures or promissory notes of the company for the loan of money, and may borrow money on debentures and promissory notes, "the whole of the assets, including premium notes of the company, being held liable to pay the same at maturity:" sec. 29.

And by section 75: "All the property and assets of the company, including premium notes or undertakings, shall be liable for all losses which may arise under insurances for cash premiums."

There is nothing in any of these sections to prevent the directors from assessing the separate account of each branch, under the word *claims* in sec. 66, the share properly chargeable to it of the *necessary expenses* under sec. 67, or from assessing the proper share of loans effected under sect 29, or the proper share of payments made to those who have insured on the cash premium principle under sec. 75. That due distribution of the general liabilities must always be made by the company among the several branches, and so long as the branches are able to bear their respective portions there will be no difficulty.

The trouble arises when, as in this case, any of the branches become insolvent, and are not able to contribute their quota of claims upon the company; and thus the question arises, are the branches which are solvent to make up to the extent of the unpaid amount of their premium notes the deficiencies of those branches which are insolvent?

It is said the *necessary expenses* are to be assessed upon and divided among the several branches. Does that mean that the landlord for his rent, or the carpenter for his work, or the solicitor for his services, is to have a claim upon the assets of the different branches for such portion of their respective claims as the directors have charged the several branches with? Or have the landlord, the car-

penter, and the solicitor a claim upon the company to be paid out of the general assets, so that if one branch fails, the other branches are to make up the deficiency occasioned by that failure?

The division of these claims among the branches seems like a rule in and for the internal management of the affairs of the company, rather than one which is to be binding upon the general creditors.

Then as to the holders of debentures and promissory notes of the company, and those who are insured on the cash premium principle, for whose claims all the property and assets of the company, including the premium notes, are expressly made liable, are they bound to look only to the assets of the different branches, or may they make up from the other branches the deficiencies of one or more of them?

The statute, while making all the property and assets of the company, including the premium notes, liable to the two classes of persons mentioned, declares that "Members insuring in one branch shall not be liable for claims on any other branch."

If *claims on any other branch* means *specific* claims on any other branch as *losses* sustained by members, and is confined to such cases, then those who are insured for cash, or who are holders of debentures or notes of the company, may rank upon or charge all the premium notes for the satisfaction of their demands, without regard to any appropriation or division of the liability made by the directors upon the different branches. That is one reading of the statute, and that reading gives no effect to the enactment that "Members insuring in one branch shall not be liable for claims on any other branch."

The other reading is, that those who are insured for a cash premium, and those who are holders of debentures and notes of the company, may have a claim upon all the assets and premium notes of the company, although their claims are apportioned among the different branches in a proper and equable manner, and although they are con-

fined in their remedy, so far as the premium notes are concerned, to the assets and funds of these respective branches, just as if they were separate and independent bodies.

It is true these claimants may by such a construction fail to obtain full payment in case of the failure of any of these branches. If they do, they knew there might be such a failure, and they knew also that members of one branch were not to be liable for claims on any other branch.

Is the same rule to be applied to the landlord, the carpenter, and solicitor, and other creditors of the like kind? I assume it must be, although the landlord and tax collector may distrain upon any property of the company which they may find.

The general tenor of the statute is to subject the members of each branch to its own special liabilities. Sec. 47 requires that "all premium notes or undertakings * * shall be assessed * * for such sums as the directors determine, and for such further sums as they think necessary to meet the losses and other expenditures of the company during the currency of the policies for which said notes or undertakings were given, and in respect to which they are liable to assessment."

And sec. 50 declares "the assessment upon premium notes or undertakings shall always be in proportion to the amount of said notes or undertakings, *having regard to the branch or department to which their policies respectively appertain.*"

And sec. 66, as before stated, provides that members of one branch shall not be liable for claims on any other branch.

We must therefore endeavour to maintain and give effect to that principle.

It may be said the power which the directors have to pass a by-law, giving to the stockholders of the guarantee fund, when there is one, as there is in and for this company, such rights as the directors may declare, as security for the repayment of the stock subscribed: C.

S. U. C. ch. 52, sec. 31; and the power the directors have to pledge two-thirds of the premium notes of the company as security to such subscribers: 27 & 28 Vic. ch. 38, sec. 6; shew the directors of the company may make liable the *general* body of the members, not by branches, but as members of the one company, for payment of the guarantee fund; and if for that fund, why not also, under the generality of the words in secs. 29 and 75, before quoted, for payment of those insured on the cash premium principle, and the holders of debentures and promissory notes of the company.

I can only say that the statute gives express power to the directors to pass a by-law of the kind in favour of the subscribers to the guarantee fund, and to grant to them such rights as the directors may consider just, or which they may be obliged to concede in the interest of the company to induce persons to take stock in such a fund, as the fund is to be devoted to the payment of "all the losses, debts, and expenses of the company:" C. S. U. C. ch. 52, sec. 31. Such a power must therefore be considered to be an exceptional case, as the power of pledging two-thirds of the premium notes certainly is, the pledge carrying along with it the possession, by the pledgee of the notes, and the power of sale of them in case of default on the part of the pledgor.

We are not now dealing with the case of the guarantee fund, and it is noticed chiefly to shew we have not failed to consider it so far as it can have any bearing on this case.

I have been very much in doubt in coming to the conclusion I have in this case, notwithstanding the case of *Beaver and Toronto Mutual Ins. Co.* v. *Spires*, 30 C. P. 304, and the decision between the parties to this action in 27 Gr. 391.

According to the best opinion I can form upon the different provisions of the statutes, which are not plainly expressed, I think the purpose of the statute is best effectuated by holding that the plaintiff's remedy must be directed against the respective branches of the company, according to the branch for which the services were in fact rendered; and in case of a deficiency of assets of any of the branches

for which the services were rendered by reason of failure of any of them, or otherwise, that the members of the other branches shall not be liable for the claims of the defaulting or insolvent branches.

OSLER, J.—I assume that the opinion of the Master is to be treated as equivalent to a report that the plaintiff's claim has been proved as an ordinary debt incurred by the company for general expenses, and should be paid out of, or has been charged by him against assets of the company, derived or derivable from assessments already made upon the premium notes of policy holders in the Hydrant and Country branches.

I also assume that such assessments were not made for the purpose of a reserve fund, under sec. 53 of R. S. O. ch. 161. If they were, the question now before us could hardly have arisen, as that section apparently contemplates that such a fund may be applied in discharging the liabilities of the company generally, without regard to their origin.

The question is, whether a creditor of the company for a debt incurred as part of the necessary expenses of the company, though in relation to the business of two of the branches, is entitled to be paid out of moneys of the company derived from assessments for losses, and expenses on policy holders in other branches.

I do not think that the decision of the Court of Appeal, 6 App. R. 238, on an appeal from a former report of the Master in this case, is of much assistance in determining the question now raised. The only point decided was that the power to make assessments on premium notes rested with the directors of the company, and that the receiver in a creditor's suit had no authority to do so. This had already been decided by Blake, V. C., in *Hill* v. *Merchants and Manufacturers' Ins. Co*, 28 Gr. 560.

It is true that Patterson, J. A., observes in 6 App. R., at p. 252, that: "If any one thing in them" (the laws respecting Mutual Insurance Companies) "is dis-

tinctly proclaimed, and is founded on a principle we can all understand and approve, it is the exemption of persons who insure in one branch from liability for the losses *and expenses* in another branch." The question there before the Court, however, was not that of liability for expenses, but whether the premium notes in the Hydrant and Country branches could be assessed to recoup the subscribers of the guarantee capital, which had been expended in payment of losses in other branches, and in effect therefore whether these branches could be indirectly forced to pay such losses. I must treat the remarks of the learned Judge as having been made with reference to the question then before the Court, and although I have not found it easy to arrive at a satisfactory conclusion on the subject, I am on the whole of opinion that the Act makes a distinction between the liability upon the premium note for losses and the liability to contribute for the necessary expenses connected with the conduct and management of the company. For the former, each branch must bear its own; for the latter I think the premium notes in all the branches are liable to be assessed, subject to the duty and discretion of the directors to make an equitable adjustment or division between them. I do not, of course, refer to the liability of the premium notes to assessment for losses on insurances for cash premiums under sec 75.

By sec. 47 all premium notes are to be assessed under the direction of the board of directors, at such intervals from their respective dates, for such sums as the directors determine (as to the meaning of the latter expression, see *Victoria Mutual Fire Ins. Co.* v. *Thompson*, 32 C. P. 476, per Cameron, J.,) and for such further sums as they think necessary to meet the losses and other expenditures of the company during the currency of the policies for which the notes were given, and for which they are liable to assessment.

Assessments for both losses and expenses may therefore be anticipatory. The directors are not bound to wait and I suppose in practice do not wait, until losses and

expenses have arisen before making an assessment; they assess such sums as they think necessary for losses and expenses together.

By sec. 50, the assessment must always be in proportion to the amount of the notes, having regard to the branch or department to which their policies respectively appertain.

Section 66 expresssly enacts that members of the company insuring in one branch shall not be liable for claims on any other branch.

The word "claims" in this section I take to mean claims for losses. Section 56 speaks of the "proofs of claim;" and the demand of a creditor of the company who has not been dealing with a branch, as the policy holder or member has, cannot accurately be said to be a claim on the branch. The latter knows that he can only recover payment out of the premium notes of other policy holders in his own branch. The former knows nothing of branches; he deals with the company as a whole. Section 67 is contrasted with sec. 66. Instead of declaring that no member shall be liable for any part of the expenses of the company, incurred in the management of any other branch than that in which he is insured, the widest discretion is given to the directors. *All necessary expenses* incurred in the conducting and management of *the company* shall be assessed upon and divided between the several branches in such proportion *as the directors determine.*

Here we observe (1), no distinction is made in the character of the expenses—all necessary expenses; (2), that they are the expenses of conducting or managing *the company* as a whole, not of the branches merely; (3), that the proportion in which they shall be divided between the branches is absolutely in the unfettered discretion of the directors.

Following this section is sec. 68, which limits the liability of a member in respect of "any loss or other claim or demand against the company," to the amount remaining unpaid upon his premium note. The right of the general

creditor, by whom I mean a creditor other than a member claiming in respect of a loss, to recover a judgment for his debt, is not denied. I cannot think that he is liable to be deprived in whole or in part of the fruits of his judgment by the accident of the insolvency of one of the branches of the company, or that the amount he is able to realize may depend upon the proportion which the directors assess upon this or that branch. If it be so, nothing prevents them from assessing the larger proportion upon the insolvent branches, and thus practically setting their creditor at defiance. These mutual insurance companies, notwithstanding all the loss, misery, and litigation they have occasioned, are still permitted to exist. They cannot, it seems, exist without incurring debts for the necessary expenses of carrying on their business, and I think there is nothing in the Act which obliges me to hold that these expenses are severable in their nature, or, so far as the creditor is concerned, are to be borne by one branch rather than another.

I therefore agree with the view taken by the Master and by Proudfoot, J., and think that the appeal should be dismissed, with costs. I may add that I think that the proceeds only of assessments upon policy holders who were members when the plaintiff's claim accrued are applicable to its payment.

GALT, J., concurred with WILSON, C. J.

*Motion granted.*

[COMMON PLEAS DIVISION.]

## McDONALD V. MURRAY ET AL.

*Sale of land—Agreement—Uncertainty—Recovery of instalment—Tender of conveyance—Title.*

By an agreement for the sale of land for $60,000, $4,000 was to be paid on the execution of the agreement, $40,795 within sixty days thereafter, and the balance to remain on mortgage. The purchasers paid the $4,000, but refused to pay the $40,795, to recover which this action was brought.

*Held*, that the provision as to the mortgage not stating when it was to be payable did not render the agreement void for uncertainty.

*Held*, also, that the plaintiff could recover the $40,795, without tendering a conveyance of the land, for that his right thereto was an independent right, and not a concurrent act with the tendering such conveyance; and at all events it was the purchasers' duty to prepare and tender the conveyance: that it was unnecessary for the plaintiff to aver and shew that he had a good title, for he was only required to make a good title when he could be called upon to do so, which could not be until the last instalment was demanded or defendant shewed his readiness and willingness to arrange that according to the contract; and that it was therefore no defence to aver that the plaintiff could not give a good title.

ACTION upon an agreement dated the 23rd of February, 1882, made between the plaintiff and the defendants, that the plaintiff should sell to the defendants, and the defendants should purchase from the plaintiff lots numbers five and six on Main street, of block number three, Hudson's Bay Reserve, in the city of Winnipeg, at the sum of $60,000, upon the terms that the defendants should pay the plaintiff the sum of $4,000 on the execution of the agreement, and $40,795 within sixty days from the date of the agreement, and the balance, $15,205, to remain on mortgage. The plaintiff averred he had always been ready and willing to complete the sale and purchase, and to execute and deliver to the defendants a proper conveyance of the said land; and all conditions were fulfilled, &c. And the plaintiff says the defendants paid the said sum of $4,000, but though the said period of sixty days had elapsed, the defendants had not, nor had either of them paid the said sum of $40,795, nor any part thereof.

The plaintiff claimed payment thereof with interest from the 23rd of April, 1882, and for other or further relief.

The statement of defence was—

1. Denial of the agreement.

2. That the plaintiff had no title to the land. He was not the owner and could not and cannot give a good title; and the defendants should not be called upon to pay the balance of the alleged purchase money, and the plaintiff should repay what has already been paid.

3. That one John B. McKilligan representing himself to be the agent of the plaintiff, whom he said was the owner of the land, requested and urged the defendants to purchase it, representing to them it was of very great value, exceeding the amount mentioned in the statement of claim as the price to be paid by the defendants for it, and stating the plaintiff had been offered a much larger price for it than that which he offered it to the defendants for; but that he would not accept such other offer until the defendants decided to take or refuse the land, as the offer to them had been first made, but if the defendants declined to take the land, the plaintiff would sell it to such other person. And the defendants say such representations and statements made by the plaintiff and McKilligan were untrue, and they knew they were untrue when they made them; they were made to the defendants fraudulently with the intention and for the purpose of inducing the defendants to enter into such agreement; and the defendants entered into the agreement believing and on the faith that the statements and representations were true, and they would not otherwise have entered into the same.

4. That during the negociations for the said purchase the plaintiff and his agent procured other persons to make fictitious offers for the land, with the fraudulent intention and purpose of exciting the defendants and inducing them to become the purchasers of the land, and the defendants believing such offers were genuine, were influenced thereby to enter into the said agreement.

5. That the plaintiff and his agent, with other persons to the defendants unknown, conspired together for the

purpose of inducing the defendants to purchase the land; and they made false and fraudulent representations to the defendants as to the value of the land, and as to offers which were then existing for the same.

6. That the defendants were strangers in the city of Winnipeg at the time of the agreement, and were wholly ignorant as to the value of the said land, and as to lands in the said city; and they wholly relied upon the plaintiff and his agent and other persons as to the value of the said land in the agreement.

7. Since the date of the agreement the defendant Cuthbert has assigned any interest he had in the agreement to one E. L. Fish, and the said E. L. Fish should be made a party defendant herein, and this action should be against him and not against Cuthbert, to make the said Fish contribute and protect Cuthbert.

Issue.

The cause came on for trial at the last winter Assizes held at Toronto before Cameron, J., with a jury.

The agreement as stated was, after a long examination of parties and discussion, admitted by the defendants' counsel.

It appeared Cuthbert had assigned his interest to Mr. Fish.

Several objections was then taken to the case.

1. That no time was mentioned when the mortgage for the balance of the purchase money, $15,205, was to be paid—whether a day, or a month, or years—and that the defendants cannot know how to perform it.

2. If this is an action for breach of the agreement for non-payment of the $40,795, the defendants should have a title to the land made to them, because on payment of that sum they are to give a mortgage, and cannot give the mortgage until the plaintiff makes a conveyance of the land to them, and he has not done that, nor tendered any conveyance.

3. If the plaintiff is suing for the purchase money he must shew his estate has passed to the defendants—a tender of conveyance will not be sufficient in such a case.

The learned Judge decided as follows: "It appearing by the evidence and statement of claim, that the action is for the recovery of the purchase money on land, and that the time for completing the transaction on both sides had arrived before the commencement of the action, and it further appearing by the evidence on behalf of the plaintiff that another person is part owner of the land, and no tender of a conveyance to, the defendants, or to the defendant Murray and the assignee of the defendant Cuthbert, having been made, I dismiss the action with full costs, without prejudice to the plaintiff's right to bring a fresh action or to take any other proceeding he would have a right to take if the action had not been brought.

The learned Judge entered judgment accordingly for the defendants.

During Hilary sittings, *McMichael*, Q. C., moved on notice to set aside the judgment of the learned Judge who tried the cause, dismissing the action, and to enter a judgment for the plaintiff for the amount of his claim and costs, on the ground that upon the evidence the plaintiff established his right to recover the amount sued for, and on the ground that the judgment is contrary to law and evidence; or to set aside the said judgment, and that a new trial be granted with costs to be paid by the defendants, on the ground that upon the evidence the plaintiff established his right to recover the amount claimed herein, and because the case should not have been withdrawn from the jury, and on the ground that the judgment is contrary to law and evidence.

During the same sittings, February 16, 1883, *J. K. Kerr*, Q. C., and *C. J. Holman*, supported the motion. This case comes clearly within the rule laid down in the leading case of *Pordage* v. *Cole*, 1 Saund. R. 319, where it was adjudged by the Court that the action was well brought without an averment of the conveyance of the land. It is said at p. 320 "If a day be appointed for payment of money, or part of it or for doing any other act, and the day *is* to happen, or *may*

happen *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act *before* performance, for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act." The purchaser must prepare and tender the conveyance to the vendor for execution. The plaintiff's statement contains the averment of a readiness and willingness to convey, which is all that is necessary. Whenever the plaintiff can be called upon to make a good title, he is prepared to do so; but it was not necessary that he should in this action produce an abstract of title. It is not necessary that the agreement should state when the mortgage was to be payable, for this was a matter which the purchaser could decide for himself by electing when it was to be payable. They further referred to *Mattock* v. *Kinglake*, 10 A. & E. 50: *Poole* v. *Hill*, 6 M. & W. 835; *Dicker* v. *Jackson*, 6 C. B. 103; *Wilks* v. *Smith*, 10 M. & W. 355; *Baggallay* v. *Pettit*, 5 C. B. N. S. 637; *Thames Haven Dock Company* v. *Brymer*, 5 Ex. 696, 710; *Yates* v. *Gardiner*, 20 L. J. N. S. Ex. 327; *Dart* on V. & P., 5th ed., 958-960; *Sugden* on Vendors, 14th English ed., 239; *Wilson* v. *Wittrock*, 19 U. C. R. 391; *Burns* v. *Boyd*, 19 U. C. R. 547; *Koster* v. *Holden*, 16 C. P. 331.

*McMichael*, Q. C., contra. The payment of the money and conveyance of land were intended to be concurrent: *Manby* v. *Cremonini*, 6 Ex. 808; *Roberts* v. *Brett*, 11 H. L. Cas. 337. The case is not governed by the first rule but by the fourth and fifth rules in *Pordage* v. *Cole*, 1 Saund. R. 319, 320. The agreement is not complete. It provides that $4,000 is to be paid down at the signing of the agreement, $40,795 to be paid within sixty days from the date of the agreement, and the balance, $15,205, to be on mortgage at seven per cent. The agreement should state when the mortgage is to become payable, or for what time it is to be given. For all that appears from the agreement, the mort-

gage might be given for a thousand years. Fish, to whom one of the defendants has sold, and also Young, who is a joint owner with the plaintiff, should have been joined as parties. No decree for specific performance can be made unless the terms of the contract are clearly stated in the agreement.

*Holman* in reply. *Manby* v. *Cremonini* relied on by the defendants, is clearly distinguishable from the rule laid down in *Pordage* v. *Cole*, as in *Manby* v. *Cremonini* there was a provision that in case of default by the vendor or purchaser in the completion of the sale, a certain rate of interest should be paid by the purchaser until the completion, which shews the parties intended the conveyance and payment should be concurrent. This distinction is apparent in all the cases which seem to lay down a different rule from *Pordage* v. *Cole*. The agreement in question is very similar to that in *Pordage* v. *Cole*. A specific day is named for payment of a specific sum of money, and default has been made, and no time is specified for a conveyance. The plaintiff does not ask for a mortgage in this suit, but merely for the payment of the second instalment. Fish and Young are not necessary parties. *Fry* on Specific Performance, p. 62; at all events they can now be joined, if necessary.

March 9, 1883. WILSON, C. J.—The agreement between the parties is, that upon the execution of the contract of sale and purchase, the purchaser shall pay $4,000, the further sum of $40,795, within sixty days after, and the balance, $15,205, to remain on mortgage.

The defendants say the latter clause as to the balance makes the whole agreement void, because no time or terms of payment are provided with respect to it. The plaintiff contends the terms of the agreement so far as respects the recovery of the $40,795 is concerned, which is all the plaintiff claims in this action, is within the first rule in *Pordage* v. *Cole*, 1 Saund. R. 319, 320, namely: that "if a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen or may happen

before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for the performance of that which is the consideration of the money or other act."

The defendants rely on the fourth and fifth rules in that case. "Where the mutual promises or covenants go to the whole consideration on both sides they are mutual conditions, and performance must be averred." Or "where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without averring performance of, or an offer to perform his part, though it is not certain which of them is to do the first act; and this particularly applies to all cases of sale."

As to the alleged uncertainty in the contract respecting the balance of $15,205 remaining on mortgage. What is meant by that sum "to remain on mortgage?"

A contract for sale of land, reserving "the necessary land for making a railway" through the estate to Prince Town, was not enforced. The Master of the Rolls said: "I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, nor anything about it:" *Pearce* v. *Watts*, L. R. 20 Eq. 492, 494.

The defendant purchased an estate, having agreed with the plaintiff that if he made the purchase he would cede part thereof to the plaintiff. The Court directed a reference to ascertain what portion the plaintiff was entitled to, and decreed the defendant should convey the same. There the defendant attended the sale partly for himself and partly as the plaintiff's agent to buy. The Court thought, also, the defendant had acquired the estate or part of it by a fraud on the plaintiff: *Chattock* v. *Muller*, 8 Ch. D. 177.

Contractors agreed to make a railway according to a specification to be prepared by the engineer for the time

being of the company, all differences as to details to be determined by a referee, and a bond in a stated sum was to be given by the contractors to the company for the due performance of the works. The company filed a bill for specific performance. *Held*, affirming the decision of the Vice Chancellor, that the entire contract was one which the Court would not decree to be specifically performed, and as the Court would not decree performance of the entire contract, it would not decree the execution of the bond Turner, L. J., said: "I do not say the Court will not execute an informal agreement when it can itself supply the deficient terms, but it will not do so if those terms are to be supplied *aliunde*:" *South Wales R. W. Co.* v. *Wythes*, 5 DeG. M. & G. 880, 888.

An agreement to take a lease of a house if put into thorough repair, and the drawing-room "handsomely decorated according to the present style," is too uncertain for the Court to enforce: *Taylor* v. *Portington*, 7DeG. M. & G. 328.

It may be a question to be settled by election of the purchasers at what time the mortgage shall be made payable, in which case the agreement will read, the balance to main on mortgage "for such length of time as the mortgagors shall desire," or it may be the balance may be required to remain as a rent charge upon the land so long as the purchasers desire it, with the usual claim for redemption, or of paying off the charge. And in such a case the purchasers may be bound to make an election or declaration of the time and terms upon which they desire the balance to be arranged: *Shep.* Touch. 250.

If the condition be to do an act without limiting any time, he who has the benefit by it may do it at what time he pleases, as if a condition of a feeoffment be that upon payment of £10 the feoffor may enter, he may pay it when he pleases: *Com.* Dig, "Condition," C. 3.

The authority referred to is *Plowde* 16, where it is stated as follows: "And so in all cases, where it is agreed that one shall have benefit upon an act first to be done by

him, and no time is limited when it shall be done, the law saith it shall be done at his will. As if a man make a feoffment in mortgage, upon condition that if he pay to the mortgagee £20, that then he shall re-enter; inasmuch as no day of payment is limited, the mortgagor may pay it when he pleases; for he is to have the benefit, viz., his land again." *Litt.* sec. 337, p, 208, *b* is to the like effect, shewing the feoffor or mortgagor has the term of his life in which to make the payment.

I do not consider the contract to be void or to be incapable of effect being given to it; and if possible contracts should be maintained according to the intent of the parties, if the Courts can do so by placing a reasonable construction upon them.

The other part of the case is, that which relates to the acts to be done, if any, by the plaintiff, the vendor of the land, to entitle him to recover the instalment of $40,795, which was payable by the purchasers within sixty days from the date of the agreement.

I am of opinion this is a case which is governed by the rule, which provides that when a day has been appointed for payment of money which *is* to happen before the conveyance of the land is made by the plaintiff to the defendants, for the balance has afterwards to be provided for, but which day of payment certainly *may* happen before the deed of conveyance is required to be given, and therefore an action may be brought by the plaintiff for the money now claimed before giving the deed.

The defendants have relied upon their remedy and have not made the giving of the deed a condition precedent to the payment of the instalment, nor fixed any time for the giving of it.

Where the day of payment for the land had not arrived, but the interest upon it was payable half-yearly, it was held, in an action by the vendor for default in payment of the interest, he need not aver he had given possession of the land to the vendee, or that he had title to the land, or was ready and willing to convey it; *Wilks* v. *Smith*, 10 M. & W. 355.

Where a time is fixed for payment of the purchase of land and no time is fixed for the conveyance of it, an action lies for the purchase money without averring performance of the consideration for it. The covenants are independent, and each party has relied upon his remedy by action against the other: *Mattock* v. *Kinglake*, 10 A. & E. 50.

In such a case the vendor need not tender a conveyance, it is the duty of the purchaser to prepare the conveyance. It is sufficient to allege that the plaintiff has always been ready and willing to execute a conveyance: *Poole* v. *Hill*, 6 M. & W. 835.

In *Dicker* v. *Jackson*, 6 C. B. 103, the case was: the plaintiff by contract dated the 2nd of September, 1844, agreed to sell land to the defendant, and within one month from the date of the agreement, or from being requested so to do, deliver to the defendant an abstract of his title and deduce a clear title thereto, and the defendant agreed to pay part of the purchase money on signing the agreement and the residue of it on or before the 2nd of September, 1848, and interest thereon half-yearly. The action was brought for arrears of interest and for the balance of the purchase money.

Wilde, C. J. said, at p. 113: "The plaintiff * * undertakes that he will, within a month from being required so to do, deliver an abstract, and deduce a clear title. And the time appointed for his performance * * does not, therefore, arrive until he has been required to do so, and a month shall have expired after the date of such requisition. But the defendant undertakes to pay the interest upon the unpaid purchase money on certain specified days between the date of the agreement and the day fixed for payment of the residue of the principal purchase money; and the time appointed for him to make these payments *may* arrive before a month has expired after a requisition to the plaintiff to deliver the abstract and deduce the title, and consequently before the time appointed for the plaintiff to do so has arrived. * * The performance of this part of the contract by the plaintiff is not a consideration precedent to his right to maintain this action."

When the conveyance and payment are contemporaneous acts, and the vendee refuses to pay the purchase money, and to accept the conveyance, and the vendor has performed all he engaged to do, the vendee is not liable for the purchase money, but for such damages for breach of his contract which may be assessed against him. The vendor cannot have the land and the price of it too. It is like the case of a contract for the sale of goods which the vendee refuses to accept: *Laird* v. *Pim*, 7 M. & W. 474. Where the acts are concurrent the one party cannot sue the other for default of performance without averring performance or a readiness to perform on his part: *Bakart* v. *Bowers*, L. R. 1 C. P. 484; *Marsden* v. *Moore*, 4 H. &. N. 500.

The vendee of land agreed to pay the purchase money on a specified day, and the vendor agreed to convey on payment of the purchase money. The vendor was held entitled to recover the purchase money without tendering a conveyance. Parke, B., said: "The defendant * * * agrees to pay the purchase money on the 1st of January, without a conveyance; he is, therefore, bound to pay it, and tender of a conveyance need not be averred. This case differs from *Laird* v. *Pim*, 7 M. & W. 474, inasmuch as in that case the money was not to be paid until the conveyance was completed; but here the defendant agrees to pay in advance, and relies upon the plaintiff afterwards giving him a conveyance:" *Yates* v. *Gardiner*, 20 L. J. N. S. Ex. 327, 328.

The contract was, that the vendor, in consideration of £90 paid and of £820 to be paid by the vendee on the 1st of November then next, agreed to sell, and the defendant to buy, and pay the residue of the purchase money on the 1st of November, and that thereupon a conveyance should be made by all proper parties at the plaintiff's expense. The plaintiff sued for the £820. Parke, B., said: "We agree, upon looking to the terms of the agreement, the defendant was not bound to pay * * unless the plaintiff made out a good title, and unless the plaintiff was also ready to execute a conveyance at his own expense:" *Manby* v. *Cremonini*, 6 Ex. 808, 812.

The case of *Roberts* v. *Brett*, 18 C. B. 561, affirmed in Ex. Ch., 6 C. B. N. S. 611, and in 11 H. L. Cas. 327, and 11 Jur. N. S. 377, does not apply here. The nature of the contract in that case was wholly different from the one now before us.

It is quite settled the vendee, unless it is expressly provided to the contrary, must prepare and tender the conveyance, as well of household as of freehold property, and also of personal property: *Stephens* v. *De Medina*, 4 Q. B. 422.

I think the statement of claim sets out all the plaintiff was required to shew to entitle him to recover the sum of money sued for in this action. The claim for that money is an independent right, and the demand for a payment of it is not a concurrent act with the giving of a conveyance, or with any right upon the part of the defendants to require him to shew a good title. He has averred a readiness and willingness to convey, which implies the ability to convey: *De Medina* v. *Norman*, 9 M. & W. 820. And I do not think it was necessary, as a still further instalment has to be provided for that he should even have made that averment: *Wilks* v. *Smith*, 10 M. & W. 355.

If this latter view be correct the defendants' allegation that the plaintiff "could not, and cannot give a good title," is quite immaterial in the action. If, however, it is a proper allegation, it has not been tried yet, and issue has been taken upon it.

The learned Judge was of opinion "the time for completing the transaction on both sides had arrived before the commencement of the action * * and no tender of a conveyance to the defendants having been made, the action must be dismissed."

Assuming it to be true that the time for completing the transaction on both sides had arrived before the bringing of the action, it is still not a defence to the action that the plaintiff has not conveyed the land nor tendered a conveyance of it. If the payment of the sum in question, and the conveyance of the land were independent engagements at first, they are independent engagements now. The plain-

tiff in such a case has engaged that whenever he can be called on to make a good title he will make it. He does not engage that he himself has the title, but that he will convey a good title: *Marsden* v. *Moore*, 4 H. & N. 500, at p. 502.

The title is *perfect* when the abstract shews the vendor is either himself competent to convey or can otherwise to procure be vested in the purchaser the legal and equitable estates free from encumbrances. See also *Dart* on V. & P., 5th ed., 281 *et seq*,

The plaintiff has never yet been in the position to be required to make or to shew a title; it will be time to do that when the last instalment is demanded, or when the defendants shews a readiness and willingness to arrange that according to the terms of the contract.

If it be a hardship on the defendants to be called upon to pay this large sum before it is shewn a title can be made to them of the land, the answer to it is, it is their contract.

And if they desire to fulfil their contract in its entirety, they may aver their readiness and willingness to give the mortgage for the last instalment, and call upon the plaintiff (if they have the power) to shew a good title and to perfect the transfer of the land to them; and if the plaintiff can give a title, they will have received all they contracted for, and can complain of nothing but perhaps a bad bargain, but for that there is no remedy in law.

