

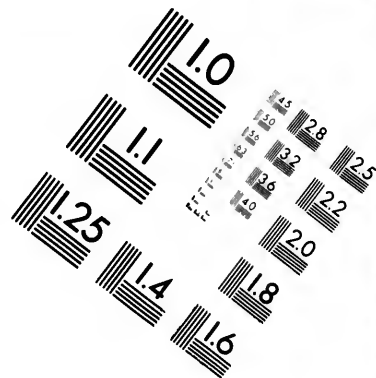
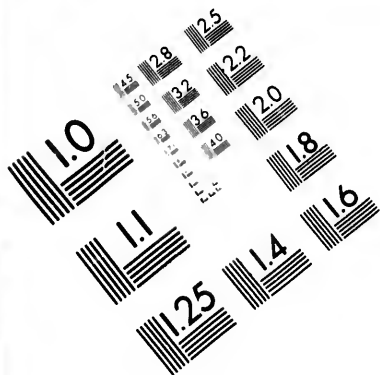
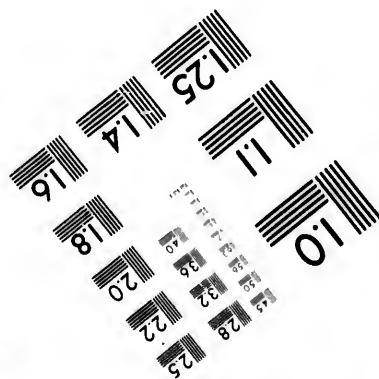
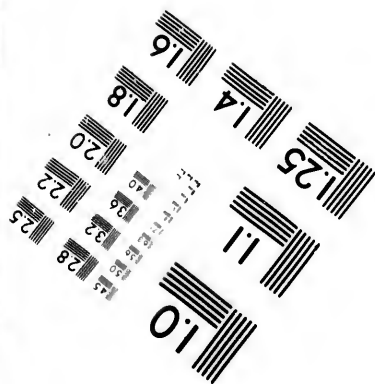
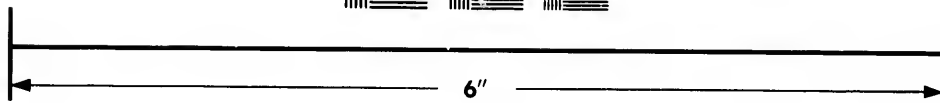
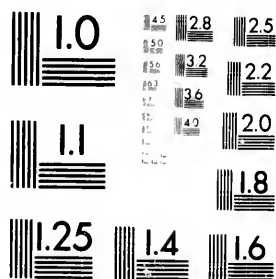