I think it is clear, from the general rule of law, that the plaintiff was not obliged to tender a conveyance to the defendants. It was the defendants' duty to prepare it and to tender it to the plaintiff for execution.

The question of fraud pleaded by the defendants has not been tried yet, the defendants resting on the objections which they took to the case, and the learned Judge ruling that the objections were sustained, and the action being dismissed upon these objections.

The question of fraud of course we have not considered.

The defendants contended, that as the defendant Cuth-

bert had assigned his interest in the contract to Mr. Fish, he was a necessary party to the action. The learned Judge was of that opinion also.

The case of *McCreight* v. *Foster*, L. R. 5 Ch. 604, which was before the Judicature Act, shews that the vendor is not obliged to notice the fact of transfer by his vendee to another, although the fact is expressly communicated to him, and that he may go on dealing with the original vendee without any regard to the transferee, notwithstanding such notice. There is probably no objection now to the joinder of such assignee if he desires it, and submits to be barred: *Kino* v *Rudkin*, 5 Ch. D. 160.

The order in my opinion should be absolute setting aside the dismissal of the action, and that there be a new trial, the costs of this last trial and of this application to be costs for the plaintiff if he is successful in the result of this action.

GALT and OSLER, JJ., concurred.

*Order absolute.*

[COMMON PLEAS DIVISION.]

## LEITCH v. MCLELLAN.

*Dower— Life estate—Estate by entireties.*

When a husband died entitled to the reversion in fee in certain lands expectant on a life estate therein: *Held*, that dower could not be claimed therein, for that the husband had never been seized during coverture of an estate of inheritance in possession.

*Held*, that a lease for life to a husband and wife makes them tenants by entireties, so that the whole accrues to the survivor.

The demandant, who was a stranger to the life estate, was held not entitled to set up that there had been a forfeiture thereof by nonpayment of rent or other breach of covenant.

THIS was an action of dower tried before Osler, J., without a jury, at Guelph, at the Spring Assizes of 1883.

The demandant claimed as widow of one Daniel McLellan, deceased.

The following facts were proved or admitted:

On the 11th December, 1867, Dougal McLellan and his wife Ann McLellan, the defendant, conveyed to their son, Daniel McLellan, the lands in question.

By indenture of even date between the two parties, Daniel McLellan demised and leased to Dougal McLellan and Ann McLellan the lands "for the term of their natural lives from the date hereof." The grantees covenanted "to pay one dollar yearly during the said term, and not to assign or lease the same, nor make alterations or carry on any offensive trade thereon without the written consent of the party of the first part. This lease to be void if the parties of the second part fail to perform this agreement." The lease was executed by Daniel McLellan and Dougal McLellan.

Dougal McLellan died in March, 1871. His widow, the defendant Ann McLellan, survived him, and had ever since remained in possession under the lease by herself or her tenants.

After Dougal's death Daniel McLellan married the demandant.

By his will, bearing date the 2nd January, 1872, he devised the lands in question to his unborn child, "subject to the life estate therein of my mother, Ann McLellan," the defendant.

On the 5th January, 1872, he died, leaving his widow, the plaintiff (who afterwards became the wife of J. D. Leitch), him surviving.

After the death of Daniel, and before the second marriage of his widow, a child was born, to whom the demandant was duly appointed guardian.

*Jacobs*, for the defendant.

*Guthrie*, Q. C., and *Watt* for the defendant.

OSLER, J.—It was urged by Mr. Jacobs that the life estate conferred upon the father and mother of the demandant's former husband, had terminated by the death of the father in her husband's lifetime, so that the latter's reversion expectant on the life estate had become an estate in possession of which she would be dowable.

If that were so, the action would not be properly constituted in the absence of the tenant of the freehold, who has not been made a party.

It is clear, however, that the defendant's life estate is still outstanding, for "if a gift be to two persons for their lives, this is understood as extending to the life of the survivor, and the parties are joint tenants:" *Burton* on Real Property, sec. 736. Here the two persons were husband and wife, and they took by entireties. "The same words of conveyance which would make two other persons joint tenants will make husband and wife tenants of the entirety, so neither can sever the jointure, but the whole must accrue to the survivor." *Cruise's* Dig., 4th. ed., vol. 2, tit. 18, ch. 1, sec. 48, and see *Britton* v. *Knight*, 29 C. P. 567: *Re Shaver and Hart*, 31 U. C. R. 603. But the demandant never can be entitled to dower out of the land in question, for her husband never was seized during the coverture of an estate of an

inheritance in possession. All that he had was the reversion in fee dependent upon the intermediate estate of freehold which he had granted to his father and mother. Of such an estate his widow is not dowable: *Cruise*, 4th. ed., vol. 1 tit 6,ch. 3, sec. 8; *Cumming* v. *Alguire*, 12 U. C. R. 330; *Pulker* v. *Evans*, 13 U. C. R. 546.

The plaintiff being a stranger to the estate cannot be heard to say, that the life lease has been forfeited by non-payment of rent or other breach of covenant.

*Quacunque via*, the action fails, and must be dismissed, with costs.

[The case was re-heard before the full Court and at the conclusion of the argument judgment delivered affirming the judgment.]

[CHANCERY DIVISION.]

## FOSTER ET AL. v. STOKES ET AL.

*Misrepresentation—Waiver—Acquiesence—Estoppel—School trustees.*

Where certain persons were elected School Trustees, and at a meeting of the board held subsequently to the election, were declared duly elected, but, proceedings having been meanwhile commenced to question the validity of the election, at a subsequent meeting of the board, they acquiesced in the conclusion of the board to hold a new election, and became candidates again, and canvassed as such, until the twenty days allowed for disputing the first election had elapsed, (the proceedings formerly commenced for that purpose having been meanwhile dropped,) and were not elected at the second election.

*Held*, they could not afterwards maintain a suit to have it declared they were the duly elected trustees.

THIS was an action brought by Robert John Foster and Amos Fennell, against William Stokes, Hugh Armstrong, the Public School Board of the village of Newbury, Alexander Armstrong, a member of the said Board, and William F. Roome, chairman of the said Board. The plaintiffs claimed a declaration that they were the duly elected School Trustees and entitled to seats at the Board of School Trustees of School Section No. 11, Village of Newbury, in the County of Middlesex, and an injunction restraining the Board of Trustees from preventing the plaintiffs from taking their seats and acting as such Trustees, alleging that the defendants other than the Board were usurping the offices that rightfully belonged to them. The facts of the case sufficiently appear in the judgment.

The case was heard at London May 22nd and 23rd, 1882, before Ferguson, J.

*C. Moss*, Q. C., for the plaintiffs. The Court has power to interfere in a case of this kind by injunction: *Mearns* v. *The Corporation of the Town of Petrolia*, 28 Gr. 98; *Smith* v. *Petersville*, 28 Gr. 599; *Aslatt* v. *Corporation of Southampton*, L. R. 16 Ch. D. 143. The election of January 4th was a good one, and was affirmed; twenty days elapsed after it, and no objection was taken under the

statute. The result left the plaintiffs the School Trustees. There was no arrangement or agreement to give up the office, and have a new election. Besides, the only power that could declare the election void was the Judge of the County Court: *In the matter of Gabriel Hawk et al.*, 3 C. P. 241. The council has no such power: *Board of Trustees, &c., of Belleville* v. *Grainger*, 25 Gr. 570; 42 Vict. ch. 34, sec. 7, sub-sec. 9, O., amended by 44 Vict. ch. 30, sec. 9, sub-sec. 2, O.; *Henderson* v. *Kerr*, 22 Gr. 91; *Close* v. *Mara*, 24 Gr. 593. The electors have the right to have the plaintiffs act as School Trustees. The plaintiffs are not seeking to attack the second election at all. Even if the plaintiffs had voted for the men who were at the second election, that would have made no difference. The great question is, was there a vacancy at the time of the second election. A vacancy cannot be created by estoppel.

*S. H. Blake*, Q. C., for the defendants other than the Board of Trustees. The proposition of law in *Pickard* v. *Sears*, 6 A. & E., 475, governs this case. The question before the meeting of January 11th, was how was a good election to be had. The course of the defendants was reasonable, that of the plaintiffs unreasonable and indefensible. The plaintiffs should have submitted the whole of the matters to the Judge of the County Court: *Board of Trustees, &c., of Belleville* v. *Grainger, supra*, does not assist the plaintiffs here. See also *Carroll* v. *Perth*, 10 Gr. 64; *Vandecar* v. *The Corporation of Oxford*, 3 App. 131; *Regina* v. *Roach*, 18 U. C. R. 226; *O'Reilly* v. *Rose*, 18 Gr. 33; Insolvent Act of 1875, sec. 50-125. The election of January 4th was not a good election; the consequence is there was a vacancy. The second election was simply a mode of getting out of the difficulty that all felt. The act of canvassing shews conclusively that the plaintiffs did consent to the second election taking place. It is absurd to say the electors are represented by the plaintiffs. The School Board represent the electors. This action is not brought on behalf of the electors in the name of the Queen, or Attorney-General *ex rel.* The plaintiffs are

"tainted"; *Regina ex rel. Regis* v. *Cusac*, 6 Pr. 303. The plaintiffs were at liberty to admit what a Court would most likely decide against them. I also refer to 42 Vict. ch. 34, and to *Hodgin's* School Law p. 10 and p. 177.

*R. Meredith*, for the Board of Trustees. If the plaintiffs accepted the office, they had the right to resign; if they did not accept, they might waive any rights they had. The proper course as to either election was to go before the County Court Judge: R. S. O. ch. 204, sec. 61; 34 Vict. ch. 34, sec. 9; 44 Vict. ch. 30, sec. 9, sub-sec. 2. The relief provided is ample: *Regina* v. *Roach*, 18 Q. B. 226; *Dillon* on Corporations, 2nd ed., 265, sec. 144. The remedy given excludes other remedies: *Commonwealth* v. *Garrigues*, 28 Penn. 9; *The State of Ohio* v. *Marlow*, 15 Ohio 114; *McNeil* v. *The Reliance Mutual Fire Ins. Co.*, 26 Gr. 567. *Mearns* v. *The Corporation of the Town of Petrolia*, *supra*, was a different case. So far as it goes, it is against the plaintiffs. In *Smith* v. *Petersville*, *supra*, the question of jurisdiction was not raised: *Aslatt* v. *Corporation of Southampton*, is the same sort of case as *Mearns* v. *Petrolia*. Proceedings were not taken before the County Court Judge to upset the first election, solely on account of the conduct of the plaintiffs. The plaintiffs attempt a trick, and then ask the Court to assist them.

C. *Moss*, Q.C., in reply. The plaintiffs are not here as contesting the second election, but as persons who are elected to the office, and who are kept out by force. To say they were bound to go before the County Court Judge is absurd. The electors cannot oust a trustee by having another election. The only way the defendants can succeed is, by shewing that though the plaintiffs were duly elected on January 4th, yet they have done something by which they have lost their offices. The plaintiffs are not relators at all, but simply occupants of the office. The moment the resolution was passed declaring the plaintiffs elected, they became trustees. The relief asked here is one of right, not of discretion. There is no objection that one not knowing his rights should, while they are getting information, act so as to retain if they can two chances.

December 9, 1882. FERGUSON, J.—At the election held in this school section on the 4th day of January last, the plaintiffs received in fact, as was proved, the largest number of votes, and it appears in evidence that a resolution was passed at a meeting of the board declaring the plaintiffs to be trustees. This election was, however, objected to on the grounds that the board had not in the previous December, or at any time, fixed the day and place for the nomination or for holding the election, and had not named any returning officer or officers, as required by the statute; and protests in writing in respect of the election were duly served.

The day after the election there was a meeting of the board, and the plaintiffs were present. This was the meeting at which the plaintiffs were declared elected. At this meeting another (or an adjournment of this one) was appointed for the evening of the 11th of January. In addition to the protests, a solicitor's letter had been received by the board stating that the election was illegal. The meeting of the 11th January took place, and the plaintiffs were also present.

Dr. Roome, one of the Board, in his evidence, says that the object of this meeting was to receive the declaration of office of the plaintiffs.

At this meeting there was a discussion as to the validity of the election, in which the plaintiffs took part. In speaking of the protests and the apparent approaching contest, the chairman of the board asked the plaintiffs if either of them would make the declaration of office and run the risk of a law suit. The plaintiff Fennell, in reply, asked if the board would pay the costs, and he was answered in the negative by the chairman, who said the board had no money for that purpose, and the plaintiff Foster then said he would not spend five cents in the matter.

At this meeting a conclusion was arrived at, which I think the evidence shews was unanimous, which was that there should be a new election. This was considered as

the best way out of the difficulty. The plaintiffs certainly did, I think, join in this conclusion. They were not, of course, in a position to act as trustees who have made the declaration of office, but, so far as it was in their power so to do, they concurred in it. The contention that they did not is not, I think, sustained by the evidence.

After this the board proceeded to have a new election held, and, according to the evidence of the chairman and others, and as I think was the fact, they endeavoured to have a regular and valid election held. Both the plaintiffs were nominated with their assent, and became candidates. They solicited votes, and, so far as one can perceive from the evidence, did all those things that candidates anxious for office usually do.

This second election was on the 26th of January. The plaintiffs, and each of them, seem to have gone on with the "electioneering" (if I may be allowed to use that word) till about the day before the polling—the 25th—and till after the expiration of the twenty days after the first election, and then finding that, owing to the course that had been adopted, the proceedings to contest their election had been dropped, they changed their course, and asserted that the validity of their election as trustees could not be questioned, and claimed the office.

The second election was nevertheless proceeded with, and the defendants other than the board were elected. These defendants took their seats on the board and have been acting as trustees, and the plaintiffs have, in consequence, brought this suit.

At the trial, much evidence was given, the foregoing being only a brief outline indeed of the facts that appeared.

At the close of the arguments of counsel, which were, I think, more than usually able, I wrote down some findings upon the facts, which were to the effect that the plaintiffs did, at the meeting of the 11th of January, relinquish and abandon whatever position they had gained by the election then past, and all that had occurred up to that time: that they concurred in the plan that was adopted for the pur-

pose of getting over what was considered to be, and no doubt was, a difficulty: that by their becoming candidates at the second election, and soliciting votes, and electioneering, and acting generally as they did up to the 25th day of January, they asserted, not only to the then members of the board of trustees, but also to the inhabitants and voters of the school section, that they were not and did not consider themselves to be trustees elect; but, on the contrary, were desirous of being elected at the second election; and that, if the change in their line of conduct on the 25th of January was from the beginning intended, there was, on their part, intolerable duplicity; and that, whether intended from the beginning or not, this change was in direct conflict with their repeated assertions, both by words and by conduct.

I have since perused the evidence, and considered the case again, without discovering any reason to change my convictions on the subject; and I am unable to perceive how this Court can grant the relief asked, or any relief, to plaintiffs occupying the position these plaintiffs do. The relief they ask is personal, and I am of the opinion that it cannot be granted.

Amongst the arguments advanced by counsel, it was contended that, as the plaintiffs had the largest number of votes at the first election and as the time for contesting that election had passed, it must be considered a good election; and that it was the rights of the inhabitants of the school section, rather than any personal rights of the plaintiffs, that really constituted the grounds of the suit. The answer to that proposition, I think, is this: The only way in which the school section is represented here is by the board of trustees, who are defendants, and whose contention is directly opposed to that of the plaintiffs, and the proceedings are not in the nature of a *quo warranto* upon the relation of any one on behalf of the Queen, or the Attorney-General.

I am of the opinion that the action should be dismissed, with costs, and it is dismissed accordingly.

My recollection is that there was a motion for an injunction in this action, and, if so, the plaintiffs will pay the costs of this also to the defendants. If necessary, I will hear counsel as to this last.

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[CHANCERY DIVISION.]

## ESSERY v. COURT PRIDE OF THE DOMINION.

*Society—Expulsion—Forum—Injunction.*

Members of charitable and provident societies should not be allowed to litigate their grievances within the society in Courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies.

Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this Court refused to interfere.

THE bill of complaint in this case was filed by Emanuel Thomas Essery against Court Pride of the Dominion No. 5660, Ancient Order of Foresters, seeking for restitution of his privileges as a member of the defendants' body, from which he alleged that he had been unlawfully expelled.

In his bill the plaintiff stated that the defendants were a friendly and benevolent society, duly incorporated in November, 1874, under 37 Vict. ch. 34, Ont., and holding their meetings in the city of London; and by their by-laws and rules the defendants were required to conform to the general laws of the Ancient Order of Foresters' Friendly Society; that he, the plaintiff, became a member of the defendants' court, in June, 1873, and remained so until the happening of the proceedings thereinafter set forth; that as a member of the defendants' court the plaintiff was entitled to certain pecuniary benefits in relation to medical attendance and otherwise; that at one time,

during his membership, the plaintiff was Chief Ranger of the defendants' court, and as such had to preside, as chairman, over the so-called arbitration committee thereof, which was, amongst other things, appointed for the trial of charges against members: that in February, 1880, a member named Moore preferred a charge against another, named Cox, at the trial of which the plaintiff presided, as aforesaid, and in consequence of disagreement arising out of the said trial the said Moore slandered the plaintiff in his profession as a lawyer, whereupon the plaintiff brought an action for slander against Moore, after the trial whereof, Moore brought a charge against the plaintiff, in the defendants' court, which charge was in writing, and accused the plaintiff of misconduct while acting in his capacity as Chief Ranger, and, secondly, of grossly insulting him and other members during the progress of the action for slander, thereby dragging the proceedings of the court before the public, and bringing it into contempt: that these charges were handed to the then chief ranger about May 10th, 1880, and next day the plaintiff was served with notice thereof, and of trial before the said arbitration committee on the 28th inst., when he attended, but the trial was adjourned to June 3rd following, when he again attended, and the trial was proceeded with: that the plaintiff requested at the time that the evidence might be taken down in writing as required by the rules, but the committee refused to do so, though the plaintiff warned them that otherwise any judgment they might give would be set aside on appeal to the district arbitration and appeal committee: that the committee nevertheless proceeded with the trial, refusing to let the plaintiff properly cross-examine the witnesses, and finally found the plaintiff guilty of the second charge brought against him, and expelled him from the Ancient Order of Foresters: that immediately after being served with notice of this decision the plaintiff served the necessary notice of appeal to the arbitration committee of the London United District of the said order, pursuant to the rules, and on July 8th,

1880, the said district arbitration committee met, in the presence of the plaintiff, and of Moore, the respondent, and duly heard the appeal, and rendered judgment quashing the decision of the arbitration committee of the defendants' court, and reinstating the plaintiff, on the ground that the evidence at the trial below was not taken in writing, a copy of which judgment was served on the plaintiff on July 14th, 1880, and as the plaintiff believed, also on Moore, and on the defendants, who, however, did not make any further appeal from the said judgment to the final arbitrators of the order, as they might have done under general law 90, sec. 3, of the General Order of Foresters, within two months from the rendering of the said judgment; that on October 18th, 1880, the plaintiff attended the annual district meeting of the said London United District of the said order as secretary of the district, and was then, and thereafter, until the happening of the circumstances hereinafter mentioned, always treated as a member in good standing: that on January 8th, 1881, the plaintiff not having been notified as to the amount of his dues, learnt, on enquiry, for the first time that the defendants' secretary had been ordered not to serve any more notices on the plaintiff, and the secretary refused to receive from the plaintiff money tendered by him sufficient to cover the said dues: that on May 14th, 1881, plaintiff was notified by the defendants of the amount of his dues, and forthwith paid them: that about June 4, 1881, the plaintiff was served with a copy of Moore's original charge against him above mentioned, on which he had been already tried as above mentioned, and also with a notice that at a meeting of the London United District, A. O. F., held on April 18, 1881, Moore's charges against him were referred back to the defendants' court for re-hearing, and notifying him to appear before the arbitration committee of the said court on June 21, 1881; that when the said committee was about to assemble on June 21, 1881, the plaintiff caused the chief ranger and chairman to be served with a notice in writing, forbidding them to take proceed-

ings on these charges of Moore against him, on the ground that they had already been tried by the arbitration committee of the defendants' court and a decision made, which was appealed against, and the appeal decided in the plaintiff's favor upon the said charges on July 8, 1880, by the district arbitration committee, and that no appeal having been made to the final arbitrators within three months after the said decision or appeal, the said decision became final and the charge at an end; and that if they took any proceedings in the matter of the said charges, a bill would be filed in this court to set them aside, and for an injunction: that the plaintiff did not attend or defend himself before the said arbitration committee; that on June 23, 1881, the plaintiff received a copy of the judgment of the said arbitration committee, which declared Moore's charges proved, and expelled the plaintiff from the defendants' court: that thereafter the plaintiff was wholly excluded from the defendants' court, and from the Ancient Order of Foresters, and the advantages thereto appertaining: that meanwhile, the plaintiff had been ill, but had been deprived of the benefits in the matter of medical attendance and sick benefit which he would otherwise have had under the general laws of the said order, and otherwise damaged: that Moore's charges were wholly untrue, except as to the fact of the plaintiffs having brought the action of slander, which was not a charge the defendants had power under the general laws of the order to hear: that the said charges having been once tried and appealed against, no further proceedings could be taken upon them except by way of further appeal to the final arbitrators, under the said general laws, and no such further appeal having been made within two months, the judgment of the district arbitration committee became final and binding, and no further proceedings could be taken on the said charges by Moore or the defendants, or any one else: that if the resolution of April 18, 1881, was ever really passed, it was *ultra vires*, and absolutely null and void: that the general laws of the order provided that the district arbitration committee

might, on trial of any appeal before them, at the request of either party, refer the charges back for further investigation, and on the trial of the plaintiffs' appeal the said committee did offer to refer the charges back for further hearing, but Moore and the defendants refused this, and thereupon the said committee rendered their decision of July 8, 1880, and thereupon all power to re-hear the said charges ceased, except by way of appeal to the final arbitration committee in accordance with the general laws: that the general laws provided every charge should be preferred, and every appeal brought within three calendar months of its discovery, and unless so brought, should not be entertained: that the said charges had been finally disposed of, and no further trial could legally take place, and all proceedings upon the pretended trial of June 21, 1881, were absolutely null and void, and should be set aside and quashed by this court. The plaintiff, therefore, prayed that the resolution passed by the London United District, A. O. F., referring the said charges back to the defendants for rehearing might be declared to have been illegally and improperly passed, and to be *ultra vires*: that the proceedings taken by the defendants for the re-hearing of the said charges as set forth above, and their decision might be declared illegal, *ultra vires*, and void, and might be set aside, and the plaintiff might be declared to be still and to have always been a member of the defendants' court, notwithstanding the said proceedings and decision: that the defendants might be enjoined from interfering with the plaintiff or any member of the said court; that he might be re-imbursed for all pecuniary losses entailed upon him by the defendant's conduct, and the costs of this suit; and for all proper directions and general relief.

The defendants in their answer set up the general laws of the Ancient Order of Foresters, and declared that they had in all respects adhered to them in their proceedings with regard to the plaintiff, and that these proceedings were final and binding on the plaintiff, and he should not be allowed to question the same by the proceedings in this cause, or otherwise save only in the manner, if any, pre-

scribed by the rules governing the defendants' society, and that the plaintiff had been lawfully expelled from the defendants' society, and had ceased to be a member thereof.

Of the general laws of the Ancient Order of Foresters, it is material to notice the following:

87. Section 1. That each Court shall appoint at a regular meeting in the month of December, January, or February, in each year, an arbitration and appeal committee of twelve contributing members, who shall perform the functions of such committee until the next annual change. * *

Sec. 2. That the functions of this committee shall be to hear and decide according to the rules and laws of the Order upon the following cases: 1st. Any dispute, charge, or complaint in respect of some matter or thing only connected with the Order, between one member or officer of the Court and another member or officer of the Court, and every dispute between a member or persons claiming to be a member, or under the rules.

Sec. 3. That every brother or officer preferring a charge or complaint, shall give notice of the same in writing to the Chief Ranger of the Court, within three calendar months of the discovery of the alleged offence, or such charge, or complaint shall not be entertained. * * The said committee shall be summoned by the secretary of the Court to hear the case within twenty-one days from the charge or complaint being served upon the Chief Ranger of the Court. * * And if the defendant neglect to appear, unless caused by illness duly certified, judgment shall be recorded against him by default, and the committee shall be empowered to fine him any sum not exceeding ten cents for such neglect to appear, and also to charge either plaintiff or defendant with the whole or any part of the expenses of the committee or of witnesses in a case. The fine to be paid to the Court funds. The decision of the committee shall be binding until reversed or altered upon an appeal to the arbitration committee of the district, or three nearest Courts out of the district, if the Court be out of the district.

88. Sec. 1. That every district shall appoint at its annual meeting in October an arbitration and appeal committee of twelve contributing members, who shall perform the functions of such committee until the next annual change, * * *

Sec. 2. That the functions of this committee shall be to hear and decide, according to the rules and laws of the Order, upon the folowing cases:

3rd. Any appeal by a member or Court against the decision or act of a Court or Court committee of the same district. * * *

Sec. 3. That every member making an appeal as above, shall give notice of the same in writing to the Chief Ranger of the district within three calendar months of the date of the Act appealed against, or such appeal shall not be entertained. * * The said committee shall be summoned by the secretary of the district, to hear the case within twenty-one days, upon the appeal being served upon the District Chief Ranger. * *

Sec. 4. That this committee shall have power to refer a case back to the Court or Court committee for a decision upon its merits, in the event of any informality having prevented it being tried; and that this committee shall have power to confirm, rescind, or alter any decision which may be appealed against, and to inflict fines for the violation of the rules and laws, and to charge the plaintiff or defendant with the whole or any part of the expenses of the committee, or of witnesses in a case. The decision of the committee shall be binding until reversed or altered upon an appeal to the final arbitration committee pursuant to the 90th law.

90. Sec. 1. That each District in the Order shall yearly, at their October meeting, elect three financial members of such District, and one additional member for every complete 500 members the District may have above 1,000 members, no District to elect more than ten members. * * Such elected members to be called final arbitrators. * *

Sec. 2. That the functions of the final arbitrators shall be to hear and decide finally upon the following cases, if the merits are gone into: Any appeal by a Court or members, or person claiming on account of a member, against the decision or resolution of a District Arbitration Committee. * *

Sec. 3. That no appeal shall be heard by the final arbitrators, unless notice of the same has been given to the executive council within two months of the date of the decision appealed against, nor unless a deposit of £1 has been made by the plaintiff or complainant towards the payment of any expenses or fines which may be recorded against them.

Sec. 6. That any dispute, complaint, or appeal, which cannot be adjudicated upon by the final arbitrators under Section two, and any appeal by a member, court, or district against any act or resolution of the executive council done on their own authority, shall be made to the high court of the order, the decision of which shall be final and conclusive without further appeal. * *

It was also provided by the general laws that any member doing anything to bring the order into contempt should be liable to expulsion.

The cause was originally heard before Proudfoot, V. C., on November 2nd, 1881, at the Autumn Sittings at London, who, without permitting the plaintiff to give evidence in support of the allegations in his bill, gave judgment as follows:

"I think the plaintiff has a remedy under the rules of order by appeal to the arbitration and appeal committee, and not until he has exhausted the remedies provided by the rules, and has shewn that the action of the judicial bodies was contrary to their rules, will he have any right to apply to this Court. Bill dismissed, with costs."

It subsequently came before the Divisional Court, under the same circumstances as the case of *Harding* v. *Corporation of the Township of Cardiff*, *supra* p. 329, and on June 12, 1882, was argued before Boyd, C., and Ferguson, J.

*R. M. Meredith*, for the appellants. *Dawkins* v. *Antrobus*, L. R. 17 Ch. D. 615, has no application here. This society was more like an insurance company than a club. Here, too, the committee had no jurisdiction, for the case did not come within the society's rules. *Re United Patriots' National Benefit Society and Alfred Holt*, L. R. 4 Q. B. D. 29, would seem an authority in our favour. The committee had no right under the rules to expel a member, because he had sued another member in a Court of law; and if the answer alleges other charges, then it was a matter in issue to decide on what ground he was expelled. It would be against the policy of the law to prevent a man going into litigation, when he thinks he has a just cause, by giving such a construction to the defendants' rules.

[BOYD, C.—If a member of a private society agreed that if he brought an action against another member he should be expelled, is there anything in that against public policy?]

I contend that there is. The *onus* is on the defendants to show very clearly that the plaintiff has done something to deprive himself of his right to come to this court; *Mulkern* v. *Lord*, L. R. 4 App. at p. 193. We say the arbitration committee should be prevented from carrying their decision into execution. The plaintiff's case comes within the circumstances under which it is said in *Dawkins* v. *Antrobus*, *supra*, the Court will interfere. A man once tried cannot be tried again; and the arbitration committee had no right to entertain the matter a second time, for three months had elapsed. A prohibition would lie on such grounds against a lower Court. *Labouchere* v. *Wharncliff*, L. R. 13 Ch. D. 346, shows our right to come to this Court. That the defendants were bound to adhere strictly to their rules, is shewn by *Wood* v. *Wood*, L. R. 9 Ex. 190; *Marsh* v. *Huron College*, 28 Gr. 505. The defendants' proceedings were quite contrary to good faith.

[BOYD, C.—Did Mr Justice Proudfoot proceed entirely on the ground that the society had machinery in itself to give relief?]

Yes. He ruled that *Dawkins* v. *Antrobus, supra*, was conclusive against us.

*W. P. R. Street*, for the respondents. The plaintiff had a clear way of having his rights determined pointed out by the rules of the society. No suggestion of bad faith on the defendants' part is made in the bill. This is not an insurance company, it is a benefit society. *Dawkins* v. *Antrobus, supra*, shews the Court will give the defendants credit for good faith, unless something is shewn clearly the other way. I refer also to *Field* v. *Court Hope*, 26 Gr. 467. The plaintiff's argument is mainly based on the contention that there was no jurisdiction in the body which expelled him. If there was jurisdiction, the case is at an end. If the expulsion was *ultra vires*, then the plaintiff should have applied the remedy given him by rule 87, section 2. Plaintiff allows he is bound by the rules, and, as such, he cannot come to this Court until he has exhausted all the remedies supplied to him by the rules. The policy of the Court is to prevent the funds of such a society as this being eaten up by litigation: *Thompson* v. *Planet Benefit Building Society*, L. R. 15 Eq. 333. I refer also to *Angell* and *Ames*, on [illegible]tions, sec. 418, and cases there referred to; and [illegible]*chere* v. *Wharncliffe*, L. R. 13 Ch. D. 346.

*R. M. Meredith*, in reply. The rules provide there shall not be jurisdiction except within three months, and failing jurisdiction the defendants' case falls to the ground: *Marsh* v. *Huron College*, 28 Gr. 605; *Field* v. *Court Hope*, 26 Gr. 467. Consent even cannot give jurisdiction: *Deadman* v. *Agriculture and Arts Association*, 6 P. R. 176. The plaintiff does allege that the other charges made against him other than that of bringing the action of slander were made in bad faith. We were willing this suit should be stayed until we got through all the courts provided by the defendants' rules. But we say it is no use because the charge will then be made again.

[BOYD, C.—That is not alleged in the bill.]

The evidence has always been gone into in these cases to shew them proper ones to go before the Court.

July 9, 1882. BOYD, C.—In reference to charitable and provident societies incorporated, like the defendants, under the statute empowering them to provide for the discipline and management of their own affairs, it is very proper to apply the principle laid down in *Field* v. *Court Hope*, 26 Gr. at p. 475, namely, that one of the members should not be allowed to litigate his grievances within the society in the Courts until he had exhausted every possible means of redress outside of the Courts. That principle applies to the circumstances of the present case as disclosed in the pleadings, and the printed book containing the rules of the defendants. When the complaint was served upon the plaintiff he did not follow the course prescribed by the rules. Instead of appearing before their arbitration committee he made default, and judgment went against him on this ground. By the rules this judgment is binding till reversed by the conventional court of appeal. Instead of raising in the proper manner the grounds of his defence, his solicitor sent to the chief ranger notice claiming that the matter of the complaint had been already disposed of in his favour, and that there could not be another trial. The rules make no provision for any such notice. The notice did not object to the jurisdiction of the committee on the ground that by lapse of time they could not entertain the complaint. Upon the only ground presented it may very well be argued that what took place before did not amount to a trial. See *Regina* v. *Marten*, 14 Q. B. at p. 80, and *Regina* v. *Brisby*, 1 Den. C. C. 416; *Regina* v. *Herrington*, 12 W. R. 420. The committee had previously investigated the matter and found the plaintiff guilty on the second charge, and expelled him. This decision he appealed from, and succeeded on the ground that the evidence in that trial not having been taken down in writing the appeal committee had no alternative but to quash the judgment. There was thus a mistrial, and the appeal was not disposed of on the merits of the complaint. The matter being sent before the committee again for rehearing, though it is conceded in a manner not justified

by the rules, it was prosecuted in the absence of the plaintiff, who made default, as already mentioned, and the evidence being taken down in writing the same result was arrived at as before. The bill does not complain of this as being done vexatiously or *mald fide*, and alleges no reason why an appeal might not have been made from this judgment to the appellate tribunal provided by the rules. The previous successful appeal of the plaintiff shews that it was competent to him to appeal from the last decision instead of filing his bill. His only reason for coming to this Court, as argued before us, was that the committee had no jurisdiction to entertain the case a second time. If he relied on the ground mentioned in his notice, that the matter was *res judicata*, then it was unquestionably within their jurisdiction to determine that. If he relied on the ground urged on the argument that the time-limit had expired for hearing the complaint, then he did not raise this objection either before the committee or in his notice of objection, nor does he raise it in his bill. The only paragraph relating to it is as follows: paragraph 25 :—" The general laws provide that every charge shall be preferred within three months of its its discovery, and unless so brought such charge shall not be entertained."

The objection here is, that the complaint was not made within three months of the discovery of the offence. But the complaint was unquestionably made by giving notice to the chief ranger within this time, and the proper objection should be that the trial was not had within 21 days after the service of the notice of that complaint. But even if this point had been specifically and properly raised it would not, in my judgment, have bettered the plaintiff's position. It was still a matter for the committee to decide upon in the first instanee, and if they went wrong an appeal would unquestionably lie to the superior committee of appeal, and till the plaintiff took this step, and the further step of appealing, if necessary, to the ultimate court of appeal provided by the rules, he is premature in filing his bill.

All that is required in these cases is, to see that the party complaining is a member of the society, and the matter in dispute is one relating to the internal economy of the organization, and provided for by its rules and regulations. In such a case the jurisdiction of the Courts is practically ousted until all expedients furnished by the conventional code of laws have been resorted to. The object of the Legislature in incorporating these bodies, and of the constituents in combining to form such societies, is to control their own schemes for mutual benefit, and to ventilate their own difficulties and quarrels by a system of original and appellate tribunals, affording a cheap and speedy mode of trial, with which the Courts never interfere unless the action complained of is contrary to natural justice, or in violation of the rules of the society, or done *mala fide*, and then only after the party complaining has gone as far as he can go, and done as much as he can do, to obtain what he seeks in the domestic forum.

*Dawkins* v. *Antrobus*, L. R. 17 Ch. D. 615; *Thompson* v. *Planet Benefit Building Society*, L. R. 15 Eq. 333; *Gardner* v. *Fremantle*, 19 W. R. 256; *Denton* v. *Marshall*, 1 H. & C. 654; *Re Skipton Industrial Co-operative Society* v. *Prince*, 11 Jur. N. S. 11; S. C., 33 L. J. Q. B. 323; *Trott* v. *Hughes* 16 L. T. O. S. 260 (Cranworth, V. C.).

The result is, that the decree is right, and should be affirmed, with costs.

FERGUSON, J., concurred.

[CHANCERY DIVISION.]

## McClung v. McCracken et al.

*Statute of Frauds—Sale of lands—Evidence—Suit for specific performance—Deed executed, but not delivered.*

When A, whose wife owned a certain freehold property on St. George street, wrote to B, the owner of a certain leasehold property on King street, with reference to the said properties, as follows: "If you will assume my mortgage, and pay me in cash $3,750; I will assume your mortgage of $5,000 on the leasehold;" and B replied, "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms:"

*Held*, not a sufficient memorandum of the contract to satisfy the Statute of Frauds.

*Held*, also, in a suit brought for the specific performance of the above contract by B, correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting title which passed between the solicitors, were inadmissible in evidence.

*Held*, further, the fact that A's wife had signed a conveyance of the land in question to B, which conveyance had never been delivered, and did not, by recital or otherwise, set forth the contract relied on, could not assist B in the suit for specific performance.

THIS was a suit brought by John McClung, plaintiff, against Thomas McCracken and Helen McCracken, his wife, defendants, for the specific performance of a certain contract, the terms of which, as well as the other facts of the case, are sufficiently set out in the judgment.

The case was heard at Toronto, on February 22nd, 1882, before Ferguson, J. At the close of the plaintiff's case,

*J. Maclennan*, Q. C., for the defendants. I submit that no contract at all is shown; there is no contract shewn, even if the case were against Mr. McCracken himself. Moreover, no requisite authority from his wife is shewn. All that Mr. McCracken is shewn to have said was against the exchange, and quite consistent with the idea of his wife owning the property, being willing to sell, permitting her husband to negotiate, but reserving to herself the right of accepting or rejecting any proposed agreement. To satisfy the Statute of Frauds, the name of the real vendor must appear in some way in the contract; so also with the name of the vendee; and a contract of exchange is only

another name for a contract of sale. "Vendor" is not a sufficient description, though "proprietor" is: *Rossiter* v. *Miller*, L. R. 5 Ch. D., 648; *S. C.*, in App. L. R. 3 App. Cas. 1124, 1140, 1141; *Donnison* v. *The Peoples' Cafe Co.*, 45 L. T. N. S. 187; *Marshall* v. *Berridge*, 45 L. T. N. S. 599; *Kronheim* v. *Johnson*, L. R. 7 Ch. D. 60; *Agnew* on the Statute of Frauds, p. 258, 277, 278; *Pollock* on Contracts, 3rd ed., p. 174, and the cases in the foot note. Moreover the letters of May 12th, 1880, describe Mr. McCracken's property, and not that of his wife, and if the agreement were established, the contract would not suffice as against the wife. As to the conveyance signed by Helen McCracken, it was provisional upon something not then settled.

*J. E. Rose*, Q. C., and *Macdonald* for the plaintiff. The contract here is sufficient and binding; *Bland* v. *Eaton*, 6 App. 73; *Catling* v. *King*, L. R. 5 Ch. D. 660; *Jollife* v. *Blumberg*, 18 W. R. 784. We also refer to *Commins* v. *Scott*, L. R. 20 Eq. 11; *Higgins* v. *Senior*, 8 M. & W. 834; *Nelthrope* v. *Holgate*, 1 Coll. 203; *Garrett* v. *Hansley*, 4 B. & C. 694; *McFarlane* v. *Dickson*, 13 Gr. 263; *Gillatly* v. *White*, 18 Gr. 1; *Ballantyne* v. *Watson*, 30 C. P. 529; *Fry* on Specific Performance, 2nd ed., p. 106, sec. 238; *Ib.*, pp. 224, 234, sec. 509; p. 240, sec. 524; p. 106, sec. 236. By signing the conveyance the defendant Helen McCracken has confirmed the contract made by her husband. In looking at the deed, we find an adoption of a contract, and of this contract, *Re International Co.*, L. R. 6 Ch. 525.

December 9, 1882. FERGUSON, J.—This action is for the specific performance of an alleged contract for the exchange of certain leasehold property of the plaintiff, situate on King street, in the city of Toronto, for freehold property belonging to the defendant Helen McCracken, also situate in Toronto, upon certain terms, of which terms some are monetary. The contract put in evidence is contained in two letters, which are in the words and figures following:

"GENTS. "TORONTO, 12th May, 1880.

"I have had an examination made of the buildings on King Street and regret it is of a very unfavourable character. The buildings were, I learn, once condemned and had to be re-built. The tenants have always been of a migratory character, never remaining long in them. Under these circumstances I do not feel disposed to entertain Mr. McClung's present offer. If he will assume my mortgage, amounting to $11,200, and pay me in cash $3,750, I will assume his mortgage of $5,000 on the leasehold. This offer to remain open until tomorrow.

"I remain, yours truly,

"THOMAS McCRAKEN.

"Messrs. PEARSON BROS.

"Or I will sell him my south house for $11,500: $6,000 cash, balance on mortgage to suit his convenience.

"J. McC."

"406 Sherbourne street, Toronto, May 12, 1880.

"—— McCRAKEN, Esq.

"City.

"Your offer of this date, for the exchange of my property on King Street for your property on St. George street, I will accept on your terms.

"Yours respectfully,

"JNO. W. McCLUNG."

In these letters there appears to be no mention made of the owner of the property claimed in exchange by the plaintiff. The defendant, Helen McCracken is not named. There appears to be no description of her at all, such as the wife of the writer, Thomas McCracken, or the owner or the proprietor of the property. There is no description whatever of her as one of the contracting parties. The defendant Thomas McCracken speaks of the property as his own property—indeed, calls it his own, without making any reference to any owner or proprietor but himself. And the plaintiff in his letter to Thomas McCraken refers to the property in the words "your property," without the slightest reference to any proprietor but the person to whom the letter is addressed,

The defendants in their answer rely on the provisions of R. S. O. ch. 127, and claim the benefit of the Statute commonly known as "The Statute of Frauds," and in this way a question (the one chiefly argued) arises as to whether or not these letters constitute a sufficient memorandum in

writing to satisfy the requirements of the statute. In the case *Rossiter* v. *Miller*, L. R. 3 App. Cas., 1124, Lord Cairns, at p. 1141, says: "The question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest*. If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1 Portland Place, *on behalf of the owner of that house*, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise."

In the same case Lord O'Hagan, at p. 1147, says: "The parties to a contract in writing must no doubt be specified, but it is not necessary that they should be specified by name. The whole course of decision and practice shows that it is not. If they are so indicated, by description or by reference, as to be ascertained or certainly ascertainable, the exigency of the statute in that respect is satisfied. Here the vendors are called 'proprietors,' and described as proprietors in possession." And Lord Blackburn, at p. 1153, says: "And though the construction by which it is held that there can be no memorandum of the agreement unless the writing shews who the parties are *is now inveterate*, it is not necessary that they should be named. It is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character, which Sir James Wigram, in his treatise, (on Extrinsic Evidence, Intro. Obs., p. 10.,) calls evidence to prove intentions as an independent fact." In that case the learned Judge said: Without receiving any such evidence there was enough to shew that the plaintiffs were there designated by the description "the proprietors;" and of the same opinion was Lord Gordon, as reported on the same page.

The law upon the subject is laid down in the same way and quite as clearly in the case *Donnison* v. *The People's Cafe Co.*, 45 L. T. N. S. 187; and I think I must receive the law stated in these two cases as being the law by which I am to be governed, notwithstanding the doctrine of the Master of the Rolls, in *Cummins* v. *Scott*, L. R. 20 Eq. 11, and some other cases and text books referred to by counsel for the plaintiff, which apparently point in a direction somewhat to the contrary. And I cannot but be of the opinion that the letters set forth above do not constitute a sufficient note or memorandum under the circumstances to answer the requirements of the statute, the benefit of which is claimed by the defendants.

At the trial the plaintiff's counsel proposed to put in as evidence correspondence between the solicitors of the parties of dates subsequent to the date of the above letters, as also the requisitions respecting title that passed between the solicitors. These were objected to by defendant's counsel, but were received subject to the objection. I am now of the opinion that the objection was well founded, but whether or not will make no difference, as I have perused the whole, and I do not find anything that can in my opinion help the plaintiff out of his difficulty, even if the evidence had been properly receivable.

Reliance was also, in a measure, placed on the fact that the defendant Helen McCracken had signed a conveyance of the property. The conveyance had not been delivered. It came from the custody of the defendants. It is in form an ordinary conveyance of land, subject to specified mortgages. It does not by recital, or in any other way, set forth the contract relied on by the plaintiff. Not being delivered it seems to me as an unfinished act. Had it been delivered the matter would not have been *in fieri*, and the subject of a suit for specific performance, and I do not see that it can aid the plaintiff in any way out of his difficulties.

I do not think I need consider Mr. Maclennan's argument, founded upon the fact of the defendant Helen McCracken being a married woman, as I am of the opinion

that if she were not a married woman she would not be bound by what occurred.

It is not alleged that there was any parol contract. It is admitted that there was none. No question as to part performance arises.

No specific relief is asked against the defendant, Thomas McCracken.

I am of the opinion that the plaintiff's bill must be dismissed, with costs.

*Bill dismissed, with costs.*

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[CHANCERY DIVISION.]

## PLUMB v. STEINHOFF.

*Improvements—Unskilful survey—R. S. O. ch. 51, ss. 29, 30.*

Where S. having purchased a lot of land, employed a public land surveyor to mark out the boundaries of it for him, and the surveyor, by reason of an unskilful survey, included in the lot, as marked out by him, land which should not have been so included, and S. misled thereby, effected improvements upon the land so erroneously included.

*Held*, on recovery of the said land by the rightful owner, that S. was entitled to compensation for the said improvements, under R. S. O. ch. 51, ss. 29, 30.

THIS was an action brought to recover possession of a parcel of land, being, as alleged, by the plaintiff, part of lot 5, in the 18th concession of the township of Dover East. The plaintiff claimed recovery of possession and mesne profits from the defendant, who had taken possession of the said land.

The defendant, in his defence, claimed to be entitled to this same parcel of land, as part of lot 24, in the 17th concession of the same township. He also alleged, that shortly after becoming owner of the said lot 24,

in the 17th concession, he employed a deputy provincial land surveyer, (one Frazer,) to survey and stake out the boundaries of the same, and that so soon as the same was done he dyked in the said lot, the land being marsh-land, according to the boundaries of such survey, and drained and otherwise permanently improved the same at great expense, under the belief that the said land was, as shown by the said survey so made for him, a part and parcel of the said lot 24, and that he had since broken up and seeded the same, at great expense; and in case it should be found that the land in question, so dyked and improved, formed part of lot 5, and not part of lot 24, then he claimed the benefit of R. S. O. ch. 51, secs. 29 and 30, and of R. S. O. ch. 95, sec. 4, and that he should be held entitled to payment for all such improvements, or to become the purchaser of the said lands at the value to be assessed by the Court.

By his reply, the plaintiff declared that he had always been willing to allow the defendant the benefit of the said statutes, in case it should appear that he was entitled thereto.

The trial took place and the witnesses were examined at the sittings of this Court, before Mr. Justice Ferguson, at Woodstock, on June 3rd, 5th, and 6th, 1882, when the argument was adjourned to take place at Toronto.

It was agreed by counsel, at the trial, that the titles to the respective lots should, for the purposes of the suit, be admitted, that is to say, that the defendant should admit the plaintiff's title to lot 5, and that the plaintiff should admit the defendant's title to lot 24, thereby confining the dispute to the location of the boundary line between these two lots, or rather the allowance for road between them, and the further question, (to arise in the event of the plaintiff's success in this respect,) as to the right of the defendant to be compensated for his improvements.

On July 14th, 1882, the cause was argued at Toronto, before Ferguson, J.

*C. Moss*, Q. C., for the plaintiff. As to the improvements, the defendant is not entitled to compensation for the improvements made by him. The ejectment Act, R. S. O. ch. 51, secs. 29 and 30, does not apply, for that Act requires that the limit or limits should have been established according to the Act respecting surveyors and the survey of lands, R. S. O. ch. 146, whereas Frazer did not make a regular survey for the defendant or for anyone, when he showed him his northern boundary. We refer to *O'Connor* v. *Dunn*, 2 App. 247; *Carroll* v. *Robertson*, 15 Gr. 173; *Davis* v. *Boulton*, 7 Gr. 39; *Russell* v. *Romanes*, 3 App. 635. Neither has the defendant brought himself within the meaning of R. S. O. ch. 95, sec. 4, concerning improvements under mistake of title.

*C. R. Atkinson*, for the defendant. The R. S. O. ch, 95, sec. 4 does apply, because the defendant made the improvements under the belief that the land was his own. The defendant is entitled to compensation for the improvements.

September 15th, 1882. FERGUSON J.—[Having decided on the evidence in favour of the plaintiff's contention, as to the location of the boundary line between the two lots.]

Then, as to the improvements, I am of opinion that the defendant is entitled to the benefits of the provisions of the Act R. S. O. ch. 51, secs. 29 and 30. This was objected to by plaintiff's counsel, for many reasons urged, amongst which was the one that Mr. Frazer did not make a regular survey for the defendant, or for any one, when he showed or professed to show the defendant the northern boundary of his lot 24. I have examined, I think, nearly all the decisions on the subject from the earliest decisions under 59 Geo. III. ch. 14, down to a very recent period. The cases do not seem to be consistent, even when decided under the same Act. I think the language of Richards, then Chief Justice, in *Mozier* v. *Keegan*, 13 C. P. 547, must be adopted as a fair expression of the law upon the subject. His words are: "I think the damages may be assessed under the 53rd section of the Surveyor's Act, C. S. U. C.

ch. 93, for improvements made by any defendant on land not his own, in consequence of an unskilful survey." That the defendant made the improvements in question in consequence of his being shown by Mr. Frazer the location of the northern boundary of his lot, cannot, I think, be doubted on the evidence. Then was what Mr. Frazer did an unskilful survey within the meaning of the Act? If it was a survey at all, it was, according to the view that I have taken of the case, an unskilful survey. The evidence as to the survey, seems to be this. The defendant says: "I purchased lot 24 six or seven years ago, I then employed a surveyor, Mr. Frazer, to run the lines for me. I do not recollect where he went to get his starting point to run the northern boundary." Mr. Frazer says, "I once made a survey of the north end of lot 24, to find the northern boundary. This was several years ago; I was acquainted with the old concession line of 18 in Chatham, and I produced this across the north west end of defendant's lot, for the boundary of 24 on the north." It appears plainly that the defendant employed a man who was a public land surveyor to make the survey for him, and that the survey was made by him. This I think sufficient on this point. There is no doubt the defendant was misled by it. I have not overlooked the clause of the Act that would seem to make the establishing of the line or limit according to the Act respecting surveyors and the survey of lands, a condition precedent to its application. This was ably commented on by counsel, but I think the earlier cases dispose of the objection. *Doe* d. *Gallagher* v. *McConnel*, 6 O. S. 347, decided under the Act of 1818, may be looked at, and there are other cases after that time indicating the same view.

Then I am to assess to the defendant damages for the loss he may sustain in consequence of any improvements on the land made by him before the commencement of this suit, by which I understand not the money that he actually expended in making such improvements, but the value of the improvements, for this value is what the

defendant will be deprived of when the land is taken from him. In the 35th section of the Act, the words employed are, "the value of the improvements made upon the land."

[The learned Judge then proceeded to determine on the evidence the value of the defendant's improvements.]*

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[CHANCERY DIVISION.]

## BELL v. MCDOUGALL.

*Insolvency—Forum—Injunction—Insolvent Act of 1875.*

In 1875 J. M. and D. M. entered into partnership, certain assets of J. M. being transferred to the partnership, but nothing being said as to his liabilities. In 1876, the firm having become insolvent, B. was appointed assignee. The partnership creditors were paid in full, and a surplus remained. D. M. then petitioned the County Judge in Insolvency to divide the said surplus between him and J. M. B. then commenced this suit against D. M. to have it declared that the said partnership deed was not binding upon him as such assignee, but that the partnership deed might be declared fraudulent and void, and that the Court might take an account of the partnership property, and make division, and for an injunction restraining D. M. from further proceedings with his petition.

*Held*, that the Insolvent Court had jurisdiction to deal with the matter, and this being so, was the proper tribunal to do so, and this Court would not interfere.

THIS was a motion to continue an injunction under the following circumstances:

In 1875, one John L. McDougall, who had for many years been in business as a lumberman and miller and general trader, and as such incurred certain liabilities, took into partnership one Duncan C. McDougall, the defendant in this action; and by articles of partnership, dated January 7th, 1875, and entered into between the two, J. L. McDougall sold and transferred to D. C. McDougall an undivided one-third part of his interest in the timber limits, and of his interest in a certain farm on the said

* This case has been carried to Appeal.

limits, but nothing was said as to his liabilities, which were not transferred to the partnership by the articles, and the parties agreed to share the profits of the business in certain proportions.

In 1877 the firm became insolvent, and Andrew Wilson Bell, the plaintiff in the present action, was, on November 10th, 1877, appointed assignee of the estate and effects of the said firm.

The firm's creditors proved on the estate of the firm, and J. L. McDougall's separate creditors proved on his separate estate. D. C. McDougall had no separate creditors. Before 1882 sufficient had been realised out of the partnership assets to pay the partnership creditors in full, and leave a surplus. Under these circumstances D. C. McDougall, on April 1st, 1882, presented a petition to the County Judge in Insolvency, being in this case the County Judge of the county of Renfrew, in which county both the partners resided, in which he stated that, after paying all the firm creditors in full out of the co-partnership estate, a surplus of $40,000 remained over, and undistributed: that he had no separate creditors, but that J. L. McDougall had separate creditors; and that the said estate was indebted to him in a sum of $21,459 or more; and he prayed that the said surplus moneys might be divided between himself and J. L. McDougall, and that for that purpose all necessary accounts might be taken.

The County Judge thereupon made an order on April 1st, 1882, directing the plaintiff to appear before him on April 11th, 1882, to proceed with a view of further granting an order in accordance with the prayer of the said petition.

The plaintiff then, on April 8th, 1882, issued the writ in the present action, and by his statement of claim, besides setting out the above facts, he alleged that at the date of the alleged articles of partnership J. L. McDougall was in insolvent circumstances, and unable to meet his liabilities as they became due: that the defendant contributed no capital to the said partnership: that the timber

limits, &c., mentioned in the said articles of partnership were virtually the only property which the creditors of J. L. McDougall could look to for the payment of the liabilities of the said J. L. McDougall: that the partnership was never registered pursuant to statute: and the withdrawal of the assets of J. L. McDougall was kept concealed from his creditors: that by the time he the plaintiff had realised all the estate and effects vested in him as such assignee in insolvency, there would be a sum of about $20,000 in his hands to meet the separate liabilities of the said J. L. McDougall, and the defendant: that the aggregate amount of the claims of J. L. McDougall's separate creditors amounted to upwards of $70,000; and the total amount of J. L. McDougall's assets, apart from the said partnership assets, amounted to about $300: that the partnership accounts of the partnership between J. L. McDougall and the defendant, if any such partnership could properly be said to have existed, were very intricate, and involved the consideration of a very great number of items, and a very full and ample discovery of many facts would be required to be made by the defendant before such partnership accounts could be properly taken. And the plaintiff submitted that the county Judge had no jurisdiction in insolvency to entertain the said petition; and he claimed (1) that the said partnership might be declared not binding on him, as such assignee in insolvency; (2) that the partnership deed and partnership might be declared fraudulent and void as against him as such assignee; (3) that an account might be taken of the partnership property by this Court, and a proper division made; (4) that an injunction might issue to restrain the defendant from further proceeding with the petition before the County Judge; and (5) for general relief.

On April 10th, 1882, the plaintiff obtained *ex parte* an interim injunction pursuant to his above claim.

On April 29th, 1882, the defendant delivered a statement of defence to the above statement of claim, in which he denied the allegations in the statement of defence, and also

contended that the said County Court Judge was the proper Judge having jurisdiction in insolvency over the estate of the partnership, and over the estate of J. L. McDougall and himself, and had jurisdiction in insolvency to entertain the said petition, and to make any proper order in answer to the prayer thereof, and submitted that the plaintiff had not shewn any case in equity entitling him to the interference of this Court.

On June 30th, 1882, this motion was made before Boyd, C., to continue the injunction obtained herein, and that the defendant might be restrained from proceeding on the petition in insolvency in the County Court, or from commencing any other proceeding in the said County Court, until the hearing of this action.

*Moss*, Q. C., for the plaintiff.

*Z. A. Lash*, Q. C., for the defendant. The Insolvent Court has jurisdiction to take the accounts and decide on the validity of the partnership, and this Court should not interfere; *re Cleverdon*, 4 App. 185; *re Caton and Cole*, insolvents, 26 C. P. 308; *re Hurst*, 6 P. R. 329; *Close* v. *Mara*, 24 Gr. 593. He also cited Insolvent Act of 1875, 38 Vict., c. 16, sects. 88, 99, 125; *re Parsons*, 4 App. 179; *Dumble* v. *White*, 32 U. C. R. 601; *Crombie* v. *Jackson*, 34 U. C. R. 575.

*C. Moss*, Q. C., in reply. *Re Caton & Cole*, *supra*, does not go so far as contended. The assignee could not assert this right in the insolvency proceedings, as it involved a question of partnership; see Insolvency Act of 1875, sec. 130; *Henderson* v. *Kerr*, 22 Gr. 91; *Cameron* v. *Kerr*, 23 Gr. 374; *ex parte Harrison*, *in re Harrison*, L. R. 13 Ch. D. 603. There is no express authority shewing that the Judge in insolvency can deal with this matter, and if it is doubtful this Court should not refuse to interfere. The Judge in insolvency is bound to treat the fund as a partnership fund, and cannot consider the claim of individual creditors as against this fund. The assignee had a right to apply to set aside the deed of partnership.

July 4th, 1882. BOYD, C. The assignee takes the debtor's property subject to legal and equitable claims upon it; *in re Coleman*, 35 U. C. R., at p. 582. The jurisdiction in insolvency is both legal and equitable: *Re Thirkell, Perrin* v. *Wood*, 21 Gr. at p. 504; *ex parte Manchester and County Bank, in re Mellor*, 28 W. R. at p. 189. After referring to *re Caton & Cole*, Insolvents, 26 C. P. 308, I have no doubt that jurisdiction exists in the Insolvency Court to deal with the claim of the separate creditors of J. L. McDougall, as presented in this suit. This being so, under *Close* v. *Mara*, 24 Gr. 593, that is the proper tribunal to deal with the matter, and if any error arises the proper remedy is by appeal. I decline to continue the injunction, and the costs of the application will be costs in the cause. If the Judge declines for any reason to entertain the matter as set forth by the assignee in the interests of the individual creditors, the application for injunction may be renewed on amended pleadings, if the plaintiff is so advised.

[CHANCERY DIVISION.]

## RE DEFOE.

*Statute of Limitations—Tenancy at will—Acceptance of devise—Trustee and cestui que trust—R. S. O. ch. 108, sec. 5, sub-sec. 7, 8.*

Where one to whom a devise *primâ facie* beneficial to him is made, neither accepts nor rejects the same, but remains passive, he will be presumed to accept.

Whenever a new tenancy at will is created, this forms a fresh starting point for the running of the Statute of Limitations.

Therefore where A. was let into possession of certain lands as tenant-at-will to B., in 1870, and B. died in 1878, having devised the lands to trustees in trust for A. for life, and then in trust for C., which devise A. in no way refused, but continued in possession ostensibly as before, and now claimed title by length of possession against the said trustees and C.

*Held*, that A must be presumed to have accepted the devise, and his retention of possession must be attributed to his rightful title under the devise; and therefore even if A. could be considered as tenant-at-will to his trustees, and capable of acquiring title by possession as against them and C., which under R. S. O. ch. 180, sec. 5, sub-ss. 7, 8, he could not, yet on the death of B. a new tenancy-at-will was created, and a new period commenced for the running of the statute, which had not at the time of action brought, continued long enough to give the plaintiff title by possession.

THIS was a petition presented under the Quieting Titles Act by one Albert Franklin Defoe, son of Conrad Defoe, the testator hereinafter mentioned, to establish his title to the east 62 acres of lot 13, concession 16, township of Blanshard. The contestants were the trustees under the will of Conrad Defoe. The facts of the case, and the questions in issue, sufficiently appear from the judgment of the learned Chancellor.

The petition was argued before Boyd, C., at Toronto, on October 9th, 1882.

*Fleming*, for the appellants (contestants), cited *Re Dunham*, 29 Gr. 258; *Ryan* v. *Ryan*, 5 S. C. 387; *Keffer* v. *Keffer*, 27 C. P. 257.

*Idington*, Q. C., for the respondent (petitioner). The petitioner's title would be good but for the testator's will.

Has the tenancy at will which determined at the end of the first year been superceded by another tenancy at will? *Re Dunham, supra*, is not to be extended to a case where it appears that the presumption would operate injuriously. Does it extend to devisees? *Townson* v. *Tickell*, 3 B. & Ald. 31. No act is necessary to repudiate a devise under a will. In *Gray* v. *Richford*, 2 S. R. 431 the same point might have arisen, but it was not taken or disposed of on that ground merely. It is not rested on the doctrine of presumption. Continuance in possession was inconsistent with the will. He also cited *Doe dem. Dayman* v. *Moore*, 9 Q. B. 555; *Paine* v. *Jones*, 18 Eq. 320.

October 25, 1882. BOYD, C.—The petitioner was let into possession of the land in question by his father, in 1870, in such circumstances as in law constituted him tenant at will to his father. According to *Keffer* v. *Keffer*, 27 C. P. 257, the Statute of Limitations would begin to run in the son's favour at the end of the first year. This state of affairs continued till the death of the father, in 1878. The father left a will by which this property was devised to trustees, (the contestants,) "upon trust to demise and lease, or otherwise manage and employ the land in such manner as they should deem best, and to pay the rents, issues, and profits" to the son, the petitioner, for his life, and thereafter to sell the land and invest the proceeds for the benefit of the son's widow and children. This devise was made known to the son after the father's death, but he did not, by word or act, refuse to take the beneficial life estate devised to him. He continued in possession ostensibly as before, and now claims that the statute has perfected his title to the lands as against the trustee and his co-beneficiaries. To this claim the Referee of Titles at Stratford gave effect, and his decision is appealed from by the trustees.

The questions presented for adjudication in this appeal, although *inter apices juris*, are, in my opinion, covered by authority. The devise of the land had the effect at the

father's death of casting the equitable life estate upon the son, subject to his right to elect whether he would receive that estate or not. *Primâ facie* the devise was a beneficial one, for it gave him for his life absolutely that to which otherwise he had acquired no title. If no sufficient disavowal appears the presumption of law is that the devise is accepted: *Doe dem Smyth* v. *Smyth*, 6 B. & C. 112; *Re Dunham*, 29 Gr. 258.

It is putting it on the facts most favorably for the petitioner to say that he neither accepted nor declined, but remained passive, knowing that there was a will in his favour. This being so the presumption that he accepted prevails. *Stabit præsumptio pro veritate.* So that the result is practically the same as if he had procured a conveyance of the life estate from his father, which would be identical with the position of the parties in *Gray* v. *Richford*, 2 S. R. 431.

The legal estate being devised to trustees for the use of the petitioner for life does not materially affect the result. As between him and the trustees he had the right of possession and of the pernancy of the profits. His retention of possession after a knowledge of the devise in his favour will be attributed to his rightful title under that devise. After the testator's death the possession of the son as beneficiary is quite in harmony with the purposes of the trust; it is in no manner inconsistent with the provisions of the will and the title of the trustees thereunder; *Keene* v. *Deardon*, 8 East at p. 263.