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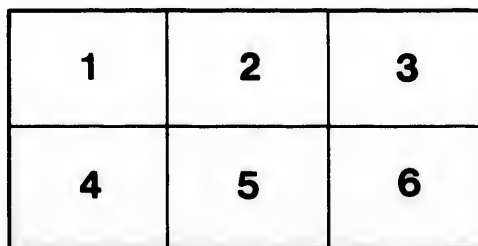
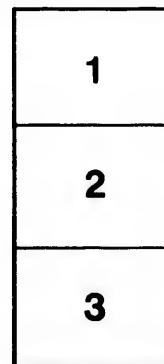
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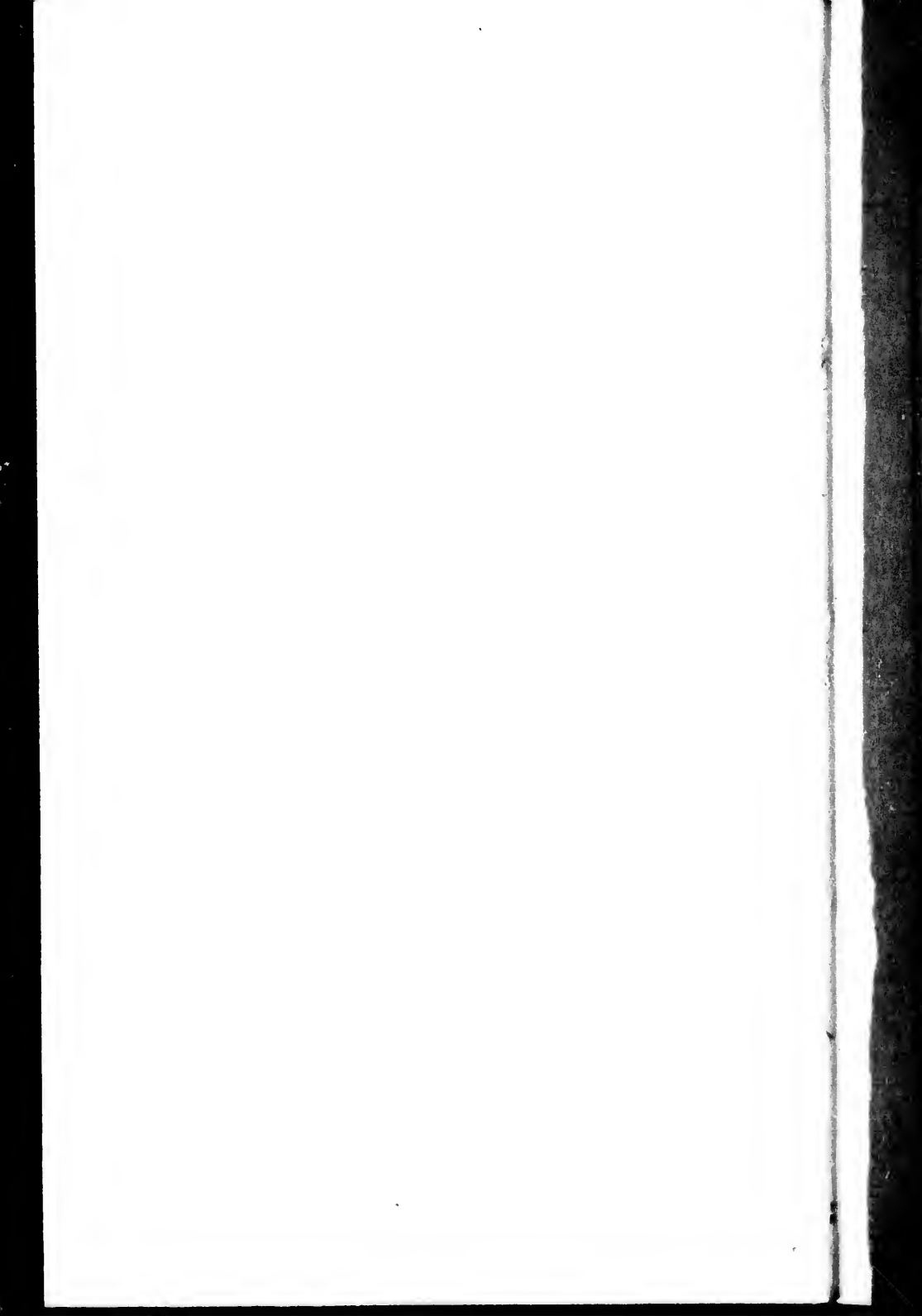
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IN THE SUPREME COURT OF THE
JUDICIAL DISTRICT OF QUEBEC
IN THE CITY OF
STUART VS. BALDWIN

(AN ACTION OF REPLEVIN FOR A HANGAR OF IRON SHEET-PILES
LANDS IN QUEBEC AND SEIZED IN ONTARIO)

Discharged with costs, defendant with calling upon plaintiff to show cause why the seizure should be set aside, and to be set aside and return for the defendant's goods, the defendant having accepted the return of the goods, and removing the same. I, the undersigned, on his part, for and in support of the plaintiff's prescription, my heirs or assigns, and those under whom they stand, the plaintiff, or his heirs or assigns, do hereby certify that the same is true and correct.

The Hon. Ch. J. G. A. Stuart
with the Plaintiff's Counsel

COPY OF THE REPORT OF THE JUDGMENT

OF THE

Court of Queen's Bench for Ontario

IN THE SUIT OF

STUART vs. BALDWIN,

(AN ACTION OF REPLEVIN FOR A CARGO OF IRON ORE MINED ON
LANDS IN QUEBEC AND SEIZED IN ONTARIO),

Discharging, with costs, defendant's rule calling upon the plaintiff to shew cause why the verdict, rendered in his favour, should not be set aside and entered for the defendant on six several grounds specified, the defendant having attempted to justify his mining and removing the ore: 1st. By alleged possession of the premises, *in good faith*, on his part, for upwards of a year and a day; 2nd. By the long prescription, by means of an alleged possession by himself and those under whom he held for a period of upwards of thirty years: the plaintiff, on the other hand, contending, as to the ~~just~~ possession referred to, that it was *not in good faith*, and that, even if it were, it did not warrant his appropriating to himself as *fruits* of the land, ore from a mine which had not been previously opened and worked; and as to the second possession set up, that the defendant, as well as those under whom he held, were, in fact, mere tenants of the plaintiff and those under whom he claims, the defendant's original *anteur* (the father of his vendors) having died in 1854 as a tenant, in possession under a lease, which he had accepted in 1847, from the representative of the estate of the plaintiff's original *anteur*, terminable upon six month's notice, (which had, in fact never been given), and which lease he never repudiated; whereas, by the law of Quebec, (unlike that of Ontario in that respect) *once a tenant always a tenant* until the contrary is proved, and the title of a possessor of lands being no better than that of the party under whom he claims.

N.B.—The within comprises pages from 446 to 484 (both inclusive) of Volume XLI. of the Queen's Bench Reports of Ontario.

TORONTO:

ROWSELL & HUTCHISON, 76 KING STREET,

1878.

1878
(18)

STUART V. BALDWIN.

Will—Construction—Power to sell—Ore severed from the land—Law of Quebec—Effect of upon the rights to such ore—Case stated under Imp. Stat. 22 & 23 Vic. c. 63—"Bona fide possessor" of land.

Replevin for iron ore taken from land in the province of Quebec. It appeared that R., the patentee of the land, by his will, made in 1829, authorized his executors to sell and convey all his estate, real and personal, for such considerations, upon such terms, and in such manner as they might judge best, and bequeathed the proceeds to different persons. Four executors were named, of whom only two proved the will, and the last of these two died in 1861. Administration with the will annexed was granted on the 20th of May, 1873, to E. S., who conveyed to the plaintiff on the 31st of May.

Held, that under 36 Vic. ch. 20, sec. 40, O., E. S. clearly had power to sell to the plaintiff.

Before the execution of this deed the ore in question had been severed from the land, but the deed purported to convey not only the land, but all iron and other ores which might have been at any time severed from the land. *Held*, that the ores passed by this conveyance: for though a chattel, and the conveyance would not, except in equity, pass the legal title to it, yet the heir in whom it was vested would be a trustee for the administrator, the donee of the power, and it might be presumed that such donee, as *cestui que trust*, had authority from the heir as trustee to dispose of it.

The land was situate in the province of Quebec, and a case was sent, under the Imperial Statute 22 & 23 Vic. ch. 63, for the opinion of the Court of Queen's Bench there. That Court decided, thereupon, that the deed by the administrator passed the land and ores to the plaintiff: that defendant had no title sufficient to defeat it: that a certain judgment, set out in the case, recovered by the defendant against the plaintiff there, had no effect upon the plaintiff's title; and that the plaintiff by their law could maintain an action for both the land and the ore, before the ore was removed from that province, but not for the ore until the title, if in dispute, had been established by a petitory action to which the action for the ore would be incident. *Held*, that the inability to sue for the ore there, except as incidental to the right to the land or after it had been determined, formed no reason why our Court here should not adjudicate with respect to the ore.

Remarks as to the meaning of the term *bona fide* possessor of land; and *Quære*, whether the defendant could claim to be so.

REPLEVIN for iron ore.