We have thus a conjunction of two facts: first, the determination of the first tenancy at will by the death of the owner: *James* v. *Dean*, 11 Ves. at p. 391; and next, the creation by implication of a new tenancy at will as between the legal owners of the estate—the trustees—and the *cestui que trust.* The character of the two holdings is quite distinct, and the latter is exclusive of the former. Apart from fiduciary relationship, it is plain that here the running of the statute is interrupted, as laid down in *Hodgson* v. *Hooper*, 3 Ell. & Ell. at p. 171. If, before the right of entry

upon a tenant at will is gone, the tenancy is put an end to and a new tenancy at will created by a fresh agreement, express or implied, then a fresh right of entry accrues, and an additional period of twenty [now ten] years must run before that entry would be barred.

But in the broader aspect of this part of the case the Statute of Limitations has no application to the new tenancy. Sub-section 8 of section 5 of that Act declares that no *cestui que trust* shall be deemed a tenant at will to his trustee within the meaning of the next preceding sub-section. That language applies to a case like the present, where the possession is in accord with the provisions of an express trust. But if the beneficiary so in possession is not to be deemed a tenant at will for the purposes of the Act, then there is no *terminus a quo* for the period of limitation, and it would appear that such a case is not covered by the statute. That was the view taken in *Garrard* v. *Tuck*, 8 C. B. 231, where Wilde, C. J., says that the general object of the Act is to settle the rights of persons adversely litigating with each other, not to deal with cases like that of trustee and *cestui que trust*, where, though there are two parties, there is but one single interest—that of the person beneficially entitled. Till the *cestui que trust* explicitly denies the right of his trustee the possession of the former is regarded as the possession of the latter, and, as under the law before the statute, the mere occupation by the *cestui que trust* in pursuance of and in conformity with an express trust, shall never bar the trustee or the other beneficiaries. This view of the effect of the statute has been adopted in a more recent case by the Court of Queen's Bench, in *Drummond* v. *Sant*, L. R. 6 Q. B. at p. 767 and the decision in the case in the Common Bench is approved of. This is the more noteworthy as the case of *Garrard* v. *Tuck* is in many text-books stated to be at variance with *Doe dem. Jacobs* v. *Phillips*, 10 Q. B. 130. Thus the conclusion is reached that after the death of the testator the statute ceased to run in favour of the petitioner's possessory claim, inasmuch as his possession thereafter was that of *cestui que*

*trust* rightfully there by virtue of his equitable life estate under the will. We have thus in substance what was pointed out as conclusive in *Gray* v. *Richford*, 2 S. R. 431, namely, the union of title and possession in the one rightful owner.

The certificate of the Referee cannot be supported, and the appeal of the trustees should be allowed, with costs.

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[CHANCERY DIVISION.]

## GREEN ET AL. V. WATSON.

*Patent—Assignment of patent right—Covenant to "warrant and defend" grantee.*

Where G. granted the exclusive right to manufacture a certain patented article to W., and covenanted that R., the original patentee of whom G. was assignee, would "warrant and defend" W. in the possession of the patent right, and that if R., neglected or refused to "protect and defend" W. in his peaceable possession of the said patent right, then the royalty to be paid by W., as the consideration for the said grant, should cease.

*Held*, G. was liable under this covenant only if R. neglected to defend W. as against all persons having any right to manufacture or sell the patented article, not as against mere wrong doers.

*Semble*, if there had been breach of the covenant by G., the defendant would not have been liable to pay the royalty under the above agreement, though he had continued to manufacture the patented article.

THIS was a suit brought by John Wesley Green, Nelson Green, and Archibald B. Walker, against John Watson, seeking an order against the defendant to pay to them the amount due in respect to certain royalties payable by the defendant under the circumstances mentioned in the judgment, and a reference to the Master to take the necessary accounts.

The case was heard at the sittings of this Court at Toronto on November 1st, 1882, and at the hearing counsel entered into the agreement which is set out in the judgment.

*W. Cassels* and *George Morphy*, for the plaintiff. The covenant in the assignment to the defendant cannot be extended to tortious acts unless there is a specific covenant to prevent infringement. *Hayes* v. *Bickerstaff*, Vaugh. 118; *Jerritt* v. *Weare*, 3 Price 575; *Henderson* v. *Mostyn Coffee Co.*, L. R. 3 C. P. 202; *Jackson* v. *Allen*, 120 Mass. 64. The defendant might have stopped the manufacture. Continuing, however, as he did to use the benefits conferred by the agreement, he must pay the price, though he may perhaps set off damages if he can establish any: *Pitts* v. *Jameson*, 15 Barb. 310. The fact that the defendant worked the patent and derived profits therefrom estops him from saying the patent is void. It was never contemplated that the plaintiff should stop infringements, but supposing he was bound so to do, the defendant must, nevertheless, account. The position of the parties is like that of landlord and tenant; in any case use and occupation must be paid for. The defendant has his set-off to rely upon. Under the covenants the title only was to be defended, and attack provided against: *Hall* v. *Conder*, 3 Jur. N. S. 366. The licensee may have an injunction, or use the patentee's name in suits: *Higgins's* Patent Cases, p. 403; *Renard* v. *Levinstein*, 13 W. R. 382.

They also cited *Crossley* v. *Dixon*, 10 H. L. C. 293; *Lawes* v. *Purser*, 3 Jur. N. S. 182; *Noton* v. *Brooks*, 10 W. R. 111, *S. C.* 8 Jur. N. S. 155; *Smith* v. *Scott*, 5 Jur. N. S. 1356; *Cutter* v. *Powell*, 2 Sm. L. C. 1; *Farnsworth* v. *Garrard*, 1 Camp. 38; *Chitty* on Contracts, 8th ed., 440, 673, 743; *Starkie* on Evidence, 4th ed., 28, 64, 97; *London Gas Light Co.* v. *Vestry of Chelsea*, 8 C. B. N. S. 215; *Lucas* v. *Goodwin*, 4 Scott 502; *Kernot* v. *Potter*, 3 D. F. & J. 447; *Campbell* v. *Jones*, 6 T. R. 570; *Higgins's* Patent Cases, 352; *Warwick* v. *Hooper*, 3 McN. & G. 60; *Adie* v. *Clarke*, L. R. 3 Ch. D. 134; *Trotman* v. *Wood*, 16 C. B. N. S. 479; *Brooks* v. *Stolley*, 3 McLean 523; *Curtis* on Patents, sec. 200; *Sugden* on V. & P., 14th ed., p. 600; *Rawle* on Patents, 4th ed., p. 182, 187; *Bythewood's* Conv., 3rd ed., vol. 7, p. 593; *Hindmarsh* on Patents 241; Patent Act of 1872, sect. 22.

*J. Bethune, Q. C.* and *W. Barwick*, for the defendant. The thing assigned is worth nothing unless there is a monopoly. It makes no difference who infringes, whether a pirate or one who has a right. The covenant warrants and defends that which the patent purports to grant. It is not like the case of real estate, of which one may have possession without any title. Here there is no possession, if the thing is invalid. "Possession" comprehends enjoyment, the peaceable exclusive enjoyment of the right. The whole covenant should be read together, and then it is clear that the covenantee provided for his own remedy, viz: stopping the payment. No doubt, in ordinary cases the licensee must not work the patent unless he submits to pay; this, however, is not that case. The prohibition in the agreement was to the interest of all parties. The defendant does not say the patent is invalid. He only says that persons are infringing it, and that Royce and the plaintiff should stop them. There can be only three classes of persons to warrant and defend against, better patentees, grantees, and strangers alleging a right to manufacture. What would be the case, if the same covenant were made with one who could not sustain a suit for an injunction?

They cited *Jackson* v. *Allan*, 120 Mass. 67, 77, 79; *Henderson* v. *Mostyn Coffee Co.*, L. R. 3 C. P. 202; *Law* v. *Garrett*, L. R. 8 Ch. D. 26.

*W. Cassels*, in reply. It could not have been intended that tortious acts were to be prevented by Watson himself: the man who is on the ground is the proper person to attack pirates in his territory. As long as the defendant uses the benefits of the assignment he must pay the royalties. The covenant is directed against damages occasioned by another stopping the defendant. He also referred to the Patent Act of 1872, sections 22 and 28.

January 15, 1883. FERGUSON, J.—On the 5th March, 1875, one Royce obtained a Canadian patent, for an invention called and known by the name of "Royce's Harvester."

On the 7th May, 1875, Royce granted and assigned to

the plaintiffs the *exclusive right* to manufacture, &c., the patented invention in Canada. The consideration for this assignment was a royalty of $8, for each machine manufactured and sold by the plaintiffs. The assignment provided that if the plaintiffs contracted with others to manufacture the machine, they should pay Royce the same royalty for each machine made by such others, and retain for their commission any excess over that amount. It also provided for the sale of territory which the plaintiffs might not desire to occupy, the sales to be for the benefit of Royce, and to be made with his consent and approval, the plaintiffs to retain a commission of ten per cent. on the sales.

On the 19th October, 1875, the plaintiffs assigned and set over to the defendant the sole and exclusive right to manufacture the "Harvester," and sell the same in the counties of Waterloo, Huron, Wellington, Perth, and Essex, a part of the county of Oxford, and certain townships in other counties. The consideration for this assignment was a royalty of $10 for each machine manufactured and sold, or caused to be manufactured and sold by the defendant.

The plaintiffs by the assignment covenanted that Royce would *warrant and defend* the defendant in the possession of the said patent right within the territory granted to the defendant, and that if Royce neglected or refused to *protect and defend* the defendant in his peaceable possession of the patent right, then and in that case the royalty should cease. And the defendant covenanted that he would pay or cause to be paid to the plaintiffs the royalty at the times specified for the payment of the same, which was the first day of January, in each year, *so long as the defendant should continue to manufacture the Harvester*, or to cause it to be manufactured, during the term for which the patent had been granted, or for which it might be extended; and that he would not at any time during the continuance of the patent or any extension of it, manufacture or sell or cause to be manufactured or sold the patented article in any place within the Dominion of

Canada, other than the places mentioned in the assignment as being granted to him (a.)

The defendant commenced to manufacture the patent article under the assignment, and continued so to do down to the time of the commencement of this suit. He paid the royalty to the end of the year '76, but in '77 refused, and still refuses to pay it, saying that this royalty was a large one, and that the consideration for it was the possession by him of a monopoly within the territories granted to him of the right to use the invention, and that except for such monopoly he would not have agreed to pay the royalty, and that the plaintiffs and Royce, after full notice of infringements of the patent, (in the territory granted to the defendant) did not warrant and defend him against the same, and that the plaintiffs and Royce neglected and

(a) The part of the agreement thus concisely stated by the learned Judge, was as follows :—

"And the said parties of the first part (the plaintiffs), further agree to and with the said party of the second part (the defendant), that the said Royce, the patentee, hereinbefore mentioned, will warrant and defend the said party of the second part, in the possession of the said patent right, within the territory hereinbefore granted. And if the said Royce neglects or refuses to protect and defend him, the said party of the second part, in his peaceable possession of the said patent right, then and in that case the royalty herein agreed to be paid by him shall cease. And this indenture further witnesseth, that the said party of the second part hereby covenants and agrees to and with the said parties of the first part, that he will well and truly pay or cause to be paid unto the said parties of the first part their heirs, executors, administrators, or assigns, the said royalty hereinbefore mentioned at the times or dates hereinbefore specified for the payment thereof, and that he, the said party of the second part, will not at any time hereafter during the continuance of the said letters patent or extension thereof, manufacture or sell or cause to be manufactured or sold the said improved harvester, in any county or counties, place or places within the Dominion of Canada, other than those hereinbefore mentioned, without the written consent of the said parties of the first part first had and obtained in writing. And that he will use all reasonable and proper diligence in the manufacture and selling of the said improved harvester. In witness whereof, &c." On this assignment there was an endorsement signed by Royce, the patentee, which, referring to the above assignment, declared that "in order to remove any doubts which may arise as to the force and effect of the within contained assignment," the said Royce did "ratify, confirm, and approve of the same in every particular."

refused to protect and defend the defendant in his peaceable possession of the patent right, and that he ceased to pay the royalty under the terms of the agreement, and that he so informed the plaintiffs. The suit is brought to enforce payment of the royalty, and the defendant, besides defending on the grounds above stated, amongst others, claims by way of cross-relief damages for breach of the plaintiffs' covenant, which he says are in excess of what the royalty would be even if he were liable to pay it.

At the trial counsel entered into an agreement as follows: "The plaintiffs contend that even admitting there were infringements within the territory embraced within the defendant's agreement, and even admitting that the defendant duly notified Royce thereof, and even admitting that Royce neglected to prevent infringements, still under the agreement the defendant is liable to account. That even if the covenant bears a different construction, that the defendant having continued to manufacture is liable to account. If this construction be correct, evidence as to the alleged infringements tendered by the defendant would be of no avail. It was, therefore, arranged that this question should be argued on the construction of the contracts and the evidence of the defendant. If the judgment is in favor of the defendant, the decree, to be treated for the purposes of an appeal as a final decree with the understanding that in the event of the Court of Appeal sustaining the view that, assuming there to have been infringements, and assuming notice of those infringements to have been given, the defendant is not liable to account, that then the case should come on for further trial in order that the defendant may have an opportunity of establishing his other defences raised by the answer."

Pursuant to this agreement the case was argued.

As to the first contention of the plaintiffs as stated in the agreement of counsel:—

I understand the word "infringements" to have been used by them to signify wrongful invasion or infractions—acts done by persons having no legal right to do them.

The defendant does not, in his answer or in his evidence, complain of anything but acts of this character. At all events, I take this, the natural meaning of the word "infringment," to be the sense in which it is used for the purposes of the questions I am to determine.

The answer to the question as to whether this first contention is correct or not depends upon the meaning to be attached to the plaintiffs' covenant. The words employed are, that Royce will "*warrant* and *defend*" the defendant in the possession of the patent, and that if Royce neglects or refuses to "*protect* and *defend*" the defendant in the peaceable possession of the patent right, then and in that case the royalty shall cease.

As to the word "warrant," it appears that there never was, strictly speaking, a "warranty" in respect of a chattel interest even in land, and it was held that when the words "warrant and defend" were used, the covenant was a covenant for quiet enjoyment: *Williams* v. *Burrell*, 1 C. B. 402. And the words "protect and defend" cannot, I think, looking at the connection in which they are employed, have any larger signification than the words "warrant and defend." The meaning in this respect, I think, is that Royce will "warrant and defend," &c., and if he neglect or refuse to do so, then and in that case the royalty shall cease.

I have examined with care the authorities that were cited on the argument, and I cannot perceive that any of them so bears upon the question as to be a guide to the proper conclusion, and, I cannot see that it would tend to any good for me to review them here. The question is, whether or not the covenantors were bound by their covenant to the effect that, upon notice being given, Royce should prosecute with success each and every person who infringed the patent within the territory granted or assigned to the defendant, and I am of the opinion that they were not so bound. I think the obligation that they, by the covenant, undertook was only that Royce should protect and defend the defendant in the peaceable posses-

sion and enjoyment of the patent right within the territory assigned, as against all persons having any right to manufacture or sell the patented article within the same territory, and that they did not undertake that Royce should protect the defendant in such possession and enjoyment as against mere wrongdoers, or that he should bring and prosecute with success a suit against each such wrongdoer. I cannot arrive at any conclusion other than this.

Then as to the plaintiffs' second contention, which is this: Even if the covenant bears a different construction from the one contended for by them (my opinion being in their favour as above), yet the defendant having continued to manufacture the article, &c., is liable to account for the royalty: to put it in other words: Even admitting that the plaintiffs' covenant were broken, yet the defendant having continued to manufacture, &c., is bound to pay the royalty, I am not of this opinion. It is true that if a patentee, in consideration of a royalty, grants to another a license to use the patented invention and the latter uses it, he cannot plead as a defence to an action for the royalty that the invention was not new or that the patentee was not the first inventor. And it is also true, I apprehend, as a rule, that, as long as one continues to manufacture under a license, he must pay the royalty agreed on, but I think this last cannot be so in a case in which the parties have contracted to the contrary; and, assuming that the plaintiffs' covenant has the broad meaning contended for by the defendant, that is, that Royce should prosecute with effect in every case of an infringement, and so protect the defendant, and that this covenant was broken (and both of these I must assume in considering this second contention), the covenant is that, then and in that case the royalty shall cease. Here one asks: what royalty? Some royalty was not to be paid, and what royalty was this? I think the answer is, the royalty on the articles manufactured, &c., after the breach of the plaintiff's covenant. And I think the parties contracted and agreed that if Royce failed to protect the

defendant according to the scope of the plaintiffs' covenant in that respect, then the defendant might manufacture, &c., the article without paying the royalty.

It is true that the defendant covenanted to pay the royalty "so long as he should continue to manufacture the harvester" &c., &c., and had the plaintiffs' covenant been silent as to the ceasing of the royalty, the covenants might have been considered as independent; but the plaintiffs' covenant providing, as it does, for the consequence of a breach or breaches of it, this consequence being that the royalty should cease, I can arrive at no conclusion but the one I have stated. It seems to me to be a case in which the defendant covenanted to pay the royalty and the plaintiffs covenanted that in a certain event he need not pay it, and assuming as I have assumed in considering this second contention this event happened. In such a case I think a plaintiff could not recover.

My opinion is, however, as I have said, in favour of the plaintiffs on their first contention.

[QUEEN'S BENCH DIVISION.]

## CANAVAN V. MEEK.

*Sale of land—Assumption of mortgage by purchaser—Liability to pay off and protect vendor.*

M. conveyed land to the plaintiff subject to a mortgage to the T. & L. Co. for $2,000, and one to C. for $500, which the plaintiff covenanted to pay and save M. harmless therefrom. The plaintiff then conveyed to the defendant in consideration of "$1,050 and assuming the payment of the mortgages" aforesaid. The defendant gave back a mortgage for the balance of purchase money. He went into possession and paid some interest on the T. & L. Co. mortgage. Subsequently a new arrangement was made and the defendant's mortgage was discharged and a mortgage for $1,850 was given by the defendant to the plaintiff which included the amount of three promissory notes for $350 and other items, besides the balance of the purchase money. There was no covenant for payment therein. The T. & L. Co. mortgage fell due and was not paid, and the plaintiff paid C.'s mortgage of $500.

*Held*, that the defendant was bound to pay off the T. & L. Co. mortgage and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon.

THIS case was tried at the last Winter Assizes, at Toronto, before Osler, J., without a jury, who found in the plaintiff's favour.

The statement of claim was in substance as follows:—

(1) That one McBean owned the property in question. (2) That he made a mortgage to the Trust and Loan Company for $2000. (3) That he sold to the plaintiff, by deed dated the 6th August, 1878. (4) That plaintiff covenanted with McBean in said deed to assume and pay the Trust and Loan mortgage. (5) That the plaintiff conveyed to the defendant by deed, dated 14th August, 1878. (6) That the $2,000 mortgage to the Trust and Loan Company was mentioned in the consideration clause of said deed as part of the consideration. (7) That arrears were due in respect of the said Trust and Loan mortgage of $2,000. (8) That defendant gave to the plaintiff a mortgage, dated 1st April, 1881, for $1,850, in which the personal covenant of defendant was struck out; but defendant gave to plaintiff his three promissory notes for the first three payments of the said mortgage money, which said notes the defendant did not pay.

Statement of defence:

(1) That the deed from plaintiff to defendant of said lands did not at the time of the execution and delivery thereof make any mention of the said $2,000 mortgage: (2) that the transaction was simply of a purchase of the equity of redemption: (3) that the only consideration mentioned in said deed at the time the same was executed and delivered by the plaintiff to him, was the sum of $1050, and that the words, "and assuming the payment of the mortgages hereinafter mentioned," were not inserted in the consideration clause at the time said deed was so executed and delivered: (4) that no mention was made of said mortgage in said deed at the time of its delivery: (5) that the defendant did not execute said deed, and that said deed had always remained in the possession of the plaintiff: (6) that the defendant did not at any time, either in writing or verbally, covenant or agree to pay off the said Trust and Loan mortgage, or to indemnify the plaintiff against the payment of the same: (7) that the arrangement finally arrived at between the parties and embodied in the $1,850 mortgage, which was executed and delivered by the defendant to the plaintiff on or about the 17th of May, 1881, was a final settlement of all matters in difference between them: (8) that the plaintiff had no claim or cause of action against the defendant other than that contained in the said $1,850 mortgage: (9) alleging part payment of the notes mentioned in the $1,850 mortgage, and that the plaintiff having taken possession of the property in question, and being in receipt of the rents and profits, had received or would receive sufficient to pay the balance due on said notes: (10) that the plaintiff was mortgagee in possession, and had been since August, 1882.

The following facts appeared:

One William McBean, on the 6th August, 1878, conveyed in fee to the plaintiff certain premises on Church street, in Toronto, the consideration being $1,200, subject to two mortgages, one to the Trust and Loan Company for $2,000, and the other to one David Carlow for $500; and

the plaintiff covenanted to pay off the said mortgages and observe the covenants therein, and indemnify and save harmless McBean from all loss, costs, &c., connected therewith.

On the 14th August, 1878, the plaintiff, Canavan, conveyed in fee to the defendant Meek the same premises for the consideration of "$1050, assuming the payment of the mortgages hereinafter mentioned;" and he covenanted that the grantee should have quiet possession free from all encumbrances, except the two above-mentioned mortgages.

On the 21st August, 1878, the defendant Meek conveyed the premises in fee to the plaintiff by way of mortgage, the consideration being $1,000, payable in three years, with full covenants for payment and for title.

After the argument a discharge by plaintiff of the $1,000 mortgage was put in, dated 10th May, 1881, registered 11th May, 1881.

McBean made an assignment in insolvency on the 12th January, 1880, and obtained his formal discharge on the 15th April, 1880. This fact was stated by defendant's counsel, and argued at the trial, as if the discharge was before the Court, but the discharge was not put in until the motion was argued before this Court.

It was uncertain whether his discharge covered his liability for the mortgage money to the company.

The Carlow mortgage was paid by the plaintiff.

Several dealings took place between the parties, but all finally resulted in a mortgage given on 1st April, 1881, by defendant to plaintiff, but apparently not delivered for several months afterwards. Defendant admitted this to have been a final settlement.

This mortgage purported to be in the short statutory form, the consideration being stated at $1,850, acknowledged to have been then paid by the mortgagee to the mortgagor.

The proviso was that it was to be void on payment of $1,850, with interest, as follows, $100 to be paid 1st July, 1881, $100 to be paid 1st October, 1881, $150 1st January,

1882, and the remaining $1,500 to become due and payable on 1st April, 1884, with interest.

The usual printed covenant to pay was struck out. Defendant covenanted that he had a good title in fee, and the right to convey, subject to the Trust and Loan Company mortgage. There was also a covenant for quiet possession until default, for further assurance, and that defendant would insure for $2,800: that on default the mortgagee, on notice, might enter and sell: that he might distrain: that the mortgagor, until default of payment, might hold possession: that three promissory notes, given by the mortgagor to the mortgagee, were for the first three payments mentioned in the mortgage; and that payment of the notes would pay the first three payments.

The further facts appear in the judgment.

February 16, 1883, *Osler*, Q. C., moved to set aside the verdict and judgment, and to enter it for the defendant upon the evidence, except as to the balance found to be due upon the promissory notes in the statement of claim set forth, on the ground that on the evidence and the law the plaintiff was not entitled to recover except as to the balance due on said notes He argued that defendant could only be liable (if at all) by virtue of some covenant in the deed from Canavan to Meek, and under it he could not be called upon to indemnify the plaintiff till the plaintiff had suffered some damage. But there was no such covenant in the deed, and moreover defendant did not execute the deed. Until Canavan paid off the mortgage to the Trust and Loan Company, or at any rate until he was sued upon it, he could maintain any action. He was not damaged. Canavan could not be sued upon it. He did not make the mortgage to the Trust and Loan Company. It was made by McBean, who sold to Canavan, and Canavan's only liability was upon his personal covenant to McBean to indemnify him (McBean) against liability upon the mortgage. McBean's discharge freed him from all liability upon his mortgage, so that he could not maintain an action against Canavan, who

therefore could never be damaged by suit upon his covenant to McBean, who could never shew damage: *Norris* v. *Meadows*, 28 Grant 334; *Rawle* on Covenants, 4th ed., 288, 264; *Platt* on Covenants, 331; *Coote* on Mortgages, 1130; *Nicholls* v. *Watson*, 23 Grant 606.

*Ferguson*, contra. The defendant is a purchaser of an equity of redemption, subject to an existing mortgage, the payment of which by the defendant was part of the consideration for his purchase, and irrespective of the form of the contract between them he is bound to pay off the mortgage, and to indemnify the plaintiff against the same: *Thompson* v. *Wilkes*, 5 Grant 594; *Re Crozier*, *Parker* v. *Glover*, 24 Grant 537; *Wh.* and *Tud.* L. C., vol. 1, 643, Am. ed. The acceptance by a grantee of a conveyance of an equity of redemption containing a provision that he is to pay off an existing mortgage is equivalent to an execution thereof by him. See *Crawford* v. *Edwards*, 33 Mich. R. 334. By the defendant's default the plaintiff has been involved in a liability upon his covenant to McBean, and it is not necessary to complete his right of action (even if treated as an action for damages), that he should have paid anything, or have been asked to pay anything: *Leith* v. *Freeland*, 24 U. C. R. 133; *Raymond* v. *Cooper*, 8 C. P. 388; *Crommelin* v. *Marquis of Donegal*, 3 Ir. C. L. R. 439; *Lethbridge* v. *Mytton*, 2 B. & A. 772; *Loosemore* v. *Redford*, 9 M. & W. 657; *Mayne* on Damages, 65; *Sedgwick* on Damages, 6th ed., 395. Canavan's covenant to McBean is not only a covenant to indemnify McBean, but that he, Canavan, *will pay to the mortgagees* the principal and interest secured by the mortgage as they become due, and indemnify, &c. Upon this covenant, immediately default took place, Canavan became liable to McBean, notwithstanding McBean may not have sustained, or cannot sustain, damage; for while a person holds not only an agreement to indemnify, *but an express promise to pay a debt to a third party*, or do some particular act, it has been held that the failure to perform the act agreed upon gives to the person with whom the agreement was made a right of action,

even before he has suffered any direct damage himself: *Sedgwick* on Damages, vol. 2, p. 4; *Hodgson* v. *Wood*, 2 H. & C. 649; *Colyear* v. *The Countess of Mulgrave*, 2 Keen 81, per Lord Langdale, M. R.; *Lloyds* v. *Harper*, L. R. 16 Chy. D. 290, and per Lush, L. J., at page 321; *Carr* v. *Roberts*, 2 N. & M. 42. If, therefore, the plaintiff has become, by the defendant's default, liable to McBean, his action for damages against the defendant is complete, under the authority of *Leith* v. *Freeland* and other cases before cited, and the measure of damages recoverable from the defendant is the amount of such liability. If, as contended, it is unnecessary for McBean to shew damage to himself, in order to entitle him to his action against Canavan upon the latter covenant, then McBean's discharge in insolvency can be of no importance; but in any event the defendant has not proved any discharge of McBean's liability to the mortgagees, who are not shewn to have been named in his schedule of creditors: *Standard Bank* v. *Johnson*, 42 U. C. R. 16.

May 23, 1883.—HAGARTY, C. J.—It is clear from the evidence that the original price fixed for the land was $3,600 or $3,500, including all the encumbrances. This would leave plaintiff's equity of redemption valued at about $1,000, for which the first mortgage was given.

After the Carlow mortgage for $500 was paid by plaintiff his equity would be about $1,500 or $1,600, but there were heavy costs incurred in some equity proceedings, which went to make up the $1,850.

Defendant insists that he is under no personal liability to pay this mortgage money. His covenant to pay is struck out.

*Jackson* v. *Yeomans*, 28 U. C. R. 307, supports his contention. The mortgage there, as here, was under the short statutory form.

There was much contradictory evidence given at the trial as to understandings and alleged agreements between the parties. I agree with the learned Judge who tried the

case, that our only safe course here is to endeavour to ascertain the contract between the parties from the deeds in evidence.

I cannot understand parties, after holding documents and acting on them for years, urging that they were not intended to mean what they plainly say.

On the 1st May, 1881, defendant leased the premises to one Burnham for a year. There is an endorsement by defendant, dated May 20, 1881, assigning the lease to plaintiff, and authorizing him to collect the rents. He admits receiving $300 from the rents, and that he paid taxes twice. Defendant admits that in addition to the $1,000 mortgage he was to pay plaintiff $550 cash, and he says this was to enable him to pay the Carlow mortgage.

On April 15, 1881, defendant gave plaintiff three notes, $100 at three months, $100 at six months, and $150 at nine months.

I understand defendant claims that the $1,850 in the mortgage represents the ~~$1,000 mortgage~~, the Carlow mortgage settled at $500, and the $350 in notes: that by that mortgage he would have personally to pay the $350 of notes, but no further personal liability, so that he could, if he pleased, abandon the property.

It appeared that in addition to the two mortgages mentioned in the conveyance to the defendant, there was another mortgage to Carlow for $1,500. It must be borne in mind that although the $1850 mortgage bears date 1st April, 1881, it does not appear to have been delivered till some months after. By bond dated 21st August, 1878, a few days after the date of the conveyance, plaintiff became bound to defendant in a penalty of $2,000, reciting the conveyance at the price of $3,600, and that there were three mortgages registered against the property, and that defendant had agreed to assume the first mortgage (the Trust and Loan Company) and to pay plaintiff $550 on or before 21st October next, and had given back a mortgage for $1,000 in full of the consideration money of $3,600, and that plaintiff had agreed to pay off the two last men-

tioned mortgages, and to indemnify defendant from the two last mentioned mortgages, and to discharge the lot from all encumbrances, except the $2,000 mortgage; then a condition to make the bond void, if plaintiff procure and register a proper discharge of the two last mortgages, on being paid the $550 and interest by defendant.

Defendant admits having received this bond, but says the recitals are of no consequence, as it was simply given to secure him from the Carlow mortgage.

He says that after receiving the bond he went into possession and lived there two and a half years, and paid interest on the Trust and Loan mortgage until proceedings were taken in a Chancery suit brought by Carlow on his mortgage, and he says that at the time of the settlement by the $1,850 mortgage it was understood the property was to go back to plaintiff.

On the 18th April, 1881, two or three weeks after the date of the $1,850 mortgage, defendant signed a letter agreeing that the rents should be applied in payment of the interest on the mortgages and taxes, and balance, if any, to be applied in reduction of the second mortgage, and that on those terms the rent should be paid to plaintiff; and on 10th May, 1881, he signed a memorandum that he would give the plaintiff an order on the tenant to pay the rent, to be applied in payment of the mortgages and interest.

He also says that though the mortgage is dated 1st April, 1881, it was not completed by delivery till early in July.

It appears that this $1,500 Carlow mortgage included the $500 mortgage, but the latter had not been discharged and remained on record, and, as defendant asserts, he was originally to pay $550 in cash, and give the $1,000 mortgage.

In his statement of claim the plaintiff asks:

1. That an account be taken of the amount due the Trust and Loan Company, and that defendant be ordered to pay the same, and indemnify the plaintiff therefor.

2. That the account be taken and the defendant ordered

to pay rents and profits collected by him since the 1st of July, 1881, to be applied towards the payment of the $1850 mortgage.

3. He claims payment of the promissory notes.

The learned Judge decreed that the account be taken and the defendant ordered to pay the amount due on the mortgage to the Trust and Loan Company, and indemnify the plaintiff therefrom; and, further, that the defendant should pay $120 due on the three notes with interest, and he allowed $40 to the defendant, to be deducted from the plaintiff's general costs of cause, to cover any costs incurred by him in respect of that part of the action on which he has succeeded.

It appears to me to be clear that in 1878 the plaintiff sold his property to defendant at the price of $3,600, and that out of this price $2,500 was reckoned for the mortgages, $2,000 and $500, and $1,100 or $1,000 for the remaining value.

Defendant buys on this basis, and in my judgment was bound to account to the plaintiff for the full purchase money. He is to pay off the $2,000 mortgage and $550 in cash; and also to pay the residue of the price to the plaintiff.

He gives an ordinary mortgage to the plaintiff for the $1,000, with full covenants for title as well as for payment.

He enters into possession, receives rents and profits, and makes some payments of interest on the $2,000 mortgage.

On this state of facts I think he would be clearly bound to pay off the mortgage and the cash, and indemnify the plaintiff if personally responsible, and to protect the property against them, at least to the full extent of plaintiff's interest over and above the mortgage and cash payment.

In no other way could the bargain or contract of sale between them be fully carried out.

If the defendant had entered into possession under an agreement for purchase on these terms, without the execution of the deed and mortgage, I presume he would undoubt-

edly be compelled either to pay off or remove or effectually indemnify the plaintiff against the mortgage, or to pay him the whole consideration money, leaving it to him to discharge it.

It would be no answer to the plaintiff to tell him that he was not in privity or personally bound to the mortgagee. His equity of redemption would be destroyed by a proceeding against the land by foreclosure or otherwise, and he would lose his $1,100 or $1,000, which he was to receive from defendant above these encumbrances.

The plaintiff in this suit accepts the finding of the learned Judge, and this, in effect, limits his claim to making the defendant liable to pay and indemnify him from the Trust and Loan mortgage, and to pay the balance of the three notes.

This being done, the parties are, in other respects, left to their respective rights and liabilities under the $1,850 mortgage, reduced by the amount of the three notes now ordered to be paid.

The only doubt I feel is, as to whether defendant is to pay at once the amount of the $2,000 mortgage before the mortgagees have proceeded to enforce payment or foreclosure. By its terms, the interest being in default, they are entitled to proceed at once for principal as well.

When we declare that this mortgage was in effect part of the agreed purchase money, and the law imposes on the defendant as purchaser the duty of indemnifying the vendor and the estate against that encumbrance, I can hardly see how we can protect plaintiff's interest, except by directing defendant to pay off the mortgage according to its provisions.

The mortgagees may at once proceed on their overdue security. A mere order on defendant to indemnify plaintiff against this mortgage would be illusory as a relief to him. The property may be deteriorating and delay fatal to his ever realizing anything out of it for the value of his equity of redemption.

In *Re Crozier, Parker* v. *Glover*, 24 Gr. 537, Proudfoot,

V. C., has carefully reviewed the law, but on a somewhat different state of facts. I agree with him, from my examination of the authorities, that we may safely take the words quoted from the American edition of White and Tudor, L. C., vol. 2, p. 344, notes to case *Aldrich* v. *Cooper*, as consonant with justice and equity: "The weight of authority seems to be that the acceptance of a deed reciting that the property is conveyed subject to a mortgage or other encumbrance implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt, unless the amount is included in the consideration, and retained by the vendee as so much money belonging to the incumbrancer."

The subject is also treated in notes to *Duke of Ancaster* v. *Mayer*, 1 White & Tudor, p. 659, English edition, 1872.

In many of the cases bearing on the general question, the person seeking this relief is himself personally liable by covenant for the mortgage money.

Many cases are on the right of the original mortgagee to charge personally the owner of the equity of redemption.

Proudfoot, V. C., has called attention to some of the cases, such as *Tweddell* v. *Tweddell*, 2 B. C. C. 152, which has been much discussed in such cases as *Waring* v. *Ward*, 7 Ves. 332; *Billinghurst* v. *Walker*, 2 B. C. C. 604.

These cases notice the distinction between merely purchasing an estate subject to charges and the case where the charge was part of the price. See also *Coote* on Mortgages, 964, 965, ed. of 1880.

It may be suggested that the plaintiff can protect himself by paying off the Trust and Loan Company and taking an assignment of their security. But would such a proceeding carry out what must have been the true intent and meaning of the bargain between the parties? If the property may have fallen in value, the effect of this would be the destruction of the value of plaintiff's equity of redemption, which he sold to defendant, and of which I do not think he should be deprived.

I see a clear marked distinction between holding defen-

dant liable as on a personal contract to pay plaintiff the amount of the $1,850 mortgage, and making him remove the first encumbrance to the Loan Company, and thus leave the plaintiff security for the value of his equity of redemption, which may be otherwise wholly destroyed.

On the whole, I consider the judgment is substantially right, and the appeal should be dismissed.

ARMOUR and CAMERON, JJ., concurred.

*Appeal dismissed.*

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[QUEEN'S BENCH DIVISION.]

## MOORE V. THE CENTRAL ONTARIO RAILWAY COMPANY.

*Railway Co.—Notice requiring lands—Notice of desistment.*

*Held*, that a railway company having desisted once from their notice to take land given under R. S. O., ch. 165, sec. 20, could not again desist pending an arbitration proceeding under a second notice.

The company's arbitrator having withdrawn from such arbitration, in deference to a notice of desistment given by the company, after the amount to be awarded had been agreed upon by the other two,

*Held*, that the company could not object to the award on the ground that he had not been asked to sign it.

ACTION tried before Wilson, C. J., without a jury, at Belleville.

The plaintiff claimed by his statement of claim $550 awarded to him as compensation for certain land taken by the defendants and used by them for the purposes of their railway, by an award bearing date 7th September, 1882, made by John Caskey and Thomas Emo, a majority of the arbitrators, to whom under the provisions of sec. 20, ch. 165, R. S. O., "The Railway Act of Ontario," the question of compensation had been referred and submitted.

The defendants resisted payment of the award, on the ground that after they had given the notice required by

the said section to enable them to exercise their compulsory power of expropriating the land, they had, under sub-section 15 of the said section, given notice of desistment therefrom, and given a new notice that they required the land.

The plaintiff conceded the defendants' right to give such notice of desistment once and to desist in accordance therewith, but contended in the present case that after one desistment they could not desist a second time, and that the award was made by arbitrators appointed under the defendants' second notice after the first desistment, and after the arbitrators had entered upon their duties, taken the evidence, and were deliberating as to their award.

The learned Chief Justice found against the defendants, and directed judgment to be entered for the plaintiff for the sum of $561—being the amount of the award, $550, and interest from 7th October, 1882, $11—$561; and upon payment of which sum, with costs of the action and of the notice of desistment, he directed the plaintiff to execute such conveyance of the land in question to the defendants, if they required the plaintiff so to do, as the plaintiff ought to make to the defendants.

May 22, 1883. *Falconbridge* moved to set aside this judgment and finding, pursuant to notice of motion, on the grounds:—1. That the defendants had a right to desist from their second notice, and to give a new notice with regard to the same lands, pursuant to the statute. He contended that a railway company had the right to desist from an arbitration as many times as it liked, citing *Cawthra* v. *Hamilton and Erie R. W. Co.*, 35 U. C. R. 581; and that the award was void because the company's arbitrator had not an opportunity given him to execute it.

*G. D. Dickson*, Q. C., contra, contended that sub-sec. 15 of sec. 20 of the Railway Act allowed only one notice of desistment, saying that any such notice, not notices, might be desisted from, and it providing that in case of desistment the company should be liable for costs incurred in consequence of such "first notice," shewing that only the

"first notice" could be desisted from. Sir J. B. Robinson was of this opinion: *Grimshawe* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 224. The notice served was not a new notice, but the same one repeated. As to the objection to the award, he cited *Widder* v. *The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222; sub-sec. 6, sec. 11, ch. 165, R. S. O.

June 30, 1883. CAMERON, J.—The question involved in the first ground of the motion does not appear to have been directly decided, but in the case of *Grimshawe* v. *The Grand Trunk R. W. Co.*, 15 U. C. R. 224, it was considered. This case is a clear authority for the right of the defendants to make one desistment at any stage of the proceedings after the notice requiring the land had been given, and there is much in the language of the learned Chief Justice, Sir John Robinson, that supports the defendants' contention, that the fact of their being in the actual occupation and use of the land does not in any way militate against their right to desist. At page 236, he thus touched upon that point: "I do not think that the legal question raised here is at all affected by the fact of the defendants having erected and constructed their road and being now in possession of the plaintiff's land. That is not necessarily wrongful, because the statute allows them to take possession in certain cases before an award made, and when no agreement has been come to. If this is not one of those cases it would only follow that the right to take and keep possession is subject to be questioned: it could have no influence on the legal construction of the clause."

I confess that, while I fully concur in the opinion that the fact of possession cannot influence the construction to be placed on the statute, I think it ought to have a most potent influence in determining that the strict letter of the statute should not be allowed to govern the rights of the parties in a case like the present.

The right to desist, I presume, is one like all other rights, except those, perhaps, affecting personal liberty, the

possessors may by their conduct divest themselves of, notwithstanding it is conferred by statute. But with reference to the question directly involved in this case, the learned Chief Justice's expression of opinion is against the defendants' right to desist. After setting out the contention there, he proceeds, on page 233: "There is much force in this argument, though to push it to its full length, as I have stated, it assumes what is, perhaps, not clear, that if the defendants by the new notice they have given have in effect revoked the authority of these arbitrators, it must follow that they can go on giving new notices under the same provision until they have procured such arbitrators as will suit them. That may or may not follow. At present I do not consider that it would. We are not now called upon to determine that point, but only whether the proceedings of the arbitrators first appointed can be thus cut short."

The arguments that may be advanced as having influenced the Legislature in permitting one desistment may be applied with equal force to a second or third, or any number of subsequent desistments, if the conduct of the company in dealing with the land is to have no weight in restricting them in pursuit of that justice which they themselves can approve, and which they may hope to obtain through repeated desistments. The right to desist a second time may be found to exist or not by determining whether, under an Act of Parliament permitting the expropriation of lands upon compensation to be ascertained by arbitration being made, a power of revocation of the authority of an arbitrator, after his appointment, exists without the Act making any special provision on the subject. At common law the right to revoke the appointment of an arbitrator before award is beyond doubt: *Randell* v. *Thompson*, L. R. 1 Q. B. D. 748; *Re Rouse and Meir*, L. R. 6 C. P. 212. If therefore the common law principle applies without the aid of sub-sec. 15, the defendants would have had the right they have endeavoured to exercise in the present case. But I think, both on prin-

ciple and authority, the common law rule ought not to apply. By the notice of the company that they required the lands for the purposes of their railway they effectually prevented any disposition of the land by the owner diverting it from that purpose: *In re Marylebone Improvement Act, Ex parte Edwards*, L. R. 12 Eq. 391; and their notice, apart from their power of desistment, became in fact a contract on their part to pay the owner the value, in the absence of mutual agreement in respect thereto, that arbitrators appointed under the Act should determine to be a proper compensation for such land, and the severance of the part taken from the other land of the owner.

This would seem to be the effect of the decision in *Rex* v. *Hungerford Market Co.*, 4 B. & Ad. 327. The power of expropriation under the Act in question in that case was not more extensive, nor were the rights of the land owner better secured than under the Railway Act now being considered. The main difference between the Acts was in the mode of ascertaining the compensation, and in the fact that the lands in respect of which the company could exercise their compulsory right of purchase were defined in a schedule to the Act. These differences are not such as to affect the legal principles applicable to the decision of the rights of the company and land owner. In that case the company had given notice in the manner required by the Act, that the land described therein was required for the purposes of the Act, and that it was the intention of the company to contract for the purchase of all subsisting leases, terms, estates, and interest therein, and if the party notified should not, within the space of twenty-one days from the date of notice, treat, contract and agree with the company for the sale of the premises, &c., it was the intention of the company forthwith after the expiration of the twenty-one days to summon a jury for the purpose of enquiring into and assessing the damages and recompense to be given for and in respect of the said premises. The company afterwards gave notice that the premises were not wanted, whereupon one of the parties interested

applied for a mandamus to compel the summoning of a jury to assess the damages and recompense, and after argument the Court ordered the mandamus to be issued. Denman, C. J., in his judgment at page 332, said: "The parties forming the company have obtained an Act of Parliament giving them great privileges in the purchasing of certain property. There is no power reserved to them of countermanding a notice once given, in case of disagreement as to terms, but they may summon a jury to ascertain them; that is their protection in case of an exorbitant demand. If they are not bound by their notice it follows that after giving it they are free during the long period of three years (allowed by the fourth section of the Act) to take the property or not at their discretion, and the owner is at their mercy during that time. I cannot think that the Legislature so intended. The rule must therefore be made absolute, and the company must go to a jury, which is the security they have provided for themselves by the Act." Parke and Taunton, JJ., were of the same opinion. To the like effect was the decision of the same Court in *The King* v. *The Commissioners for Improving Market-street, Manchester*, reported in a note appended to the report of the above case, page 333. These cases have not been questioned, and Kelly, C. B., in *Morgan* v. *The Metropolitan R. W. Co.*, L. R. 4 C. P., at p. 105, thus states the law upon the question: "Ever since the case of *Rex* v. *Hungerford Market Co.*, it has uniformly been held that whenever a company is entitled to take land compulsorily under the powers of an Act of Parliament, if they give notice of their intention to take the land, that is an exercise of their option from which they cannot recede, and the notice operates as a contract or an undertaking by them to become the purchasers. That case was decided in the year 1832, and it has never yet been questioned."

If the General Railway Act, the provisions of which are incorporated with the defendants' act of incorporation, had not permitted a desistment, the above authorities would have been directly against the defendants' right to with-

draw from a notice once given. The sub-section under which they have the right of desistment, is as follows: "Any such notice for lands as aforesaid may be desisted from and new notice given with regard to the same or other lands, to the same or any other party, but in any such case the liability to the party first notified for all damages or costs by him incurred in consequence of such first notice and desistment shall subsist."

Now, unless in this clause "first" could be read as meaning *any former* notice, the party notified after a second desistment would not be entitled to costs or damages incurred in consequence of a second desistment, which would work manifest injustice. It would therefore seem more reasonable to hold the use of the word "first" as indicating that the Legislature only intended the company to have the privilege of one desistment.

Considering the state of the law on the adjudged cases at the time the Act was passed, and the Imperial Legislation on the subject, as shewn by the Act 8 & 9 Vic. ch. 20, sec. 126, which Sir John Robinson referred to in *Grimshawe* v. *The Grand Trunk R. W. Co.*, already cited, at page 234, and which it may be assumed the Legislature of Ontario was aware of when it passed the Railway Act now in question, there would seem by such construction to be no rough curtailment of a power which so limited would seem ample to secure the company in a just exercise of their very full and extraordinary powers to interfere with and appropriate the property of others.

If this conclusion be right, there would seem no room for the interference of the Court on the second ground of motion, as the arbitration was conducted in the manner prescribed by sub-sec. 6, and the company's arbitrator did not desire to take part in making the award, having chosen to withdraw himself from the arbitration in deference to the defendants' notice of desistment. He was present up to the time that the amount to be awarded was fixed and agreed upon, and would have joined in the award if the amount had not been larger than he approved of. The only thing there-

fore, in the strictest view of the case that he or the defendants can complain of, is the formal omission to ask him to sign the award. After his withdrawal at the instance of the defendants themselves from the arbitration, I do not think this objection can be allowed to prevail. The defendants should in justice be prevented from raising the objection if the facts established that there had been any formal error of this kind. The motion should be dismissed.

HAGARTY, C. J., and ARMOUR, J., concurred.

*Judgment accordingly.*

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[QUEEN'S BENCH DIVISION.]

## LEE v. McMAHON.

*Sale of land—False representations—Laches—Counterclaim for purchase money.*

The plaintiff induced the defendant to purchase land in Portage la Prairie by exhibiting to him a map representing the property to be in the business portion of the town, and by representing that this was true. The defendant applied to persons on the spot for information, and was told that the representations made were incorrect. But he swore that one of the plaintiffs told him that his informants were interested in depreciating the property, and that on this he purchased, paying $500 cash, and giving a mortgage for the balance. He tried to sell, and could have sold the property for more than he gave for it, but did not go to Portage la Prairie for six months after, when he found that the representations were untrue, and repudiated the bargain. This action was brought on the mortgage, and the defendant counter-claimed for the cash payment of purchase-money.

*Held*, affirming the decision of Armour, J., that the defendant was induced to purchase by false representations, and, reversing the judgment, that he had not disentitled himself to belief by laches; that the mortgage should be delivered up to be cancelled, and that the counterclaim for the money paid, without interest, should be allowed, on his re-conveying the estate free from incumbrances created by him.

THIS was an action brought to recover the amount of a mortgage for $1,000, made by defendant to plaintiff in payment of the purchase money of land in the North-West, in the town of Portage la Prairie.

The defendant pleaded that he was induced to purchase the land by the fraudulent representations of one Baker, a part owner of the land with the plaintiff, and through a map falsely representing its position as the built up or business portion of the town. He also counter-claimed to recover back the sum of $500 paid by him on the land, and offered to reconvey the estate conveyed to him.

The case was tried by Armour, J., without a jury, and he found that defendant was induced to purchase by the false representations of Baker. He also found that defendant had disentitled himself to be relieved from said purchase by his delay in repudiating it, and he therefore found for plaintiff for the amount claimed, but without costs.

May 30, 1883. *Britton*, Q. C., moved to set aside the judgment and to enter a verdict for the defendant, contending—

1. That there was misrepresentation on each of the points set up in the defence.

2. That defendant relied upon this.

3. That the delay of defendant in disaffirming was not sufficient to disentitle the defendant to the relief asked, and that he was not otherwise guilty of any laches. He cited *Kerr* on Frauds, 305 and 306; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 H. L. at p. 239.

*Clute*, contra, contended—

1. That there was no misrepresentation in fact, but that defendant bought on speculation.

2. That the representations made were true; and that

3. In any event the defendant was not entitled to succeed by reason of his laches: that he held the lands after the price had advanced much beyond the purchase price, and only complained when prices fell and plaintiff's position had been altered. He cited *Smith's Case*, 2 Ch. App. 609-613; *Jennings* v. *Broughton*, 5 DeG. M. & G. 126; *Fraser* v. *McLean*, 46 U. C. R. 302; *Urquhart* v. *Macpherson*, L. R. 3 App. 837; *Clarke* v. *Dickson*, E. B. & E. 148; *Smith* v. *Chadwick*, 20 Ch. D. 27; *Redgrave* v. *Hurd*, 20 Ch. D. 1.

June 30, 1883. HAGARTY, C. J.—We are unable to say that the evidence did not warrant the finding of the learned Judge, or that we can reverse his decision as to the false representations which induced the purchase.

But for the extraordinary map of the town, professing to shew the position of the Lee & Baker estate, exhibited to purchasers, we should have unanimously decided that the defence failed as to the soil and general character of the land.

The evidence established beyond question that this map untruly represented the position of the land in relation to the town and the business portion thereof, and that it was designedly framed to deceive purchasers.

We cannot reverse the verdict on this head without sanctioning the use of an instrument so calculated to deceive.

Assuming therefore that the contract was induced by fraud, we are unable to concur in the opinion that the defendant has done or omitted anything to disentitle himself to relief.

It is true that he applied to persons on the spot for information, and was informed by them of the incorrectness of some of the representations made to him, but he says Baker reassured him by stating that his informants were interested in depreciating the property, and that he completed the bargain trusting to Baker. He also tried to sell the property, and in fact could have realized more than he had agreed to give for it.

He did not go up to Portage till six months after. He then found out the true position of affairs, and tried to repudiate the bargain.

We do not think that anything has occurred to prevent his raising the question of fraud.

The law is fully stated in the judgment of the Privy Council in *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 H. L. 221. The head note is: "Fraud being established against a party, it is for him, if he allege *laches* in the other party, to shew when the latter acquired a knowledge of the

truth, and prove that he knowingly forbore to assert his right."

The defendant is not entitled to any special consideration in his purchase of this land; and, without fully stating the evidence, we may express the opinion that it is quite possible that a jury would have decided against him on the whole case. Had they done so, I do not think this Court would have interfered with their verdict.

We direct judgment to be entered in favour of the defendant, but without costs: that the mortgage be delivered up to be cancelled, on the defendant executing a reconveyance, free from incumbrance made by him, of any interest in the land conveyed to him; and that his counter-claim to the extent of $500 (without interest) be allowed to him, and that he have judgment therefor, and execution against the plaintiff.

ARMOUR and CAMERON, JJ., concurred.

*Judgment accordingly.*

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[QUEEN'S BENCH DIVISION.]

## GIBSON v. MIDLAND RAILWAY COMPANY.

*Railway—Overhead bridge—Death therefrom—Illegitimate son—44 Vic. ch. 22, O.*

The plaintiff, as administratrix, sued the defendants, under 44 Vic. ch. 22, sec. 7, O., for the death of her illegitimate son, a brakesman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge.

*Held*, that the plaintiff was not entitled to recover (1), because section 7 of the Act applies only to bridges within the control of the company whose servant has been injured, and (2) the Act was intended to give no greater right to recover than Lord Campbell's Act, and therefore the plaintiff's relationship to the deceased prevented her recovery.

The plaintiff sued as administratrix for damages arising from the death of her son Ralph, a brakesman employed on defendants' road.

The case was tried at the last Spring Assizes at Belleville, before Armour, J., and a jury.

It appeared that the defendants' train was passing under a bridge in the town of Peterborough, by which another railroad, the Cobourg, Peterborough, and Marmora Company, crossed the defendants' line. This bridge belonged to the Cobourg, Peterborough, and Marmora road, and was built over defendants' line under charter. The bridge when erected was a lawful bridge. It was not the height now required by law over defendants' roadway, and it was sought to make defendants liable therefor.

On the 28th September, 1881, defendants wrote to the Cobourg, Peterborough, and Marmora Railway Company asking permission to pull down their bridge as being of an illegal height, &c., and on the 27th October, 1881, the latter company answered: "Regarding the bridge, if the stringers in any way interfere with the Midland Railway trains they might be lifted a little. We cannot allow the bridge to be destroyed until we are prepared to replace it."

It was proved that none of the beams or structures could have been cut or removed to get the required clear headway without rendering the bridge unsafe.

The learned Judge, expressing strong doubts as to the plaintiff's right to recover, left the following questions to the jury:—

1. Were the defendants guilty of negligence in not raising, or procuring to be raised, the bridge? Answer—Yes.

2. Was deceased guilty of contributory negligence? Answer—No.

3. What damages is the plaintiff entitled to recover? Answer—$909.

These questions were put to save the expense of a new trial if the plaintiff was held entitled to recover.

May 30, 1883. *Bethune*, Q. C., moved to set aside the verdict on the law and evidence. He also filed affidavits setting out that since the trial the defendants discovered for the first time that the person killed was the illegitimate son of the plaintiff.

The affidavits were very clear on this point, and no attempt was made to answer them.

Before making this motion the defendants served the plaintiff with an order to attend to be examined, but she did not attend.

*Bethune*, Q. C., in support of the motion, contended first, that the Act of 1881, 44 Vic. ch. 22, O., sec. 4, did not apply, as the bridge which caused the injury was not owned or controlled by defendants; and secondly, that as the deceased was the illegitimate son of the plaintiff the case did not fall within Lord Campbell's Act.

*Clute*, contra, argued that sec. 4 of the Act of 1881, must be read with sec. 7 of the same Act, and that the remedy therein given covered a case of this kind; and as to the second point, the Court should not now grant a new trial to let in evidence of the illegitimacy of the deceased.

June 30, 1883. HAGATRTY C. J.—This action is brought under the Ontario Act of 1881, (passsd 4th March, 1881) 44 Vic. ch. 22.

Section 4 directs that "every highway or other overhead bridge * * over any railway existing at the time of the passing of this Act of which the lower beams are not of sufficient height from the surface of the rails to admit of an open and clear headwayof at least seven feet * * shall, within twelve months from that date, be re-constructed to that effect with suitable approaches thereto if a bridge, by and at the cost of the railway company, municipality or other owner thereof, and shall at all times thereafter be maintained at such height; and every such railway company before using higher freight cars than those running on their railway at the passing of this Act, or of the reconstruction as aforesaid of any such bridge * * as the case may be, shall, after having first obtained the consent of the municipality or of the owners of such bridge * * raise every such bridge * * over their railway and the approaches thereto, if necessary, at the cost and charges of the railway company, so as to admit as aforesaid an open and clear headway of not less than seven feet over the top of the highest freight car then about to be used on the railway."

Section 7 gives an action to any railway servant or his representatives, if death ensue, in several cases (1) "By reason of the lower beams * * of any highway or other overhead bridge or any other erection or structure over said railway not being at all times after the lapse of twelve months from the passing of this Act of a sufficient height from the surface of the rails to admit of an open and clear headway of seven feet * * between the top of the highest freight cars then running on such railway and the bottom of such lower beams or members."

The right of action appears to rest on this 4th section. It seems to be divided into two distinct cases:—

1st. That every overhead bridge, &c., existing at the passing of the Act, shall, within twelve months, be, if not

allowing the prescribed headway, reconstructed, giving such headway, "by and at the cost of the railway company, municipality, or other owner thereof." This seems clearly to render it imperative on the bridge owner to make the change prescribed by the law.

2nd. If such railway company use higher freight cars than those in use at the passing of the Act, or of the reconstruction, that such company, having first obtained the consent of the bridge owners, shall at their own cost make the necessary alterations to conform to the Act.

The case before us must turn on the first branch of the section. No case was suggested as to using higher freight cars; therefore the duty is cast on the actual owners of the bridge, and these defendants are not liable.

After they had laid their track another railway is allowed to carry its track over their line.

With the enacting clause framed as stated I cannot believe that the general words used in the 7th section can apply except to bridges within the control of the company whose servant is injured.

Then it was argued that these defendants were guilty of negligence in not procuring or compelling the other company, who owned the offending bridge, to make it conform to the statute.

I do not see how this could have been done. The Act is silent on that subject. A correspondence was in evidence shewing that the defendants did apply to the bridge-owning company on the subject.

On the point of illegitimacy, I do not consider that in the case of death our Legislature intended to confer any larger right to recover than was provided by what is generally called Lord Campbell's Act, and that the mother of an illegitimate child cannot recover damages for its death.

The case of *Dickinson* v. *North-Eastern R. W. Co.*, 2 H. & C. 735, is expressly in point.

Besides therefore the difficulty under our Railway Act

we think the action must fail on the last ground, and must be dismissed.

ARMOUR and CAMERON, JJ., concurred.

*Judgment accordingly.*

# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

## THE QUEEN'S BENCH, THE CHANCERY AND COMMON PLEAS DIVISIONS

OF THE

# HIGH COURT OF JUSTICE FOR ONTARIO.

### ABANDONMENT.

*Of contract.*] —*See* SALE OF GOODS.

### ACCIDENT.

*Death of illegitimate son—Lord Campbell's Act.*] — *See* RAILWAYS AND RAILWAY COMPANIES, 4.

### ACKNOWLEDGEMENT.

*See* LIMITATIONS, STATUTE OF, 1.

### ACTION.

*Right of.*]—*See* CARRIERS.

*Cause of.*]—*See* SEDUCTION.

### ACQUIESCENCE.

*See* PUBLIC SCHOOLS.

### ADMINISTRATION.

*Reckless litigation — Costs.*] — When it appeared that administration proceedings had been instituted without any shew of reason, or proper foundation for the benefit of the estate, and that they had not, in their results, conduced to that benefit, the decision of Proudfoot, J., ordering the plaintiff to pay the costs of all parties, was affirmed in appeal.—*Re Woodhall — Garbutt* v. *Hewson et al.*, 456.

*See* EXECUTORS AND ADMINISTRATORS.

### AGREEMENT.

*See* ARBITRATION AND AWARD, 1—CONTRACT.

### AMBIGUITY.

*See* PLEADING, 1—SALE OF LAND, 2.

## AMENDMENT.

*Adding parties.*]—*See* WAYS, 1.

## APPEAL.

*See* ARBITRATION AND AWARD, 2.—MORTGAGE, 5.

## APPEARANCE.

*Judgment—Immediate execution—Irregularity.*]—*See* BANKRUPTCY AND INSOLVENCY, 3.

## ARBITRATION AND AWARD.

1. *Agreement at trial—Subsequent enforcement thereof—Res judicata—Jurisdiction.*—Where, in 1875, in an action of ejectment the parties agreed in writing that a verdict be entered for the plaintiff, but not enforced till defendant be paid $50 for costs and the value of his improvements, said value to be fixed by arbitration; and, though the $50 had not been paid, nor the said value so ascertained, plaintiff entered judgment on the verdict, and ejected the defendant, whose devisee now filed this bill, claiming possession, damages, a reference as to improvements, and an order for payment of the amount found due, and of the $50 for costs.

*Held*, that though the judgment could not be set aside, and possession given to plaintiff, the plaintiff was entitled to a reference as prayed, with costs.—*Watson* v. *Ketchum*, 237.

2. *Reference—C. L. P. Act, sec.* 189 *—O. J. Act, secs*, 47-49*—Appeal*]—An action for an account and delivery up of a trust estate was referred at the trial to the Master at Picton, by an order drawn up on reading the pleadings and hearing counsel; the Master to have all the powers of a Judge as to certifying and amending pleadings., &c., and to enquire and report as to the plaintiff's right to bring an action; the defendant to have the right to claim all such allowances for his care, &c., as in the Master's opinion he should shew himself entitled to; costs to be in the Master's discretion, and the whole report to be reviewed or appealed from, according to the statute in that behalf.

*Held*, a reference under sec. 189 of the C. L. P. Act, (not under secs. 47. or 48 of the Judicature Act,) and that an appeal from the finding of the Master was therefore regularly set down under the provisions of that Act to be heard before a single Judge in Court.

Remarks as to the effect and application of secs. 47 and 48, above referred to, and as to the proper form of the order of reference.—*Cumming* v. *Low*, 499.

*See* RAILWAYS AND RAILWAY COMPANIES, 3.

## ARCHITECT.

*Certificate of*]—*See* MECHANICS LIEN.

## ASSAULT.

*See* SHIPPING.

## ASSESSMENT AND TAXES.

*Crown lands—Locatees—Inoperative patent—Lands erroneously returned as patented — Tax sales—Compensation for improvements—*

*Mistake of title.*]—Where the Crown Land Commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantee, B., who had paid only a part of the purchase-money, and the lands were afterwards sold for taxes:

*Held*, the tax sales were of no validity as against M., to whom a patent was subsequently issued.

*Held*, also, *per* FERGUSON, J.—B. having assigned his interest, and the assignee having surrendered his interest to the Crown, before the issue of the patent to M., it could not be said that at the time of the issue of the patent to M., there was any "adverse claim" to the lands in question within 23 Vict. ch. 2, sec. 22, so as to debar the commissioner from cancelling the patent to B. under that section.

Since 16 Vict. ch. 182, sec. 56, a tax sale of unpatented lands conveys to a purchaser only such rights in respect of the land as the original locatee enjoyed.

Where a claimant of certain lands commenced an action of ejectment, in which he afterwards entered a *nolle pros.*, and then, subsequently, commenced a suit in this Court for the recovery of the said lands, and the defendant claimed compensation for improvements made under *bonâ fide* mistake of title;

*Held*, the defendant was entitled to compensation for improvements made before the ejectment action, and for those made between the *nolle pros.* and the commencement of the second suit, but not for those made during the pendency of the ejectment, or since the commencement of the second suit. — *O'Grady* v. *McCaffray*, 309.

## ASSIGNMENT.

*Without assets—Discharge.*]—*See* BANKRUPTCY AND INSOLVENCY, 1.

*Vacating discharge—Concealment of assets.*]—*See* BANKRUPTCY AND INSOLVENCY, 2.

*In trust for creditors.*]—*See* BANKRUPTCY AND INSOLVENCY, 5.—BILLS OF SALE AND CHATTEL MORTGAGES, 2.

*Of land warrant.*]—*See* FRAUD AND MISREPRESENTATION, 2.

*Of re-insurance.*]—*See* INSURANCE, 4, 5.

*Of patent right.*]—*See* PATENT FOR INVENTION.

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## ATTACHMENT OF DEBTS.

*Promissory note—Attachment.*]—*Held*, affirming the judgment of Armour, J., that a negotiable promissory note, not due, is not a debt which may be attached within the meaning of Rule 370 of the Ontario Judicature Act. — *Jackson* v. *Cassidy*, 521.

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## ATTORNEY AND SOLICITOR.

*Costs — Taxation — Solicitor and client — Delivery of bill — "Special circumstances" — R. S. O. ch. 140. sec. 35.*—On July 20, 1877, A. and B., a firm of solicitors, rendered their bill to C., also a solicitor, for professional services. On May 30, 1878, C. wrote to A. and B., claiming a reduction of the bill, and alleging over-charge, and an agreement to do the work for half fees. No notice was taken of this letter,

nor did C. take steps to have the bill taxed. On July 8, 1882, A. and B. sued in the County Court on this bill, and judgment was entered therein on July 19, 1882, for default of appearance, which judgment was, by consent, subsequently waived. On July 27, 1882, a bill for services, rendered subsequently to July, 1877, was delivered to C. by A. and B. In this bill was included the following item: "To amount of judgment entered July 19, 1882, $268.67 for various accounts rendered." An action was then commenced in the Chancery Division for the amount of the two bills.

On the trial of the action, judgment was given for the amount of the first bill, as rendered, and also for the amount of the second bill, subject to taxation.

*Held*, on appeal to the Divisional Court, that neither the existence of a controversy as to the terms on which the business was done, nor the continuance of the employment after the delivery of the first bill, were "special circumstances" within R. S. O. ch. 140, sec. 35, entitling C. to tax the first bill after the lapse of a year.

*Held*, also, that the reference in the second bill to the amount claimed in respect of the first bill, did not amount to a rendering of the first bill so as to entitle the client to a taxation. — *Arnoldi* v. *O'Donohoe*, 322.

*Costs.*]—*See* INSURANCE, 6—MORTGAGE, 5.

## ATTORNEY GENERAL.

*Notice to.*]—*See* CARRIERS.

## BANKRUPTCY AND INSOLVENCY.

1. *Insolvent Act of* 1864—*Assignment without assets — Discharge — Personal action.*—In 1866 judgment was recovered against the defendant in this action for breach of promise of marriage, and in another for seduction. The defendant then made an assignment under the Insolvent Act, 1864, having no assets, and his only creditors being the plaintiffs in the two actions. No creditors appeared, and after twelve months he petitioned for his discharge. The application was duly advertised, and no opposition being made, was granted. He subsequently acquired some property, and execution was then issued in this action. The Master in Chambers refused to set aside the execution on motion made by the defendant, and his order was reversed by Osler, J.

*Held*, affirming the decision of Osler, J., that the want of assets at the time of making the assignment could not be set up on the application as a ground for avoiding the discharge, but was a matter for the consideration of the Insolvent Court upon the application therefor, and that unless attacked for fraud it was a complete answer to the plaintiffs' claim.

*Held*, also, that the plaintiff's claim was one which was barred by the discharge.—*Forrester* v. *Thrasher*, 38.

2. *Insolvent Act of* 1875, 38 *Vic. ch.* 16, *D., and amending Acts—Vacating final order of discharge — Concealment of assets — Parties — Forum—Nudum pactum.*]—A final order of discharge obtained by an insolvent upon a deed of composition and discharge duly confirmed, will be vacated by this Court, on

bill filed by a creditor, party to the insolvency proceedings, where such discharge has been obtained by a fraudulent concealment of assets.

An insolvent firm, on September 16, 1878, made an assignment under the Insolvent Acts. On October 2, 1878, a deed of composition and discharge, under the said Acts, was executed, whereby the said firm covenanted to pay a certain dividend, and on February 28, 1879, the Judge in Insolvency made an order for its confirmation, a sworn statement of the assets and liabilities of the firm having been first duly filed by the members thereof. Long afterwards one of the creditors, who had consented, on payment of a certain dividend, to assign his claim to S. as trustee for the insolvent firm, and for the purpose of executing the said deed, though he himself refused to execute it, discovered that C., one of the members of the firm had fraudulently concealed some of his assets, and he filed a bill in this Court to have the said deed of composition, and the order confirming the same, declared void as against him.

*Held*, that the deed and order of confirmation must be vacated as regards C., and the insolvency proceedings re-opened, so that there might be a due administration of the assets thus withheld, and the assignment to S. must be prevented from being set up as a bar to such relief.

*Held*, also, (PROUDFOOT, J., *dubitante*,) inasmuch as the assets fraudulently concealed were C.'s private property, and not the property of the partnership, the discharge should only be vacated as to the private estate of C.

*Per* PROUDFOOT, J., the assignment to S. was invalid, being made without consideration, or for a consideration which was no satisfaction, being the payment of a less sum for a greater; but even if it must be taken to have been for value, it was sufficient for the plaintiff to shew that it was entered into under a mistake caused by the insolvent firm, as to the true amount of the assets, whether the firm acted innocently or otherwise.

It appearing that part of C.'s assets was certain railway stock, obtained by him on a contract, that he was to retain one-half, if he could give the stock a marketable value, but that if he could not do so within a certain time, extending beyond the period of the insolvency proceedings, the transaction was to be void, and he was to re-transfer.

*Held*, that the shares should have been returned in his sworn statement as part of his assets, for the language of the statute was large enough to cover such an interest. It was a valid executory contract, and as such passed on insolvency to the assignee.

It also appeared that among C.'s assets was a certain sum received by him, or to which he had a claim, from a certain railway company as compensation for services rendered as temporary acting president. *Held*, that C. was bound to return as an asset the portion of the compensation payable for services rendered up to the date of the assignment in insolvency, but not the remainder.

*Held*, further, the assignee in insolvency was not a necessary party to the present suit, which was rightly brought in this Court.—*McGee* v. *Campbell et al.*, 130.

3. *Interpleader — Judgment on non-appearance—Immediate execution—Irregularity—Preferential judgment—Sheriff's sale—Purchase by judgment creditor—R. S. O. ch.* 118.]—An execution issued on the same day that a judgment on default of appearance, contrary to Order 9, Rule 4, is signed, is an irregularity only, and not a nulity.

M., a merchant, who was in insolvent circumstances, and had purchased largely from defendants, stated an account with the defendants as for cash due, in which were included some acceptances maturing, which were then delivered up to him, he receiving a buyer's discount of five per cent. By arrangement the defendants recovered judgment by default of appearance, and under an execution issued on the same day plaintiff's stock in trade was sold by the sheriff, the defendants becoming purchasers. E., the defendant's agent, wrote to the defendants before suit, that he had arranged with M.'s consent to issue a writ for judgment, and take everything, and they would then let M. go and reduce his stock, and see what the Spring trade would do. The plaintiffs, ten days after, obtained judgment and execution under Rule 324, and the defendants having subsequently purchased the goods under these and other executions, an interpleader was directed.

*Held*, ARMOUR, J., dissenting, reversing the judgment of Armour, J., at the trial, that the defendants' judgment, execution, and purchase at the sheriff's sale were not a gift conveyance, assignment, or transfer of M.'s goods within the meaning of R. S. O. ch. 118, sec. 2.

*Per* CAMERON, J.—The statute R. S. O. ch. 118, should be construed strictly. It is in derogation of the common law, and does not operate to give all the creditors of a debt a ratable share in his effects. Before setting aside the debtor's preference for a legislative preference not more honest, it should be clear that the debtor has done something which brings him within the enumerated acts which the statute prohibits. *Macdonald et al.* v. *Crombie et al.*, 243.

4. *Fraudulent preference—Pressure —Collusion—R. S. O.* 118.]—Where certain persons who were liable as endorsers of certain promissory notes not yet due, knowing the maker's insolvent circumstances, under threat of suit, induced him to give a *cognovit actionem*, whereon they entered judgment and issued execution.

*Held*, not such pressure as exempted the *cognovit* and subsequent proceedings from being collusive, fraudulent, and void, within R. S. O. ch. 118.

A mercantile firm obtained from their debtor promissory notes for the amount of his indebtedness which notes they endorsed to third parties: before the notes were due, and while they were still outstanding in the hands of third parties, they applied to the debtor to give a *cognovit actionem*, knowing at the time that he had recently given a chattel mortgage on his stock-in trade, and was hopelessly insolvent — and under threat of suit the debtor gave the *cognovit*, upon which judgment was entered and execution issued.

*Held*, a fraudulent preference, and that the judgment and execution were fraudulent and void under R. S. O. ch. 118.

*Held*, also, that the transaction could not be supported on the ground

of pressure. *Ex parte Hall*, 19 Ch. D. 580 followed. *Meriden Silver Company* v. *Lee and Chillas*, 451.

5. *Assignment in trust for creditors—Trustee's powers.*]—An assignment in trust for creditors contained clause which, amongst other things, a empowered the trustee to sell for cash or on credit, and *with or without security* for the unpaid purchase money.

*Held*, that the introduction of the words "with or without security" was immaterial, and did not invalidate the assignment, there being no proof of any design on the part of the debtors to so enable the trustee to unfairly delay the realization of the assets. *O'Brien et al* v. *Clarkson*, 525.

[Appealed and stands for argument.]

6. *Insolvency—Forum—Injunction—Insolvent Act of* 1875.]—In 1875 J. M. and D. M. entered into partnership, certain assets of J. M. being transferred to the partnership, but nothing being said as to his liabilities. In 1876, the firm having become insolvent, B. was appointed assignee. The partnership creditors were paid in full, and a surplus remained. D. M. then petitioned the County Judge in Insolvency to divide the said surplus between him and J. M. B. then commenced this suit against D. M to have it declared that the said partnership deed was not binding upon him as such assignee, but that the partnership deed might be declared fraudulent and void, and that the Court might take an account of the partnership property, and make division, and for an injunction restraining D. M. from further proceeding with his petition,

*Held*, that the Insolvent Court had jurisdiction to deal with the matter, and this being so, was the proper tribunal to do so, and this Court would not interfere. *Bell* v. *McDougall*, 618.

*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2—LIMITATIONS, STATUTE OF, 1.

## BAWDY HOUSE.

*Conviction — House of ill-fame—32-33 Vic. ch. 32.*]—*Held*, that a conviction under 32-33 Vic. ch. 32, sec. 2, sub-sec. 6, for being an *unlawful* (instead of an *habitual*) frequenter of a house of ill-fame, and which adjudged the payment of costs which is unauthorized by the statute, must be quashed.

That section makes the being such habitual frequenter a substantial offence, punishable as in sec. 17 and does not merely create a procedure for trial and punishment. *Regina* v. *Clark*, 523.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Illegal consideration.*]—*See* COMPROMISING.

*See* ATTACHMENT OF DEBTS.

## BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Stock in trade—Sale—Vendor employed as clerk—Immediate delivery—Change of possession—Chattel mortgage Act—R. S. O. ch.* 119.—M. carried on a retail business in a village store, on premises known as

the "Star House," from a design over the door, but there was nothing to indicate who was the proprietor. He sold the stock-in-trade to the plaintiff in August, and formally handed over to him the keys, at the same time telling M., his clerk, that he would not require him any longer. The plaintiff gave one key to M., telling him to open the store next morning, which he did, but the plaintiff next day quarrelled with M., and dismissed him, and he then employed M. until the 1st of October to act as salesman, &c., the plaintiff being at the store a good part of the time. The change of business was advertised, and became well known in the neighbourhood, and new books were opened by the plaintiff.

The stock was seized on the 2nd October under execution against M. The transaction was found to have been in good faith and for valuable consideration.

*Held*, that the question of change of possession was one of fact to be determined on the circumstances of each case, and (reversing the decision of Osler, J.,) that there was here such an actual and continued change of possession as to dispense with the necessity for a bill of sale. HAGARTY, C. J., dissenting.

*Per* HAGARTY, C. J.—The question being one of fact, and the learned Judge having found as a fact that the change of possession was not actual and continued, his finding should not be disturbed, as it could not be said to be clearly wrong. *Scribner* v. *McLaren et al.*, 265

2. *Chattel mortgage—Consideration—Future advances—Assignment for the benefit of creditors—Creditors—R. S. O. ch.* 119, *ss.* 1, 2, 6.]—Q. and A., partners, being indebted in a sum of $1,551.66, gave a chattel mortgage on their stock in trade to the creditor to secure $2,400; it being verbally agreed that the creditor would make further advances to the extent of $800; and Q. and A. subsequently made a voluntary assignment for the benefit of their creditors, after which the mortgagee seized the property included in the mortgage, and sold the same, undertaking to hold the proceeds subject to the order of the Court, whereupon a creditor, whose claim existed at the date of the mortgage, though he had not recovered judgment, brought the present action on behalf of all the creditors of Q. and A. to have the mortgage declared void, and the proceeds paid to the assignee:

*Held*, that the mortgage was void, under R. S. O. ch. 119, for not stating on its face the true consideration.

*Held*, also, that neither the assignment for the benefit of creditors, nor the sale of the goods as aforesaid, disentitled the plaintiff to impeach the mortgage, and he was entitled to the relief claimed. *Parkes* v. *St. George et al.*, 342.

[Appealed and stands for argument.]

## BONDHOLDER.

*See* RAILWAY AND RAILWAY COMPANIES. 2.

## BREAD.

*Regulations as to.*]—*See* MUNICIPAL CORPORATIONS, 1.

## BRIDGE.

*Overhead—Belonging to another railway—Death therefrom—Illegitimate son.*]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

## BUILDINGS.

*Easement—Lateral support—Action by tenant.*]—*Held*, that an action against the proprietor of adjoining land for damage done to a building by removal of the lateral support afforded by such adjoining land, may be maintained by the tenant of the building. *McCann* v. *Chisholm*, 506.

## BY-LAWS.

*Closing up road.*]—*See* WAYS, 1.

*See* MUNICIPAL CORPORATIONS.

## CARRIERS.

*Damage to goods carried—Right of action by consignor—Nonsuit—New trial—Joinder of consignee as co-plaintiff—Constitutional question—Notice to Attorney-General—46 Vic. ch. 6, O.*]—The plaintiff consigned goods to parties in England, and shipped them by the defendant companies on bills of lading, describing them as shipped by the plaintiff to be delivered to —— order or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading to various parties in England to whom he had sold the goods. The consignees paid the drafts drawn upon them for the price, and the goods having been seriously damaged in transit they made claim upon the plaintiff for the loss. The plaintiff now sued for the damage and was nonsuited, on the ground that he had not sufficient interest, or was not the proper person to sue.

The Court, without deciding as to the plaintiff having no right of action, or the effect of R. S. O. ch. 116, sec. 5, set aside the nonsuit, and directed a new trial, with leave to the plaintiffs to add as co-plaintiffs any or all of the consignees or endorsees of the bills of lading, the evidence already given to stand with any additions the parties might desire, reserving all costs.

The validity of R. S. O. ch. 116, sec. 5, was disputed on the ground that it was *ultra vires* as interfering with trade and commerce, but the Court refused to decide the point without notice to the Attorney-General and Minister of Justice under 46 Vic. ch. 6, sec. 6, O., which would involve great delay, and adopted the above course as being the speediest and least expensive. *Hately* v. *Merchants' Despatch Co. et al.*, 384.

*See* RAILWAYS AND RAILWAY COMPANIES, 1.—SHIPPING.

## CERTIFICATE.

*Married woman.*] — *See* LIMITATIONS, STATUTE OF, 2.

*Architects.*]—*See* MECHANICS' LIEN.

## CERTIORARI.

*See* TEMPERANCE ACT, 1878. — TRESPASS.

## CHARITABLE SOCIETIES.

*See* CORPORATIONS.

## CHATTEL MORTGAGES.

*See* BILLS OF SALE AND CHATTEL MORTGAGES.—INSURANCE, 4.

## COGNOVIT.

*See* BANKRUPTCY AND INSOLVENCY, 4.

## COLLUSION.

*See* BANKRUPTCY AND INSOLVENCY, 4.

## COMMON LAW PROCEDURE ACT.

*See* ARBITRATION AND AWARD, 2.

## COMPANY.

*See* CORPORATIONS.

## COMPENSATION.

*Improvements.*]—*See* ASSESSMENT AND TAXES,

*Unskilful survey.*]—*See* IMPROVEMENTS.

*By-law opening road.*]—*See* MUNICIPAL CORPORATIONS, 3.

## COMPROMISING.

*Stifling prosecution for felony—Promissory note—Illegal consideration.*]—The defendant was arrested on the charge of embezzling fines which he had received as a Justice of the Peace on the information of the Reeve of the township claiming the fines, who took the proceedings with a view to force the defendant into a settlement. He was brought before a Justice and committed for trial, and while under arrest pressure was brought to bear on him to compromise by giving security to procure his release, and the plaintiff, who proposed to act on his behalf, gave a note to the township for the amount claimed, and induced the defendant to give him a note for the amount, endorsed by his wife. The note included the amount of the fines, and also expenses incurred by the township in an investigation of the defendant's alleged default, to which the latter was not a party. The defendant was then brought before the deputy County Judge, but no evidence was offered, and it was stated that the affair had been settled, and that the charge would not be proceeded with, whereupon the defendant was discharged. The plaintiff now sought to recover upon the defendant's note.

*Held*, that the consideration therefor being the stifling of a prosecution for felony was illegal, and rendered the note void, and that the plaintiff was in no better position than the township would have been had they taken the note.

*Held, per* BURTON, J., at the trial, that the defendant Catharine, who joined in the note with her husband, the other defendant, was not, under the facts stated in the case, possessed of separate estate, and was therefore not liable, notwithstanding her admission endorsed on the note that the payee had advanced the money on the faith of such separate estate. *Bell* v. *Riddell et ux*, 25.

[Appealed and stands for argument.]

## CONCEALMENT.

*Of assets—Vacating discharge.*]—*See* BANKRUPTCY AND INSOLVENCY, 2.

## CONDITIONS.

*Statutory.*]—*See* INSURANCE, 2, 4, 5.

*See* RAILWAYS AND RAILWAY COMPANIES, 1.

## CONDITIONS PRECEDENT.

*See* MECHANICS' LIEN.

## CONSENT.

*To be tried summarily.*]—*See* CRIMINAL LAW.

## CONSIDERATION

*Sufficiency.*]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2.

*Illegal.*]—*See* COMPROMISING.

## CONSTITUTIONAL LAW.

*Local Courts Act — County Court Districts — Validity of Act respecting—Jurisdiction of Division Court Judge without his own county—Prohibition.*]—Pursuant to the Local Courts Act, R. S. O. ch. 42, sec. 16, *et seq.*, the counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a County Court District. By sec. 17, in such a district the several County Courts, Division Courts, &c., shall be held by the Judges in the district in rotation. By the Division Court Act, R. S. O. ch. 47, sec. 19, the Division Courts shall be presided over by the County Court Judges in their respective counties. An order for the committal of the defendant was made by the Judge of the County Court of the county of Lambton, sitting in a Division Court in the county of Middlesex under the provisions of the Local Courts Act. A motion for a prohibition was made on the ground that that enactmant was *ultra vires*.

*Held*, ARMOUR, J., dissenting, that the Provincial Legislature has complete jurisdiction over the Division Courts, including the appointment of officers to preside over them: that the learned Judge acted in the Middlesex Division Court as one of the persons designated by the Legislature to preside over it, and having regard to the enactment in question, solely in its bearing on Division Courts, it was not *ultra vires*.

*Per* ARMOUR, J.—Sec. 13 of the Local Courts Act is *ultra vires*. The Provincial Legislature having no power to appoint County Court Judges, neither can authorize the Governor-General to appoint one by order as enacted (the appointment being properly made by Letters Patent under the Great Seal), nor can it depute a County Court Judge to nominate another Judge to take his place as enacted. The clear and sole effect of sec. 17 is to appoint the Judge of each County Court in any district Judge of all the other counties, which is *ultra vires*. The Provincial Legislature has no power to appoint the Judges of the Division Courts; but it has not yet assumed to do so, and in this case the Judge acted solely by virtue of being Judge of the County Court of the county of Lambton, and as such assigned to perform the duties of the Judge of the County Court of Middlesex, and was therefore acting without authority. *Re Wilson* v. *McGuire*, 118.

*Ultra vires.*]—*See* CARRIERS.

## CONTRACT.

*See* HUSBAND AND WIFE, 1.—LUNATIC.—MECHANICS' LIEN.—MORTGAGE, 2. — PARTNERSHIP. — RAILWAYS AND RAILWAY COMPANIES, 1. —SALE OF GOODS.—SALE OF LAND.

## CONTRACTOR.

*See* MECHANICS' LIEN.

## CONVEYANCE.

*See* DEED.

## CONVICTION.

*Summary.*]—*See* SHIPPING.

*On different charge from committal.*]—*See* CRIMINAL LAW.

*Hard labour.*]—*See* TEMPERANCE ACT, 1878.

*See* BAWDY HOUSE—TRESPASS.

## CORPORATIONS.

*Company—Quorum — Election of officers—Forcible entry—Injunction —Parties—R. S. O.* ch. 150]—Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of the plaintiff must be considered, and the Court will not generally investigate it upon an interlocutory proceeding such as an application for an interlocutory injunction.

R. S. O. ch. 150 requires that companies incorporated thereunder shall have not less than three directors, who shall not be appointed directors unless they are shareholders, and it was provided by the by-laws of the plaintiffs' company that a director should not only be qualified when elected, but that he should continue to be so. The plaintiffs' company was managed by three directors, and one of them disposed of his stock.

*Held*, that he thereupon ceased to be a director, and the directorate then became incomplete and incompetent to manage the affairs of the company.

*Semble*, also, even assuming that a quorum (2) of the directors could manage the business, yet, where neither the statute nor the by-laws gave the president a casting vote, resolutions passed by such vote, at a meeting attended only by the president and one other director, were invalid.

An election of officers obtained by a trick or artifice cannot be considered a *bona fide* election, but when shares have been actually purchased and paid for, the fact of their being purchased with a view to influence the election is no objection.

The Court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed.

Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. *Toronto Brewing and Malting Co.* v. *Blake*, 175.

2. *Society—Expulsion—Forum—Injunction.*]—Members of charitable and provident societies should not be allowed to litigate their grievances within the society in Courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies.

Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto, on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this Court refused to interfere. *Essery* v. *Court Pride of the Dominion*, 596.

*See* FRAUD AND MISREPRESENTATION, 1—SHIPPING.

## CORRESPONDENCE.

*Contract by.*]—*See* SALE OF GOODS.

## COSTS.

*Delivery of bill—Special circumstances.*]—*See* ATTORNEY AND SOLICITOR.

*Solicitor and client.*]—*See* MORTGAGE, 5.

*Reckless litigation.*]—*See* ADMINISTRATION.

*See* EXECUTORS AND ADMINISTRATORS—COSTS—INSURANCE, 6—TEMPERANCE ACT, 1878—WAYS, 2.

## COUNTER-CLAIM.

*For purchase money.*]—*See* FRAUD AND MISREPRESENTATION, 4.

*Damages for non-delivery of goods.*]—*See* SALE OF GOODS.

## COUNTY COURTS.

*Districts—Act respecting.*]—*See* CONSTITUTIONAL LAW.

## COURTS.

*Single Judge.*]—*See* ARBITRATION AND AWARD, 2.

*See* CONSTITUTIONAL LAW.

## COVENANT.

*See* DOWER—PATENT FOR INVENTION.

## CRIMINAL LAW.

*Committal on one charge, conviction on another—42 Vic. ch. (D.) Consent—Error.*]—The prisoners were committed for trial on a charge of gambling on a railway train. On the case coming before the County Judge for trial, an indictment was preferred, under 42 Vic. ch. 44, sec. 3, D., for obtaining money by false pretenses. The prisoners' counsel objected to the prisoners being tried on a different charge from that on which they had been committed. The objection was overruled, and the charge read over to the prisoners, and, on its being explained that they could be tried forthwith or remain in custody until the next sittings of Oyer and Terminer, &c., they pleaded not guilty, and said they were ready for trial. The case then proceeded, and the prisoners were convicted; no question being raised as to their

having been tried without their consent, although their counsel took other objections to the proceedings. A writ of *habeas corpus* having been issued, and the prisoners' discharge moved for, on the ground of the absence of such consent:

*Held*, that the motion must be refused.

*Per* WILSON, C. J. It was unnecessary to decide whether the prisoners' remedy was by *habeas corpus* or writ of error, because, on the facts, they were not entitled to either remedy.

*Per* OSLER, J. The prisoners having been imprisoned under the conviction of a court of record, an objection of error in the proceedings must be by writ of error: the writ of *habeas corpus* was therefore improvidently issued, and should be quashed. *Regina* v. *Goodman and Wilson*, 468.

*See* BAWDY HOUSE.

## CROWN LANDS.

*See* ASSESSMENT AND TAXES.

## DAMAGES.

*Under counter-claim for non-delivery of goods.*]—*See* SALE OF GOODS.

## DEATH.

*Accident.*]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

## DEBTS.

*See* ATTACHMENT OF DEBTS.

## DECEIT.

*See* FRAUD AND MISREPRESENTATION.

## DEDICATION.

*See* WAYS, 2.

## DEED.

*Tender of.*]—*See* SALE OF LAND, 2.

*Executed, but not delivered.*]—*See* SALE OF LAND, 3.

*See* LIMITATIONS, STATUTE OF, 2.

## DELAY.

*Trial of questions between defendant and third party.*]—*See* PARTIES.

## DEMURRER.

*See* PLEADING.

## DESCRIPTION.

*Of party—"Vendor."*]—*See* SALE OF LAND, 1.

## DEVISE.

*Acceptance of devise.*]—Where one to whom a devise *primâ facie* beneficial to him is made, neither accepts nor rejects the same, but remains passive, he will be presumed to accept. *Re Defoe*, 623.

*See* LIMITATIONS, STATUTE OF.

## DIRECTORS.

*See* CORPORATIONS, 1.

## DISCHARGE.

*Claim barred by.*]—*See* BANKRUPTCY AND INSOLVENCY, 1.

*Final order of—Vacating.*]—*See* BANKRUPTCY AND INSOLVENCY, 2.

## DISTRICTS.

*County Court.*]—*See* CONSTITUTIONAL LAW.

## DIVISION COURTS.

*Jurisdiction of Judge outside of county.*]—*See* CONSTITUTIONAL LAW.

## DOMESTIC RELATIONS.

*See* HUSBAND AND WIFE, 1.

## DOUBLE INSURANCE.

*See* INSURANCE, 4, 5.

## DOWER.

*Life estate—Estate by entireties.*]—When a husband died entitled to the reversion in fee in certain lands expectant on a life estate therein: *Held*, that dower could not be claimed therein, for that the husband had never been seized during coverture of an estate of inheritance in possession.

*Held*, that a lease for life to a husband and wife makes them tenants by entireties, so that the whole accrues to the survivor.

The demandant, who was a stranger to the life estate, was held not entitled to set up that there had been a forfeiture thereof by nonpayment of rent or other breach of covenant. *Leitch* v. *McLellan*, 587.

*See* HUSBAND AND WIFE. 1.

## DRAINS.

*See* MUNICIPAL CORPORATIONS, 2.

## EASEMENT.

*See* BUILDINGS.

## EJECTMENT.

*See* ASSESSMENT AND TAXES.

## ELECTION.

*Of officers.*]—*See* CORPORATIONS.

*School Trustees.*]—*See* PUBLIC SCHOOLS.

## ENTIRETIES.

*Estate by.*]—*See* DOWER.

## EQUITY OF REDEMPTION.

*See* MORTGAGE, 3, 4.

## ERROR.

*Writ of.*]—*See* CRIMINAL LAW.

## ESTATE.

*For life.*]—*See* DOWER.

## ESTOPPEL.

*See* FRAUD AND MISREPRESENTATION, 3—LIMITATIONS, STATUTE, OF, 1—MUNICIPAL CORPORATIONS, 3.—PUBLIC SCHOOLS.

## EVIDENCE.

*Admissibility.*] — *See* SALE OF LAND, 3.—EXECUTION.

*See* BILLS OF SALE AND CHATTEL MORTGAGES, — CRIMINAL LAW. — INSURANCE, 1.—JUDGMENT.—PARTNERSHIP.—SEDUCTION.—WAYS, 2.

## EXECUTION.

*See* BANKRUPTCY AND INSOLVENCY, 3.

## EXECUTORS AND ADMINISTRATORS.

*Administration—Executor—Costs—Administrator ad litem.*]—The plaintiff being a lunatic, and entitled to maintenance out of the income of a fund in the hands of executors, brought an action for the income, and for administration. The Master reported a balance of income in the hands of the executors, being an amount charged against them for interest upon moneys retained by them and not invested according to the terms of the will; but the conduct of the executors was otherwise proper.

*Held*, that, if the question of the liability of the executors for the interest had been the only one in the action, the executors should have been ordered to pay the costs; but, inasmuch as a general administration was unnecessarily sought by bill and granted, no costs should be awarded for or against the executors.

The original plaintiff having died *pendente lite* and an order having been obtained to continue the proceedings in the name of an administrator *ad litem*.

*Held*, that the plaintiff's costs, between solicitor and client, should be paid out of the interest recovered.

*Held*, also, that the administrator *ad litem* was not entitled to be paid the residue of the fund; but as to this liberty to apply was granted. *McCardle* v. *Moore et al.*, 229.

## EXPULSION.

*See* CORPORATIONS, 2.

## FALSE REPRESENTATION.

*See* FRAUD AND MISREPRESENTATION.

## FARE.

*Refusal to pay.*]—*See* SHIPPING.

## FELONY.

*See* COMPROMISING.

## FIRE INSURANCE.

*See* INSURANCE.

## FORCIBLE ENTRY.

*See* CORPORATIONS, 1.

## FORECLOSURE.

*Opening—Equitable rights.*]—*See* MORTGAGE, 3.

## FOREIGN JUDGMENT.

*See* JUDGMENT.

## FORFEITURE.

*See* DOWER.—MORTGAGE, 1, 3.

## FORUM.

*Chancery Division—Vacating discharge.*]—*See* BANKRUPTCY AND INSOLVENCY, 2.

*Insolvent Court.*]—*See* BANKRUPTCY AND INSOLVENCY, 6.

*See* CORPORATIONS, 2.

## FRAUD AND MISREPRESENTATION.

1. *Action of deceit—Legal and moral fraud—Company—Laches—Attending shareholders' meeting.*]—There must be a wilful and fraudulent statement of that which is false to maintain an action of deceit, and the law still distinguishes between legal and moral fraud in this respect.

Therefore, where the plaintiff sued a certain company and its promoters, seeking to have his name removed from the list of shareholders, and to have the money paid for his shares repaid to him by the defendants, on the ground of fraudulent representation and concealment by the said promoters, but failed to prove that the latter had been guilty of any fraudulent intent, or that they had made representations knowing them to be false, or with a reckless disregard as to their truth or falsehood, it being admitted that, as far as the suit related to the said promoters, it was simply an action of deceit.

*Held*, the plaintiffs' case failed as against the latter.

*Held*, also, that as against the company, though the plaintiff, had he come before the Court in good time, might perhaps have had his contract rescinded, yet his having, as the fact was, acted at a meeting of the shareholders after knowledge of what he now charged against them, precluded him from asserting any such right now, and his bill must be dismissed, with costs. *Petrie* v. *Guelph Lumber Co.*, 218.

[Argued in Appeal and stands for judgment.]

2. *North-West Mounted Police warrant—Assignment of—Action for misrepresentation as to right of holder.*]—The defendant was assignee of a land warrant issued to a constable of the North-West Mounted Police Force, for service in that body, which entitled him upon its face to locate 160 acres upon any of the Dominion lands, subject to sale at $1.00 per acre. The defendant induced the plaintiff to purchase the warrant by representing to him that he would be entitled to obtain from the government 160 acres of land. There were lands subject to sale at $1.00 per acre when the warrant was issued and thereafter. By various statutes and Orders in Council the Dominion lands were made subject to sale at higher prices than $1.00 per acre, but these land warrants were to be accepted by the Government in part payment of $1.00 per acre. The plaintiff was refused lands at $1.00 per acre by the Crown,

and then brought this action to rescind the sale to him on the ground of misrepresentation. The jury found that defendant represented to plaintiff, to induce him to purchase, that the warrant would entitle him to 160 acres of land : that the plaintiff purchased on the faith of this : that the representation was false ; and that defendant made it without knowing whether it was true or false, intending it to be relied upon.

*Held*, ARMOUR, J., dissenting, that the plaintiff must fail ; for the construction of the warrant clearly expressed that the holder was entitled to 160 acres of land at $1 per acre, and not simply to a credit of $160 on a purchase, and the representation was such as defendant might properly make.

*Per* ARMOUR, J.—The representation that the warrant would entitle the plaintiff to 160 acres of land comprehended the affirmation of fact by the defendant that there were then Dominion lands subject to sale at $1 per acre, and this not being so the plaintiff should succeed. *McKenzie* v. *Dwight*, 366.

[Appealed and stands for argument.]

3. *Title by possession—Lease from original owner to person having possessory title — Effect of — Fraud— Setting aside lease.*]—The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the lands under the Statute of Limitations, but was not aware of the effect of his possesion. The defendant, who had purchased the interest of the heirs of the original owner and vendor, and his solicitor, by representing to plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years at a nominal rent, with a convenant to yield possession at the end of the term.

*Held*, that, under the circumstances, the lease must be set aside ; but even, if allowed to stand, it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance. *Hillock* v. *Sutton et al.*, 548.

4. *Sale of land—False representations — Laches—Counter-claim for purchase money.*]—The plaintiff induced the defendant to purchase land in Portage-la Prairie, by exhibiting to him a map representing the property to be in the business portion of the town, and by representing that this was true. The defendant applied to persons on the spot for information, and was told that the representations made were incorrect. But he swore that one of the plaintiffs told him that his informants were interested in depreciating the property, and that on this he purchased, paying $500 cash, and giving a mortgage for the balance. He tried to sell, and could have sold the property for more than he gave for it, but did not go to Portage la Prairie for six months after, when he found that the representations were untrue, and repudiated the bargain. This action was brought on the mortgage, and the defendant counter-claimed for the cash payment of purchase money.

*Held*, affirming the decision of ARMOUR, J., that the defendant was induced to purchase by false representations, and, reversing the judgment, that he had not disentitled himself to relief by laches ; that the

mortgage should be delivered up to be cancelled, and that the counter-claim for the money paid, without interest, should be allowed, on his re-conveying the estate free from incumbrances created by him. *Lee* v. *McMahon*, 654.

[Appealed and stands for argument.]

*See* BANKRUPTCY AND INSOLVENCY, 1, 2, 4.—CORPORATIONS, 1.—INSURANCE, 2.—PUBLIC SCHOOLS.

## FRAUDS, STATUTE OF.

*See* MECHANICS' LIEN.—PARTNERSHIP.—SALE OF LAND, 1, 3.

## GOODS.

*See* SALE OF GOODS.

## HABEAS CORPUS.

*See* CRIMINAL LAW.

## HARD LABOUR.

*Conviction.*] — *See* TEMPERANCE ACT, 1878.

## HIGHWAYS.

*See* WAYS.

## HOUSE.

*Of ill-fame.*]—*See* BAWDY HOUSE.

## HUSBAND AND WIFE.

1. *Public policy — Domestic relations.*—A. being about to sell a certain property, and in order to induce his wife, B., to bar her dower, entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B. "as she may require it for the maintenance of A. and B. and their family."

*Held*, a valid agreement, and not opposed to public policy. *Lavin* v. *Lavin*, 187.

2. *Married woman—Separate estate—Separate trader.*]—B. told the plaintiff that having failed he was unable to carry on business in his own name, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a grocer, either on her or his order, the account to be opened in her name. Goods were shipped accordingly upon orders of the husband, and on one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate.

*Held*, HAGARTY, C. J., dissenting, that the plaintiff was entitled to recover.

*Per* CAMERON, J.—The defendant was liable, being possessed of separate estate, whether the goods were bought by her or her husband. In the latter case she would be surety for her husband as acceptor of bills drawn upon her for the price of the goods.

*Per* HAGARTY, C. J.—The goods were bought by the husband, and the liability was his and not the wife's, her name being used merely to shield him from his creditors, and the plaintiff being aware of this; and therefore the defendant was not liable to him. *Hessin* v. *Baine*, 302.

3. *Married woman—Separate property.*]—The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land, and had it conveyed to his wife, the plaintiff, who, with the rents and profits thereof, she and her husband not living on the land, with money raised by mortgage thereof, and with money borrowed from her sons, purchased the chattels in question herein, which were seized under execution against the husband.

*Held*, that the chattels were her separate property within the meaning of R. S. O. ch. 125, sec. 1, and free from the debts of her husband. *Trotter* v. *Chambers, et al.*, 515.

*See* SEPARATE ESTATE.—COMPROMISING. — DOWER. — LIMITATIONS, STATUTE OF, 1, 2. — PLEADING. — SEDUCTION.

## ILLEGALITY.

*See* COMPROMISING. — CORPORATIONS, 2.

## ILLEGITIMATE SON.

*Action for death of.*]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

## IMPRISONMENT.

*See* SHIPPING.

## IMPROVEMENTS.

*Unskilful survey—R. S. O. ch.* 51, *ss.* 29, 30.]—Where S. having purchased a lot of land employed a public land surveyor to mark out the boundaries of it for him, and the surveyor, by reason of an unskilful survey, included in the lot, as marked out by him, land which should not have been so included, and S. misled thereby, effected improvements upon the land so erroneously included.

*Held*, on recovery of the said land by the rightful owner, that S. was entitled to compensation for the said improvements, under R. S. O. ch. 51, secs. 29, 30. *Plumb* v. *Steinhoff*, 614.

[Appealed and stands for argument.]

*Compensation for.*]—*See* ASSESSMENT AND TAXES.

## INJUNCTION.

*Jurisdiction of Chancery Division.*]—*See* BANKRUPTCY AND INSOLVENCY, 6.

*Forcible entry.*] — *See* CORPORATIONS.

## INSANITY.

*See* LUNATIC.

## INSOLVENCY.

*See* BANKRUPTCY AND INSOLVENCY.

## INSURANCE.

*Subrogation — "Subrogation" or "Unconditional clause"—Parol evidence—Material change of risk.*]—The agent of a loan company insured certain mortgaged property, for collateral security, in the name of the said company, but at the request, and on behalf of the mortgagor, who had in his mortgage covenanted to insure, and was charged with, and

paid the premiums, and who was specified as the owner in the policy, and in the application therefor.

The policy purported to be an insurance of the property itself, loss payable to the loan company, and contained a "subrogation clause" to the effect that the insurance, as to the interest of the mortgagees only therein, should not be invalidated by any act of the mortgagor; but that if the insurers should pay to the mortgagee any loss, and should claim that as to the mortgagor no liability therefor existed, they should to the extent of such payment be subrogated to the rights of the party so paid under any securities held by him; or they might, in such case pay the mortgagee the whole debt due under the mortgage, and obtain an assignment thereof.

*Held*, that the policy was a general insurance of the property itself, and not merely of the mortgagee's interest, and parol evidence was not admissible to prove that the loan company, and the insurers had, in effecting the insurance, only the interest of the mortgagees under consideration.

The circumstances being as above stated, and a fire having occurred, the insurers, on paying the whole amount due on the mortgage, obtained an assignment thereof, but had notice at the time that the mortgagor claimed credit on his mortgage for the moneys due under the policy, he having done no act which invalidated it.

*Held*, the mortgagor was entitled, on redeeming the mortgage, to have such credit; and this, although the insurers neither assented to, nor acquiesced in, his paying the premiums to the mortgagees.

The policy was by its conditions avoidable on any change of occupation material to the risk. On it was endorsed: "This property used to store doors and sashes." This application, however, stated that the property had been used as a bending factory, and was intended to be used as a sash factory, and the application was by the policy, made a part thereof, and a warranty by the assured. The assured used the property as a sash factory.

*Held*, that though a sash factory was more hazardous than a bending factory, yet reading the application and policy together, the policy was not thereby avoided.

*Held*, also, the use of the premises for ripping timber for building, as well as for the proper purpose of a sash factory, was not under the evidence such a material increase of risk so as to avoid the policy.

*Held*, further, the subrogating clause itself afforded some evidence that an interest in the mortgagor was recognized, and that it was not merely the mortgagees' debt which was being insured. *Howes* v. *Dominion Fire and Marine Ins. Co.* 83.

[Appealed and stands for argument.]

2. *Fire insurance—Statutory condition—Variation—Misrepresentation*—The plaintiff applied for an insurance upon his stock-in-trade with the defendant company Pending the negotiations the company's agent told the plaintiff he thought the company's condition was to allow twenty-five pounds of powder to be kept, and the plaintiff said he did not keep more than ten pounds. The insurance was then effected by an interim receipt, and on the same night the premises were burned. The plaintiff had more than ten pounds, but less than twenty-five pounds of

powder in stock when the fire occurred. The statutory condition prohibited more than twenty-five pounds being kept in stock without permission, and the company's variation of their condition relieved them from liability if more than ten pounds was "deposited on the premises, unless the same be specially allowed in the body of the policy and suitable extra premium paid." The case having been dealt with on other grounds on an appeal to the Privy Council was remitted to this Court to try whether the variation was a just and reasonable one. The learned Judge at the trial found it to be reasonable.

*Held*, HAGARTY, C J., dissenting, that under the circumstances of this case, inasmuch as the company's agent had represented that twenty-five pounds of gunpowder were allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one to be set up by the company, or one which they could have inserted in the policy, and was therefore void, and that the plaintiff should recover.

*Per* ARMOUR, J.—The condition being more onerous than the statutory condition relating to the same subject matter, was for that reason to be deemed not just or reasonable.

*Per* HAGARTY, C. J., and GALT, J.—The variation was not, under the circumstances, necessarily unjust or unreasonable, and the judgment should not be interferred with.

*Per* HAGARTY, C. J.—The statutory condition exempting the company from liability if more than twenty-five pounds of powder were kept without permission, does not preclude or prohibit the insurers from bargaining that they will not be liable if more than ten pounds be kept, except on certain conditions as to extra premiums, &c.; and as the plaintiff at the trial did not in his evidence mention the representation of the agent, or allege that it influenced him, and it was not relied upon there, it should not now be given effect to. *Parsons* v. *Queen's Ins. Co.*, 45.

3. *Payment of premium in cash—Principal and agent—R. S. O. ch. 161, sec. 34.*]—An agent instructed to receive payment for his principal cannot, as a general rule, accept anything but money.

*Held*, therefore, on this principle, and also in view of R. S. O. ch. 161, sec. 24, and of the fact that the renewal receipt in question in this case contained a notice that it would not be valid unless dated and countersigned by the agent on the day on which the money was paid, that, where in consideration merely of a setting off of debts as between the agent of an insurance company and a policy holder, the former wrongfully delivered a renewal receipt to the latter, the receipt did not bind the company, and the policy lapsed. *Frazer* v. *Gore District Mutual Fire Ins. Co.*, 416.

4. *Re-insurance—Statutory conditions—Chattel mortgage.*]—The Dominion Insurance Company insured one H. against loss by fire to the amount of $5,000, and under a contract of re-insurance made between the defendants and the Dominion Company, the latter company re-insured $2,500 with the defendants. Subsequently the Dominion Company entered into an agreement with the Fire Association, whereby, after reciting that the Dominion Company desired to be relieved from and guaranteed against loss on existing risks,

and that the Fire Association had agreed to do so, and to re-insure said risks, the company transferred all their business and the good-will thereof to the association, who thereby re-insured all the existing risks, subject to the terms of the policies, &c.; the association to take and accept all re-insurances made with other companies, with power to use the company's name. A loss occurred on H.'s policy which was adjusted and paid by the association In an action against the defendants to recover the amount of the re-insurance:

*Held*, that the defendants could not escape liability for either one or the other of the plaintiffs was entitled to recover; and that there was nothing in an objection raised as to double indemnity.

*Held*, also, that the statutory conditions could not be imported into and read with either the agreement between the plaintiffs, or that between the Dominion Company and the defendants.

*Held*, also, that the defendants' contract of re-insurance did not prevent the plaintiffs from assenting to any reasonable and proper waiver of conditions made in good faith, and not shewn to influence the loss or increase the burden of the re-insurers; and therefore an assent given by the Dominion Company to a chattel mortgage on some of the insured goods, without the defendants' knowledge and assent, did not release the defendants. *Fire Ins. Association (Limited) et al.* v. *Canada Fire and Marine Ins. Co.*, 481.

5. *Re-insurance—Assignment of—Statutory conditions.*—Under a similar state of facts as stated in the Q. B. D. case, *ante* p. 481, except that the insurance was of one C.'s property:

*Held*, that the plaintiffs were entitled to recover, for treating the agreement between the plaintiffs as a re-insurance, (though more properly a transfer of business with its liabilities and collateral securities.) if it was of the whole amount of the Dominion Company's liability, the association having paid the whole loss to the company, or which was the same thing, to C., were entitled, irrespective of any assignment, to contribution from defendants; if, however, it was only of the residue of C.'s risk the defendants were still liable to the company on their policy, and by the very terms of the agreement it was effectually assigned to the association, who acquired all their co-plaintiff's rights and interest in it

*Held*, also, that the statutory conditions were not applicable to such a contract of re-insurance as in this case. *Fire Ins. Association (Limited) et al.* v. *Canada Fire and Marine Ins. Co.*, 495.

6. *Mutual insurance company—Solicitor's costs—Separate branches.*]—*Held*, OSLER, J., dissenting, that under the Mutual Insurance Act, R. S. O. ch. 161, the costs of a solicitor for services rendered to a Mutual Insurance Company, are chargable not against the general assets of the company, but against the respective branches for which the services were in fact rendered, and in case of deficiency of assets of any of the branches the other branches are not liable for the claims thereon.

*Per* OSLER, J.—A creditor of the company, for a debt incurred as part of the necessary expenses thereof,

though in relation to the business of some branches only, is entitled to be paid out of the company's moneys derived from assessments for losses and expenses on policy holders in other branches. *Duff* v. *Canadian Mutual Fire Ins. Co. et al.*, 560.

## INTEREST.

*Agreement to pay higher.*] — *See* MORTGAGE, 1, 2.

## INTERPLEADER.

*See* BANKRUPTCY AND INSOLVENCY, 3.

## INVENTION.

*See* PATENT FOR INVENTION,

## IRREGULARITY.

*Judgment on non-appearance — Immediate execution.*] — *See* BANKRUPTCY AND INSOLVENCY, 3.

## JUDGE

*Division Courts--Jurisdiction.*] — *See* CONSTITUTIONAL LAW.

## JUDGMENT.

*Foreign judgment–Action on—Rule 322 — Motion for judgment — Evidence.*] —The defendant in an action on a judgment obtained in Iowa, U. S. A., pleaded denying the recovery of the judgment. Upon a motion for judgment under Rule 322, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment.

*Held*, affirming the opinion of the Master, that judgment could not be ordered on these materials under Rule 322, the defendant having put the judgment distinctly in issue.

In proceeding under this Rule 322 it is not sufficient to produce a document on which the plaintiff relies, without any proof to connect the defendant with it or to support its genuineness. *Henebery* v. *Turner*, 284.

*Non-appearance—Immediate execution—Irregularity—Preference.*] — *See* BANKRUPTCY AND INSOLVENCY, 3.

## JUDICATURE ACT.

*See* O. J. ACT.

## JURISDICTION.

*See* ARBITRATION AND AWARD, 1.—BANKRUPTCY AND INSOLVENCY, 6.—CARRIERS. — CONSTITUTIONAL LAW.—TEMPERANCE ACT, 1878.

## JUSTICE OF THE PEACE.

*See* MAGISTRATE.

## LACHES.

*See* FRAUD AND MISREPRESENTATION, 4.

## LAND.

*Assignment of warrant for land grant.*]—*See* FRAUD AND MISREPRESENTATION, 2.

*Notice requiring – Dissistment.*]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

*Sale of.*]—*See* FRAUD AND MISREPRESENTATION, 4.

*See* ASSESSMENT AND TAXES.—IMPROVEMENTS.—SALE OF LAND.

## LANDLORD AND TENANT.

*Lateral support—Action by tenant.*]—*See* BUILDINGS.

*Setting aside lease.*]—*See* FRAUD AND MISREPRESENTATION, 3.

## LATERAL SUPPORT.

*See* BUILDINGS.

## LETTERS.

*Contract by.*]—*See* SALE OF GOODS.

## LIEN.

*See* MECHANICS' LIEN.

## LIFE ESTATE.

*See* DOWER.

## LIMITATIONS, STATUTE OF.

*Mortgagor and mortgagee — Acknowledgment — Insolvent Act of 1864 — Possession of husband and wife.*]—H., being seized of land subject to a mortgage to L., dated 14th October, 1863, and to one M., dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, he obtained his discharge. On 27th 1869, he obtained from M. an assignment of M.'s mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale of this mortgage to F. H. to the use of his, the grantor's wife, his co-defendant, the consideration mentioned being $250, which was credited on the mortgage.

On 12th April, 1869, L. assigned his mortgage to M and B., who, on 28th March, 1873, assigned it to W. In 1879 H., having procured assignments to himself of most of the claims against his insolvent estate, presented a petition signed by himself to compel W. to wind it up. He alleged that M. & B. held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right, title, and interest of the insolvent in the land; and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. H. attended at the sale, and objected to the sale of the land, and bid for the same; but the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to H. as assignee, for the claims against his estate. H. and his wife had remained in undisturbed possession since his discharge in insolvency.

*Held*, reversing the decision of Osler, J., that upon the evidence set out in the case, the possession of H. and his wife must be considered to have been the possession of H.: That the title of the first mortgagee was not

extinguished, and that defendants were estopped by their conduct from disputing the plaintiff's title. *Miller* v. *Hamlin et ux.*, 103.

2. *Conveyance by married woman—Want of certificate—Possession contrary to deed—R. S. O. ch.* 127 *sec.* 13, 14—*Curing defect.*]—A., a married woman, owning the whole lot, in 1834, by deed jointly with her husband, purported to convey the east half to F. in fee simple. The conveyance was void in not having the proper magistrate's certificate endorsed thereon. F. never took possession, but in 1852 conveyed to H., through whom the plaintiff claimed. Shortly after the conveyance to F. he told A. that he would not live on the land, or have anything to do with it. A then procured some one to look after it for her, and about sixteen years before this action two sons of A. settled upon the west half of the lot upon the understanding that they were to have the whole land, each paying her $50 on account; but no deed was executed to them till 1875. They paid taxes on the whole lot, and cut timber at times upon the east half. In 1871 E., having obtained a conveyance of the east half, had a line run between the east and west halves, and cut timber on the east half. An action of trespass was brought against him by A.'s sons, which he settled. The east half was neither cleared, fenced, nor cultivated.

*Held*, CAMERON, J., dissenting, that those claiming under A. in 1873, when 36 Vic. ch. 18 was passed, were not in "actual possession or enjoyment" of the east half, contrary to the terms of the conveyance within the meaning of the proviso at the end of sec. 13 of that Act, and therefore that A.'s conveyance to F., void in its inception, was validated by sec. 12 of the Act (R. S. O. ch. 128, sec. 13), and the plaintiffs were entitled to recover.

*Per* CAMERON, J., the possession of A., and those claiming under her, must be construed with reference to her paper title to the land, which remained in her, as her deed to F. was void, and it must therefore be held to have extended to the whole lot, and not only to those parts actually occupied as in the case of a trespasser, and therefore the case fell within the exception in the Act, and the deed was not validated thereby. *Elliott* v. *Brown et al.*, 352.

[Appealed and stands for argument.]

3. *Tenancy at will—Trustee and cestui que trust*—R. S. O. ch. 108, sec. 5, sub-sec 7, 8.]—Whenever a new tenancy at will is created, this forms a fresh starting point for the running of the Statute of Limitations.

Therefore where A. was let into possession of certain lands as tenant-at-will to B., in 1870, and B. died in 1878, having devised the lands to trustees in trust for A. for life, and then in trust for C., which devise A. in no way refused, but continued in possession ostensibly as before, and now claimed title by length of possession against the said trustees and C.

*Held*, that A. must be presumed to have accepted the devise, and his retention of possession must be attributed to his rightful title under the devise; and therefore even if A. could be considered as tenant-at-will to his trustees, and capable of acquiring title by possession as against them and C., which under R. S. O. ch

180, sec. 5, sub-secs. 7, 8, he could not, yet on the death of B. a new tenancy-at-will was created, and a new period commenced for the running of the statute, which had not at the time of action brought, continued long enough to give the plaintiff title by possession. *Re Defoe*, 623.

*See* MORTGAGE, 4.

## LITIGATION.

*Reckless.*]—*See* ADMINISTRATION.

## LOCAL COURTS.

*See* CONSTITUTIONAL LAW.

## LOCAL LEGISLATURES.

*Jurisdiction of.*]—*See* CONSTITUTIONAL LAW.

## LOCATEE.

*See* ASSESSMENT AND TAXES.

## LUNATIC.

*Contract of lunatic—Validity of.*]—The plaintiffs made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, one of the plaintiffs knew that the defendant was subject to insane delusions, believing that people were conspiring against him. He, however, superintended the repairs, and talked intelligently to the workmen; but some months after he became violent, and was confined in an asylum for the insane.

*Held*, that the plaintiffs were entitled to recover for the work done. *Robertson et al.* v. *Kelly*, 163.

## MAGISTRATE.

*Jurisdiction of.*]—*See* TEMPERANCE ACT, 1878.—TRESPASS.

## MANDAMUS.

*See* MUNICIPAL CORPORATIONS, 2.

## MARRIED WOMAN.

*See* HUSBAND AND WIFE.

## MARRIAGE.

*During pregnancy — Cause of action.*]—*See* SEDUCTION.

## MASTER AND SERVANT.

*See* SHIPPING.

## MECHANIC'S LIEN.

*Contracts—Sub-contractor—Novation—Condition precedent—Architect's certificate.*]—Where a contractor for the building of a house, made default in carrying on the work, and in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed verbally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor would go on and finish the work, he, the owner, would pay him:

*Held*, that the agreement with the sub-contractor was a new and inde-

pendent contract, and was not a contract to answer for the debt, default, or miscarriage of another, within the fourth section of the Statute of Frauds, and was therefore valid and binding on the owner, although not in writing; *Bond* v. *Treahy*. 37 U. C. R. 360, distinguished.

*Held*, also, that the sub-contractor was entitled to a lien for all work done under such agreement as a "contractor," and as to such work he was no longer in the position of a sub-contractor.

*Held*, also, that the sub-contractor acting under such an agreement, was not bound by clauses contained in the original contract with the dismissed contractor, providing for forfeiture, &c.

*Held*, also, that the non-production of an architect's certificate approving of the work done, though required by the contract with the dismissed contractor, as a condition precedent to payment, did not preclude the sub-contractor from recovering under the verbal agreement, provided the work was so done as to morally entitle him to such certificate, following *Lewis* v. *Hoare*, 44 L. T. N. S. 66. *Petrie* v. *Hunter et al.*, 233.

[Appealed and stands for argument.]

## MINISTER OF JUSTICE.

*Notice to.*]—*See* CARRIERS.

## MISREPRESENTATION.

*See* FRAUD AND MISREPRESENTATION.

## MISTAKE.

*Of title.*]—*See* ASSESSMENT AND TAXES.

*See* IMPROVEMENTS.

## MORTGAGE.

1. *Interest—Penalty.*]—Where a mortgage to secure the re-payment of money with interest at ten per cent. provided that, "should default be made in payment of the principal money or interest, or any part thereof respectively, then the amount so over-due and unpaid to bear interest at the rate of twenty per cent. per annum until paid.

*Held*, the said proviso was not invalid, or relieveable against on the ground of forfeiture. *Downey* v. *Parnell*, 82.

2. *Notice of payment — Parol agreement to pay higher rate of interest.*]—Where a mortgagee comes in under a decree for partition or sale and proves his claim, and consents to a sale he is not entitled to six months' interest, or six months' notice.

A parol agreement to pay a higher rate of interest than that reserved in the mortgage, is ineffectual to charge the land.

*Totten* v. *Watson*. 17 Gr. 235, and *Matson* v. *Swift*, 5 Jur. 645, followed. *Re Houston—Houston* v. *Houston*, 84.

3. *Opening foreclosure.*]—Where, after foreclosure, the rights of purchasers have intervened, any equitable claim which the mortgagor may have previously had to open the foreclosure, is, in this country at all events, to be considered forfeited.

*Campbell* v. *Holyland*, L. R. 7 Ch. D. 173 remarked upon, and *Platt* v. *Ashbridge*, 12 Gr. 107, followed. *Trinity College* v. *Hill et al.*, 348.

[Appealed and stands for argument.]

4. *Equity of redemption—Statute of Limitations in mortgage cases—*

*Parties—R. S. O. c.* 108, *ss.* 11, 19, 20, 43.]—The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage.

Hence, in a redemption suit, where the mortgagor died intestate in 1858, leaving children, the plaintiffs therein some of whom, if alone, would have been barred as to redemption, by R. S. O. c. 108, ss. 19, 20.

*Held*, since some of the children had not been adult for five years preceding the filing of the bill, none of the plaintiffs were barred by the statute.

R. S. O. c. 108, s. 43 applies to mortgage cases as well as other cases. *Hall* v. *Caldwell*, 8 U. C. L. J. 93 followed. *Forster* v. *Patterson*, L. R. 17 Ch. D. 132, and *Kinsman* v. *Rouse*, *ib.* 104 not followed.

One of the mortgagor's surviving children died an infant and intestate before this suit.

*Held*, that this suit enured to the benefit of those entitled to her share, including her mother as tenant for life under R. S. O. c. 105, s. 27.

*Held*, also, the mother should be directed to be made a party in the master's office under G. O. 438, since the present case did not fall under the Judicature Act.

*Semble*, if under that Act the same might have been directed under Rule 89. *Faulds* v. *Harper et al.*, 405.

5. *Solicitor and client—Costs—Duty of solicitor—Notice of sale under mortgage—Service of under R. S. O. ch.* 104*—Leave to appeal.*]—Where F., a solicitor, on behalf of his client, served a notice of sale under a mortgage made pursuant to the Act respecting Short Forms, R. S. O. ch. 104, upon what he believed, after diligent enquiry, was the last place of residence of the mortgagor in this Province, and did so on the instructions of his client, who was fully advised as to the said enquiries and their result, and *bonâ fide* deeming such service sufficient:

*Held*, that F. was entitled, as against his client, to tax the costs of the proceedings under the power of sale, although it appeared the mortgagor really was at the time of such service, within the province.

R. S. O. ch. 104, permits substitutional service at the residence, though the mortgagor may be within the jurisdiction. But even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who *bonâ fide* acted on that view of the statute should not lose his costs of so effecting service.

Where services are rendered by a solicitor at the instance of a client, possessing the like knowledge of the matters of fact as the solicitor, the *onus* is on the client to establish negligence, ignorance, or want of skill, by reason of which alone and entirely the services have been utterly worthless, if he resist the taxation of costs incurred by such services.

Where the question involved affected matters arising in the exercise of statutory powers, and was of general interest, leave was given to appeal although a sum less than $200 was at stake. *O'Donohoe* v. *Whitty*, 424.

[Appealed and stands for argument.]

*Subrogation.*]—*See* INSURANCE, 1.

*See* LIMITATIONS, STATUTE OF, 1. —SALE OF LAND, 4.

## MOTION.

*For judgment*]—*See* JUDGMENT.

## MUNICIPAL CORPORATIONS.

1. *Municipal by-law—Regulations as to bread.*]—By-law 1128 of the City of Toronto declared what the weight of loaves should be, and enacted that the weight of each loaf sold or offered for sale should be stamped thereon, and that all bread offered for sale of any less weight than the weight fixed by the by-law should be seized and forfeited.

*Held*, that the by-law was *intra vires* and not unreasonable. *Re Nasmith and Corporation of Toronto*, 192.

2. *Municipal works — Drains—Non-repair—Action for damage—Mandamus.*]—The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear.

*Held*, affirming the judgment of Hagarty, C. J., (CAMERON, J., dissenting) that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair under R. S. O. ch. 174, sec. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs.

*Per* CAMERON, J.—An action is expressly given by sec. 542 for injury done by such neglect, where the drain serves two municipalities; but in a case like the present, though under sec. 543 the municipality may be compelled by mandamus to repair the drain at the expense of the lands benefited, no action lies for injury caused by non-repair. *White* v. *Corporation of Gosfield*, 287.

[Appealed and stands for argument.]

3. *Municipal by-law — By-law opening road—Entry before compensation — Quashing by-law — Non-registration of by-law—Estoppel—Pleading—Approbating and reprobating—R. S. O. ch. 174, sec. 325.*]—Where the plaintiff filed his bill seeking to quash a certain municipal by-law passed to open a road, and also an award made thereunder:

*Held*, that there was nothing inconsistent in this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award.

Where, however, under such circumstances, the plaintiff, being called on by the Court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor:

*Held*, he could not afterwards complain of having been forced to elect at the hearing.

*Held*, further, the by-law in ques-

tion not being void on its face, nor *ultra vires*, and the plaintiff not having attacked it for more than a year after its passing, but having on the contrary appointed an arbitrator to assess compensation thereunder, it had now become absolute and incontrovertible.

*Held*, also, although such a by-law may not become effectual in law till registration thereof, nevertheless non-registration does not prolong the time allowed by R. S. O. ch. 174, sec. 323, within which it may be quashed, and such time does not count from the registration.

*Held*, also, where a by-law has been passed for opening a road over certain land, the municipality is not bound under R. S. O. ch. 174, sec. 456 to make compensation to the owner before entering on the land. *Harding* v. *Corporation of Cardiff*, 329.

## MUTUAL INSURANCE.

*See* INSURANCE.

## NECESSITY.

*Way of.*]—*See* WAYS, 1.

## NEGLIGENCE.

*Railway Act* 1879, 42 *Vic. ch.* 9 *sec.* 25, *sub-sec.* 4.]—*See* RAILWAY AND RAILWAY COMPANIES, 1.

## NEW TRIAL.

*See* CARRIERS.

## NONSUIT.

*See* CARRIERS.

## NORTH-WEST.

*Land warrant.*]—*See* FRAUD AND MISREPRESENTATION, 2.

## NOTICE.

*R. W. Co. requiring land—Notice of desistment.*]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

*See* MORTGAGE, 2.

## NOTICE OF SALE.

*See* MORTGAGE, 5.

## NOVATION.

*See* MECHANICS' LIEN.

## NUDUM PACTUM.

*See* BANKRUPTCY AND INSOLVENCY, 2.

## OFFENCE.

*See* TEMPERANCE ACT 1878.

## O. J. ACT.

*Secs.* 47, 49.]—*See* ARBITRATION AND AWARD, 2.

*Rules* 108, 112.]—*See* PARTIES.

*Rule* 89.]—*See* MORTGAGE, 4.

*Rule* 322.]—*See* JUDGMENT.

*Rule* 370.]—*See* ATTACHMENT OF DEBTS.

*See* PLEADING, 2.

## ONUS.

*Of proof.*]—*See* WAYS, 2.

## PAROL EVIDENCE.

*See* EVIDENCE.—INSURANCE, 1.—PARTNERSHIP.

## PARTIES.

*Trial of questions between defendant and third party — Delaying plaintiff — Rule* 112.]—Under Rule 112, where in an action the plaintiff is entitled to recover against the defendant, against whom the action is brought, the defendant is precluded from trying questions arising between himself and a third party added at his instigation under Rule 108, in the trial of which the plaintiff has no interest, and which has the effect of delaying the plaintiff in his recovery.

Defendants, sued by the plaintiffs for the amount due under a lease of a toll-gate, brought in W. as a defendant, alleging that an agreement to commute tolls payable by W. had been made by the plaintiffs, and claiming as a set off, the difference between such commutation and the tolls otherwise payable by W. This agreement having been disproved the parties proceeded to try the question as to the liability of W. to the original defendants, in which the plaintiffs had no interest, and judgment was given in favour of the original defendants.

*Held*, that such judgment must be set aside. *Corporation of Dundas v. Gilmour et al.*, 463.

*Description of.*]—*See* SALE OF LAND, 1.

*See* BANKRUPTCY AND INSOLVENCY, 2.—CARRIERS—CORPORATIONS, 1.—MORTGAGE, 4. — PLEADING, 2. — WAYS, 1.

## PARTNERSHIP.

*Specific performance—Statute of Frauds—Parol evidence to explain written contract.*] — Where S., a partner, had contracted in writing in the partnership name, to sell certain timber limits, property of the partnership, but standing in his name only, and M., his co-partner, when informed thereof, had not dissented, but had shortly afterwards furnished information to the purchaser, which he was only entitled to ask for as such purchaser.

*Held*, having regard to all these circumstances, S. had assented to the said contract, and was bound thereby.

The contract was expressed to sell "Limits No. 1 and 3 for $15,500; also all the plant used in connection with the shanty now in operation in Limit No. 1, included in the list made out last summer, and the material then not included which had been in use for the winter's operations of 1880 and 1881, at the price of $3,000.

*Held*, sufficiently definite to satisfy the Statute of Frauds, since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing, which accompanied the above contract, and which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of the $15,500, and such parol evidence was admissible, though the contract imported *primâ facie* a down payment of the $15,500,

It appeared also, that S., who was the managing partner, and the purchaser subsequently put an end to the terms of credit, and agreed to a cash payment of the $15,500.

*Held*, it was competent for them so to do, and within the power of S., so far as his co-partner was concerned. *Reid* v. *Smith*, 69.

*See* BANKRUPTCY AND INSOLVENCY, 2.

## PASSENGER.

*See* SHIPPING.

## PATENT.

*Inoperative.*] — *See* ASSESSMENT AND TAXES.

## PATENT FOR INVENTION.

*Patent — Assignment of patent right—Covenant to "warrant and defend" grantee.*]—Where G. granted the exclusive right to manufacture a certain patented article to W., and covenanted that R., the original patentee, of whom G. was assignee, would "warrant and defend" W. in the possession of the patent right, and that if R. neglected or refused to "protect and defend" W. in his peaceable possession of the said patent right, then the royalty to be paid by W., as the consideration for the said grant, should cease.

*Held*, G. was liable under this covenant only if R. neglected to defend W. as against all persons having any right to manufacture or sell the patented article, not as against mere wrongdoers.

*Semble*, if there had been breach of the covenant by G., the defendant would not have been liable to pay the royalty under the above agreement, though he had continued to manufacture the patented article. *Green et al.* v. *Watson*, 627.

[Appealed and stands for argument.]

## PENALTY.

*See* MORTGAGE, 1.

## PLEADING.

1. *Ambiguity—Demurrer—Prayer for general relief.*]—Where the allegations in a bill of complaint were of an ambiguous character, hovering between two inconsistent alternatives, neither of which supported the conclusion suggested by the pleader, a demurrer for want equity was upheld.

The Court will regard the *intuitus* with which the allegations in a bill of complaint are made, and will not allow the prayer for general relief to control the obvious frame of the record.

The primary object of the bill was to enforce a contract of sale of land between N. an insolvent, of whom the plaintiff was assignee, and one C. N. was made a party because, as the bill alleged, said C. N. pretended that one L. who advanced money to N. on the security of the property, had conveyed his interest to C., while the plaintiff charged the contrary, and alleged that if such conveyance was made yet it was without value, and made to defeat N.'s and L.'s creditors. A demurrer by C. N. was allowed, on the ground above mentioned, and because the bill was multifarious. *Gunn* v. *Trust and Loan Co. et al.*, 393.

2. *Demurrer — Specific performance — Misjoinder of parties — Judicature Act.*]—Where a demurrer is raised to a statement of claim for specific performance on the ground of no sufficient agreement, it is enough if in any aspect of the case the plaintiff may be entitled to some relief. In this case it was held, on the statement of claim, set out in the case, that a concluded contract was shewn and that defendant was liable.

Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer.

Where the owners of the property in an action for the specific performance of a sale of land, were married women, and their husbands were joined as co-plaintiffs, and the defendant demurred *ore tenus*, on ground of misjoinder of parties, leave was given to amend by making the husbands defendants, or by adding next friends for the married women as co-plaintiffs. *Young et al.* v. *Robertson*, 434.

*See* MUNICIPAL CORPORATIONS, 3.

## POSSESSION.

*Change of.*]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

*Title by.*]—*See* FRAUD AND MISREPRESENTATION, 3.—LIMITATIONS, STATUTE OF.

## PREFERENCE.

*See* BANKRUPTCY AND INSOLVENCY, 3, 4.

## PREMIUM.

*Payment in cash.*] — *See* INSURANCE, 3.

## PRESSURE.

*See* BANKRUPTCY AND INSOLVENCY, 4.

## PRINCIPAL AND AGENT.

*See* INSURANCE, 3.

## PROCEDURE.

*See* BAWDY HOUSE.

## PROHIBITION.

*See* CONSTITUTIONAL LAW.

## PROMISSORY NOTE.

*See* ATTACHMENT OF DEBTS.

## PROVINCIAL LEGISLATURE.

*See* CONSTITUTIONAL LAW.

## PUBLIC POLICY.

*See* HUSBAND AND WIFE, 1.

## PUBLIC SCHOOLS.

*Misrepresentation — Waiver — Acquiescence — Estoppel — School trustees.*]—Where certain persons were elected school trustees, and at a meeting of the board held subsequently to the election, were declared duly elected, but, proceedings having been, meanwhile, commenced to question the validity of the election, at a subsequent meeting of the board they acquiesced in the conclu-

sion of the board to hold a new election, and became candidates again, and canvassed as such, until the twenty days allowed for disputing the first election had elapsed (the proceeeings formerly commenced for that purpose having been meanwhile dropped), and were not elected at the second election.

*Held*, they could not afterwards maintain a suit to have it declared they were the duly elected trustees. *Foster et al.* v. *Stokes et al.*, 590.

## PURCHASE MONEY.

*Counter-claim for.*]—*See* FRAUD AND MISREPRESENTATION, 4.

## PURSER.

*Of vessel—Liability for acts of.*]—*See* SHIPPING.

## QUASHING.

*By-law.*]—*See* MUNICIPAL CORPORATIONS, 3.

## QUORUM.

*See* CORPORATIONS, 1.

## RAILWAYS AND RAILWAY COMPANIES.

1. *Railway Act* 1879, 42 *Vict. ch.* 9, *sec.* 25, *sub-sec.* 4—*Carriage of live stock—Special contract—Liability for negligence.*]—The Railway Act, 1879, 42 Vict. ch. 9, sec. 25, sub-sec. 4, which declares that the party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, conditions, or declarations, if the damage has arisen from any negligence or omission of the company, or of its servants, is applicable to the defendant company, and the words "in the premises" means the premises as set out in the previous sub-sections.

The plaintiff shipped live stock on the defendants' railway, subject to the conditions on a shipping bill, one of which was that live stock was taken entirely at the owner's risk of loss, injury, or damage, whether in loading or unloading conveyances or otherwise, and that all live stock should be carried by special contract only. The animals were killed or lost by the defendants' negligence.

*Held*, that the defendants could not escape liability by their conditions, for their liability was expressly provided for by the above clause of the Railway Act. *Vogel* v. *Grand Trunk R. W. Co.*, 197.

[Appealed and stands for argument.]

2. *Railway company—Bondholders—Right to vote as shareholders—Voting—Toronto Grey, and Bruce Railway Co.*—31 *Vict. ch.* 40, *sec.* 21 (*O.*)—38 *Vict. ch.* 56, *sec.* 13 (*O.*)—44 *Vict. ch.* 74, *sec.* 14 (*O.*)—Under a statute which provided that, in the event at any time of the interest upon the bonds of a railway company remaining unpaid and owing, then, at the next general meeting of the company, all holders of bonds should have and possess the same rights and privileges, and qualifications for directors, and for voting, as are attached to shareholders, provided that the bonds, and any transfers thereof, should have been first registered in the same manner as was

provided for the registration of shares.

*Held*, that the words "at the next general meeting" were merely indicative of the earliest period at which the bondholders might vote, and that the statute did not require a new registration in order to entitle the bondholders to vote at any subsequent meeting, so long as the interest remained unpaid.

*Held*, also, that the bondholders' right to vote was not limited to the right of voting for directors, but that they had the right to vote on all subjects properly coming before a general annual meeting upon which shareholders might vote.

And where a subsequent statute extended the bondholders' right of voting to "special meetings:"

*Held*, also, that the bondholders had the like right to vote on all subjects coming before "special meetings."

When a further statute authorized the railway company to enter into agreement with any other company, for leasing or working its line, provided that assent thereto should be given by at least two-thirds of the shareholders present, or represented by proxy, at any meeting specially called for the purpose.

*Held*, that the word "shareholders" must be interpreted to include all who were entitled to vote as shareholders, which included bondholders.

*Held*, also, that the registered bondholders were entitled to vote at a special meeting called for the purpose of obtaining the assent of the shareholders to such an arrangement, on the question of its adoption.

*Osler* v. *Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 506; and *Re Johnson and Toronto Grey, and Bruce R. W. Co.*, 8 P. R. 535, followed.

*Held*, also, that the votes of registered bondholders having been rejected, the arrangement, though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed. *Hendrie* v. *Grand Trunk R. W. Co.*, 441.

[Appealed and stands for argument.]

3. *Railway Co.—Notice requiring lands—Notice of desistment.*]—*Held*, that a railway company having desisted once from their notice to take land given under R. S. O. ch. 165, sec. 20, could not again desist pending an arbitration proceeding under a second notice.

The company's arbitrator having withdrawn from such arbitration, in deference to a notice of desistment given by the company, after the amount to be awarded had been agreed upon by the other two.

*Held*, that the company could not object to the award on the ground that he had not been asked to sign it. *Moore* v. *Central Ontario R. W. Co.*, 647.

[Appealed and stands for argument.]

4. *Railway — Overhead bridge—Death therefrom—Illegitimate son—44 Vic. ch. 22, O.*]—The plaintiff, as administratrix, sued the defendants, under 44 Vic. ch. 22, sec. 7, O., for the death of her illegitimate son, a brakesman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that Act, while on one of their trains passing underneath it.

The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised the bridge.

*Held*, that the plaintiff was not entitled to recover (1), because section 7 of the Act applies only to bridges within the control of the company whose servant has been injured, and (2) the Act was intended to give no greater right to recover than Lord Campbell's Act, and therefore the plaintiff's relationship to the deceased prevented her recovery. *Gibson* v. *Midland R. W. Co.*, 658.

## REASONABLE AND PROBABLE CAUSE.

*See* TRESPASS.

## REDEMPTION.

*See* MORTGAGE, 3, 4.

## REGISTRATION.

*By-law.*] — *See* MUNICIPAL CORPORATIONS, 3.

## RE INSURANCE.

*See* INSURANCE, 4, 5.

## RELIEF.

*Prayer for general.*]—*See* PLEADING, 1.

## REPAIR.

*Drains.*]—*See* MUNICIPAL CORPORATIONS, 2.

## RES JUDICATA.

*See* ARBITRATION AND AWARD, 1.

## RIGHT OF WAY.

*See* WAYS, 1.

## ROAD.

*See* WAYS.

## SALE.

*By sheriff—Purchase by judgment creditor.*]—*See* BANKRUPTCY AND INSOLVENCY, 3.

*Notice of.*]—*See* MORTGAGE, 5.

*See* BILLS OF SALE AND CHATTEL MORTGAGES.

## SALE OF GOODS.

*Contract to deliver goods—Refusal to pay as agreed—Right to refuse further delivery—Abandonment of contract—Counter claim—Damages for non-delivery—Contract by letters.*]—The plaintiffs agreed to deliver to the defendant from 1300 to 1500 tons of old iron rails—"cash on delivery of each 100 tons, or with privilege of drawing against them as may be agreed on between us as they are shipped." On 17th February, 1880, the plaintiffs having delivered 1150 tons sent an account of shipments drew for $1500, which the

defendants on the 21st refused to accept, erroneously, as they afterwards admitted, asserting that two carloads, price $333, had not been received, and adding, "You should deliver the balance due on contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount that we think it not unreasonable to ask this." There was a silence for some time, though the parties were in correspondence about another contract, and on the 5th June, 1880, the plaintiffs wrote: "We shall now soon be able to complete the delivery of the old rails," and they went on to refer to the contemplated contract. In answer the defendants' agent referred to the other contract, but said nothing about the completion of the present one. On August 20th the plaintiffs again drew for the price of the amount delivered, and acceptance was refused for the same reasons as before. The plaintiffs sued for the price of the iron delivered, and the defendants counter-claimed for damages for the non-delivery of the difference between the iron delivered and 1300 tons.

*Held*, reversing the judgment of Osler, J., on this point, at the trial, HAGARTY, C. J., dissenting, that the plaintiffs were not justified in treating the defendants' letter of the 21st and their conduct as shewing that they considered the contract at an end, and refused further performance of it, for they could not, after the letter of the 21st February have sued for breach thereof, in not accepting the remaining 150 tons; and that while the defendants were liable for the price of the amount delivered, they were entitled to judgment on their counter-claim for damages caused by the failure of the plaintiffs to deliver the balance.

The plaintiffs claimed damages for non-acceptance of iron under another contract.

*Held, per* OSLER, J., upon the evidence and correspondence, set out in the case, that no concluded contract was shewn, and if it had been, the plaintiffs could not have recovered; for 1. They had transferred the contract, and 2. They made default in delivery at the time agreed upon. *Midland R. W. Co.* v. *Ontario Rolling Mills Co.*, 1.

[Appealed and stands for argument.]

*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

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## SALE OF LAND.

*Statute of Frauds — "Vendor."*]—Where a written agreement for the sale of land contained following condition of sale: "The vendor shall have the option of a reserved bid, which is now placed in the hands of the auctioneer," and the reserved bid was worded as follows: "*Re* sale of Allan Wilmot's farm; reserved bid, $105 per acre."

*Held*, that the above words, even though read together, as they should be, did not so identify the vendor as to satisfy the Statute of Frauds.

"Vendor" is not a sufficient description of the party selling to satisfy the requirements of the said statute. *Wilmot* v. *Stalker*, 78.

2. *Agreement — Uncertainty—Recovery of instalment—Tender of conveyance—Title.*]—By an agreement for the sale of land for $60,000, $4,000 was to be paid on the execution of the agreement, $40,795 with-

in sixty days thereafter, and the balance to remain on mortgage. The purchasers paid the $4,000, but refused to pay the $40,795. to recover which this action was brought.

*Held*, that the provision as to the mortgage not stating when it was to be payable, did not render the agreement void for uncertainty.

*Held*, also, that the plaintiff could recover the $40,795, without tendering a conveyance of the land, for that his right thereto was an independent right, and not a concurrent act with the tendering such conveyance; and at all events it was the purchasers' duty to prepare and tender the conveyance; that it was unnecessary for the plaintiff to aver and shew that he had a good title, for he was only required to make a good title when he could be called upon to do so, which could not be until the last instalment was demanded or defendant shewed his readiness and willingness to arrange that according to the contract; and that it was therefore no defence to aver that the plaintiff could not give a good title. *McDonald* v. *Murray et al.*, 573.

[Appealed and stands for argument.

3. *Statute of Frauds—Evidence—Suit for specific performance—Deed executed, but not delivered.*]—When A., whose wife owned a certain freehold property on St. George street, wrote to B., the owner of a certain leasehold property on King street, with reference to the said properties, as follows: "If you will assume my mortgage, and pay me in cash $3,750; I will assume your mortgage of $5,000 on the leasehold:" and B. replied, "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms:"

*Held*, not a sufficient memorandum of the contract to satisfy the Statute of Frauds.

*Held*, also, in a suit brought for the specific performance of the above contract by B., correspondence between the solicitors of the parties of a date subsequent to the date of the above letters, as also the requisitions respecting title which passed between the solicitors, were inadmissible in evidence.

*Held*, further, the fact that A's wife had signed a conveyance of the land in question to B. which conveyance had never been delivered, and did not, by recital or otherwise, set forth the contract relied on, could not assist B. in the suit for specific performance. *McClung* v. *McCracken et al.*, 609.

4. *Assumption of mortgage by purchaser—Liability to pay off and protect vendor.*]—M. conveyed land to the plaintiff subject to a mortgage to the T. & L. Co. for $2,000, and one to C. for $500, which the plaintiff covenanted to pay and save M. harmless therefrom. The plaintiff then conveyed to the defendant in consideration of "$1,050 and assuming the payment of the mortgages' aforesaid. The defendant gave back a mortgage for the balance of purchase money. He went into possession and paid some interest on the T. & L. Co. mortgage. Subsequently a new arrangement was made and the defendant's mortgage was discharged and a mortgage for $1,850 was given by the defendant to the plaintiff which included the amount of three promissory notes for $350, and other items besides the balance of the purchase money.

There was no covenant for payment therein. The T. & L. Co. mortgage fell due and was not paid, and the plaintiff paid C.'s mortgage of $500.

*Held*, that the defendant was bound to pay off the T. & L. Co. mortgage and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon. *Canavan* v. *Meek*, 636.

*For taxes*]—*See* ASSESSMENT AND TAXES.

*See* FRAUD AND MISREPRESENTATION, 4.

## SCHOOL TRUSTEES.

*See* PUBLIC SCHOOLS.

## SEDUCTION.

*Marriage to third party during pregnancy—Cause of action—Evidence of daughter and husband—Admissibility of.*]—Where an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete, and cannot be divested by the subsequent marriage of his daughter before birth of a child. The facts of seduction, pregnancy, and illness might be proved by the daughter, but might refuse to answer as to who was the cause of her pregnancy if she asserted that the child she bore was born in wedlock.

But where the daughter was married to a third person during her pregnancy consequent upon her seduction by the defendant, and her child was born in wedlock, and the action was brought at the instigation of the husband, he and his wife being the only witnesses, and no proof of sickness or inability to serve was given:

*Held*, ARMOUR, J., dissenting, that a nonsuit was properly entered.

*Per* ARMOUR, J.—If loss of service was necessary to be proved, a new trial should be granted for that purpose; and it cannot be said that under such circumstances a father sustains no damages apart from the loss of service. *Evans* v. *Watt*, 166.

## SEPARATE ESTATE.

*See* COMPROMISING. — HUSBAND AND WIFE, 2, 3.

## SEPARATE TRADE.

*See* HUSBAND AND WIFE, 2.

## SERVICE.

*R. S. O. ch.* 104.]—*See* MORTGAGE, 5.

## SHAREHOLDERS.

*See* FRAUD AND MISREPRESENTATION, 1.—RAILWAYS AND RAILWAY COMPANIES, 2.

## SHERIFF.

*Sale by—Purchase by judgment creditor.*]—*See* BANKRUPTCY AND INSOLVENCY, 3.

## SHIPPING.

*Carriers by water — Refusal of passenger to pay fare—Assault and imprisonment by purser—Liability*

*of master for act of servant—Summary conviction—Civil remedy.*]—The plaintiff who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured.

*Held*, OSLER, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act.

It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid.

*Per* WILSON, C. J. — This, under 32-33 Vic. ch. 20, sec. 45, D., through a release to the purser, did not constitute any bar to the present action against the company.

*Held*, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Emerson* v. *Niagara Navigation Co.*, 528.

## SOCIETIES.

*See* CORPORATIONS, 2.

## SOLICITOR.

*Costs between solicitor and client.*]—*See* EXECUTORS AND ADMINISTRATORS.

*See* ATTORNEY AND SOLICITOR.—INSURANCE, 6.—MORTGAGE, 5.

## SON.

*Illegitimate — Action for death of.*]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

## SPECIFIC PERFORMANCE.

*See* PARTNERSHIP—PLEADING, 2—SALE OF LAND, 3.

## STATUTE OF FRAUDS.

*See* FRAUDS, STATUTE OF.

## STATUTES, CONSTRUCTION OF.

*C. S. U. C. ch.* 22]—*See* TRESPASS.

*C. S. U. C. ch.* 105.]—*See* TRESPASS.

25 *Vic. ch.* 22.]—*See* TRESPASS.

31 *Vic. ch.* 40, *sec.* 21, O.]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

32 & 33 Vic. ch. 20, sec. 45, D.]—*See* SHIPPING.

32 & 33 *Vic. ch.* 31 *sec.* 25,]—*See* TEMPERANCE ACT, 1878.

32 & 33 Vic. ch. 32, sec. 2, sub-sec. 6, D.]—*See* BAWDY HOUSE.

33 *Vic. ch.* 27, *sec.* 2.]—*See* TRESPASS.

36 *Vic. ch.* 18, *secs.* 12, 13.]—*See* LIMITATIONS, STATUTE OF, 2.

38 *Vic. ch.* 16, D.,—*See* BANKRUPTCY AND INSOLVENCY, 2.

38 *Vic. ch.* 56, *sec.* 13, O.]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

*R. S. O. ch.* 42, *secs.* 13, 16, 17.]—*See* CONSTITUTIONAL LAW.

*R. S. O. ch.* 47, *sec.* 19.]—*See* CONSTITUTIONAL LAW.

*R. S. O.* ch. 50, sec. 189.]—*See* ARBITRATION AND AWARD, 2.

*R. S. O. ch.* 51, *secs.* 29, 30.]—*See* IMPROVEMENTS.

*R. S O.* ch. 104.]—*See* MORTGAGE, 5.

*R. S. O.* ch. 105, sec. 27.]—*See* MORTGAGE, 4.

*R. S. O, ch.* 108, *sec.* 5, *sub-secs.* 7, 8, 11, 19, 20, 43.]—*See* MORTGAGE, 4.—LIMITATIONS, STATUTE OF, 3.

*R. S. O. ch.* 116, *sec.* 5.]—*See* CARRIERS.

*R. S. O. ch.* 118.]—*See* BANKRUPTCY AND INSOLVENCY, 3, 4.

*R. S. O. ch.* 119.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

*R. S. O. ch.* 125, *sec.* 1.]—*See* HUSBAND AND WIFE, 3.

*R. S. O. ch* 127, *secs.* 13, 14.]—*See* LIMITATIONS, STATUTE OF.

*R. S. O. ch.* 128, *sec.* 13.]—*See* LIMITATIONS, STATUTE OF.

*R. S. O. ch.* 140, *sec.* 35.]—*See* ATTORNEY AND SOLICITOR,

*R. S. O. ch.* 150.]—*See* CORPORATIONS, 1.

*R. S. O, ch.* 161.]—*See* INSURANCE, 3, 6.

*R. S. O. ch.* 165, *sec.* 20.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

*R. S. O. ch.* 174, *secs.* 456, 504, 525, 542, 543.]—*See* MUNICIPAL CORPORATIONS, 2, 3.

42 Vic. ch. 9, sec. 25, sub-sec. 4, D.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

42 *Vic. ch.* 44, D.]—*See* CRIMINAL LAW.

44 *Vic. ch.* 22, *sec.* 7, O.]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

44 *Vic. ch.* 74, *sec.* 14, O.]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

46 Vic. ch. 6, O.]—*See* CARRIERS.

## STATUTORY CONDITIONS.

*See* INSURANCE, 2, 4, 5.

## SUB-CONTRACTOR.

*See* MECHANICS' LIEN.

## SUBROGATION.

*See* INSURANCE, 1.

## SUMMARY CONVICTION.

*See* SHIPPING.

## SURVEY.

*Unskilful.*]—*See* IMPROVEMENTS.

## TAXES.

*See* ASSESSMENT AND TAXES.

## TAXATION.

*Of costs.*]—*See* ATTORNEY AND SOLICITOR.

## TEMPERANCE ACT, 1878.

*Canada Temperance Act*, 1878—*Conviction—Hard labour—Proof of Act being in force—Jurisdiction of magistrate — Certiorari — Several offences.*]—The defendant was convicted of selling intoxicating liquor

contrary to the Canada Temperance Act, 1878, upon an information charging him with keeping, selling, bartering, and otherwise unlawfully disposing of liquor. He was adjudged to pay a fine of $50, and $5.20 costs, and in default of payment and of sufficient distress, he was adjudged to be imprisioned in the common gaol at *hard* labour. A second record of the conviction, bearing the same date as the first, was filed, differing in some minor points from the first, and omitting the adjudication as to hard labour, and adjudging the payment of $5.27 costs. The proceedings having been removed by *certiorari*,

*Held*, that the first conviction was bad for want of jurisdiction to impose hard labour, which was not authorized by the Act, and that the second was bad in not following the actual adjudication as to costs, which were, as shewn by the magistrate's minute, $5.20, and not $5.27.

The Canada Temperance Act does not *per se* make the selling of intoxicating liquor an offence; it is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part, which proceedings cannot be judicially noticed but must be proved, and in the absence of such proof the magistrate acts without jurisdiction.

*Held*, therefore, that the convictions were bad, for they did not allege that the Act was in force, nor was it proved otherwise, and therefore, as the jurisdiction of the magistrate did not appear, the writ of *certiorari* was not taken away by sec. 111 of the Act.

*Quære*, whether the convictions were not also open to objection on the ground that the information embraced more than one offence, and whether the magistrate having, in this respect, disregarded the express directions of the Act 32-33 Vic. ch. 31, sec. 25, made applicable by the Canada Temperance Act, he might not be said to have acted without jurisdiction.

*Quære*, whether sec. 111 takes away the *certiorari* in all cases, or only in cases coming under sec. 110. *Regina* v. *Walsh*, 206,

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## TENANT AT WILL.

*See* LIMITATIONS, STATUTE OF, 3.

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## TENDER.

*Of conveyance.*]—*See* SALE OF LAND, 2.

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## TITLE.

*Mistake.*]—*See* ASSESSMENT AND TAXES.

*See* FRAUD AND MISRESENTATION, 3.—SALE OF LAND, 2.

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## TRADE.

*Stock in.*]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

*Separate.*]—*See* HUSBAND AND WIFE, 2.

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## TRADE AND COMMERCE.

*See* CARRIERS.

## TRESPASS.

*Fair and reasonable supposition—C. S. U. C. ch.* 105—*25 Vic. ch.* 32–33 *Vic. ch.* 27, *sec.* 2—*Conviction—Certiorari.*]—The defendants were convvicted of a trespass under C. S. U. C. ch. 105, as amended by 25 Vic. ch. 22. They appealed to the Sessions, which affirmed the conviction. The conviction was then brought into this Court, and a motion was made to quash it on the ground of want of jurisdiction in the convicting Justice, inasmuch as it appeared by the evidence, and by affidavits filed, that the defendants acted under a fair and reasonable supposition that they had the right to do the acts complained of within the meaning of the above statutes.

*Held*, that that was a fact to be adjudicated upon by the convicting Justice upon the evidence, and, therefore, that a *certiorari* would not lie for want of jurisdiction. *Regina* v. *Malcolm et al.*, 511.

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## TRIAL.

*Agreement at, subsequent enforcement of.*]—*See* ARBITRATION AND AWARD, 1.

*Questions between defendant and third party—Delaying plaintiff.*]—*See* PARTIES.

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## TRUSTEE.

*See* BANKRUPTCY AND INSOLVENCY, 4.—LIMITATIONS, STATUTE OF, 3.

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## ULTRA VIRES.

*See* CARRIERS. — CONSTITUTIONAL LAW.—MUNICIPAL CORPORATIONS, 3.

## UNCERTAINTY.

*See* SALE OF LAND, 2.

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## VARIATIONS.

*Statutory conditions.*]—*See* INSURANCE, 2.

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## VENDOR.

*Description of party.*]*See* SALE OF LAND, 1.

*Liability to protect.*]—*See* SALE OF LAND, 4.

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## VOTING.

*Bondholders — Right to vote as shareholders.*]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

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## WAIVER.

*See* PUBLIC SCHOOLS. — INSURANCE, 4.

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## WARRANT.

*Northwest mounted police — Assignment of — Misrepresentation.*]—*See* FRAUD AND MISREPRESENTATION, 2.

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## WATER.

*Carriers.*]—*See* SHIPPING.

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## WAYS.

1. *Right of way—Way of necessity—"Premises"—Parties—Amendment.*]—Where C., by deed, conveyed certain land to S., who owned certain land adjoining the land of C., but not

adjoining the land now conveyed, and the deed proceeded, "And I further convey the right of way to cross my land * * from the highway * * to the land owned by S., * * to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of S., his heirs and assigns forever."

*Held*, that the right of way was not a mere way in gross, but became appurtenant to the land of S., generally, and not merely to the land conveyed by the deed.

The word "premises" in a deed may cover not merely the land conveyed, but all that goes before in the deed.

Where C. conveyed to S. land which was inaccessible from the highway without passing over the lands of C., or some other person,

*Held*, that a way of necessity was impliedly granted by C., over his land conveyed to S.,

Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a party to an action claiming such way and

Where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing. *Saylor* v. *Cooper*, 398.

[Appealed and stands for argument.]

*Closing travelled road—Other convenient access to road — Onus of proof—Dedication.*]— The power of a municipal council to close up a road under section 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed.

The onus of shewing that another convenient road is open to the applicant is upon the corporation.

The corporation of East Whitby by by-law closed up an old travelled road, whereby the applicant was shut out from ingress to his lands except by a short road leading to the original road allowance, which was now for the first time opened. For some years prior to 1844 the short road was used as a private road for the convenience of persons going to one F.'s place, mills, brewery, and distillery. In 1844 F. conveyed the land on each side of it to his son and son-in-law, but no mention was made of it in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road might be closed up. F. replied that they would still have the short road leading to the road allowance, which would still be opened if the old travelled road were closed.

*Held*, that the latter statement, in connection with the facts of the former user of the road, and of its not having been disposed of when F. disposed of the lands on each side thereof sufficiently shewed the intention to dedicate the short road to the public; that the applicant had therefore another convenient way to his lands, and that the by-law should not be quashed; but, under the circumstances, without costs. *Adams and Corporation of East Whitby*, 473.

*By-law opening.*]—*See* MUNICIPAL CORPORATIONS, 3.

## WIFE.

*See* HUSBAND AND WIFE.

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## WORDS, CONSTRUCTION OF,

"*Adverse claim.*"]—*See* ASSESSMENT AND TAXES.

"*Special circumstances.*"] — *See* ATTORNEY AND SOLICITOR.

"*With or without security.*"] — *See* BANKRUPTCY AND INSOLVENCY, 5.

"*Contractor.*" — *See* MECHANICS' LIEN.

"*In the premises.*"] — *See* RAILWAYS AND RAILWAY COMPANIES, 1.

"*Shareholder.*"]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

"*Vendor.*"]—*See* SALE OF LAND, 1.

"*Premises.*"]—*See* WAYS, 1.

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## WORK AND LABOUR.

*See* LUNATIC.

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## YEAR.

*Delivery of bill after—Special circumstances.*] — See ATTORNEY AND SOLICITOR.

*See* RAILWAYS
NIES, 2.

ALE OF LAND, 1.

WAYS, 1.

LABOUR.

ATIC.

r—*Special cir-*
TTORNEY AND