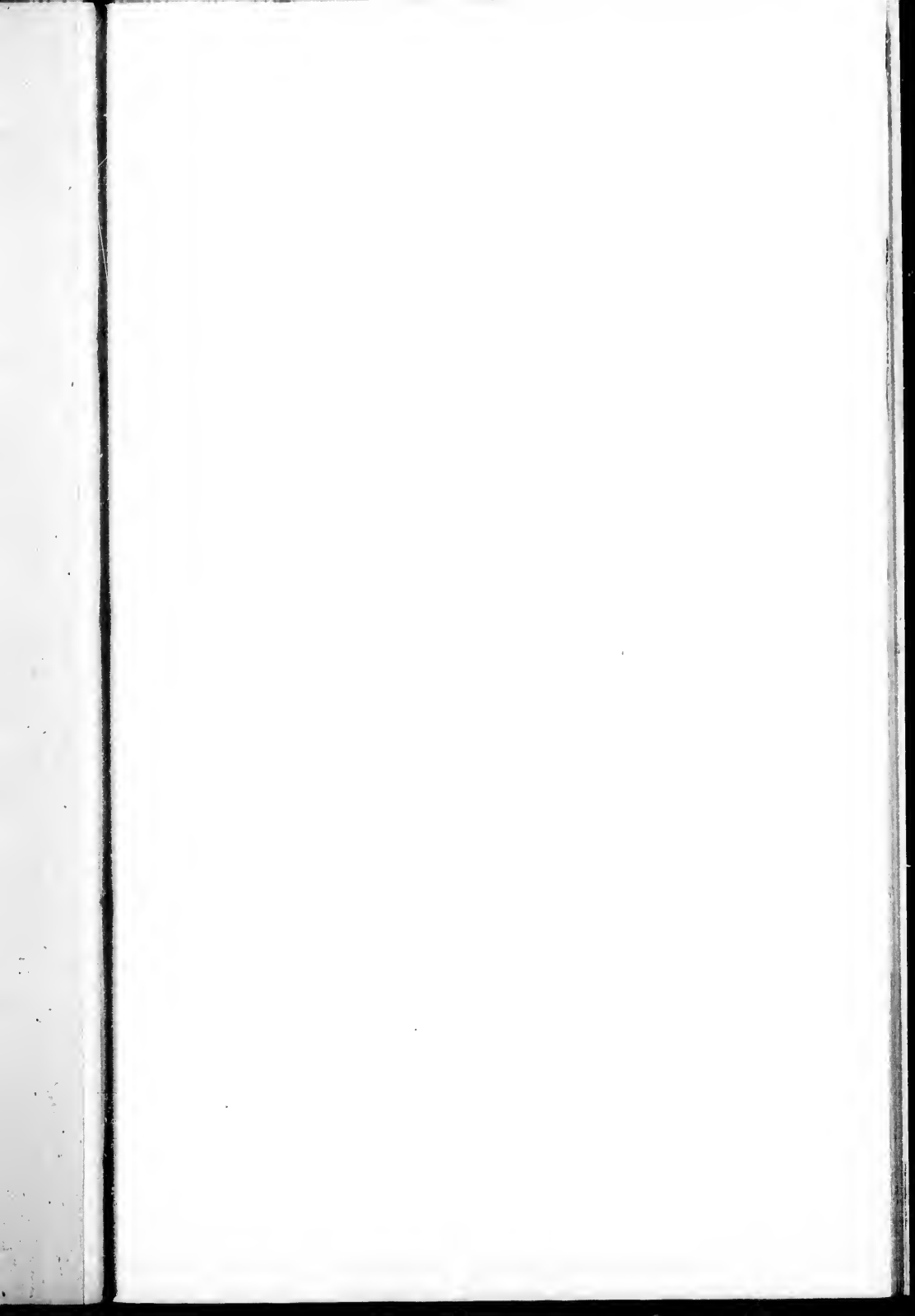
Pleas, *non detinet*, and goods not plaintiff's.

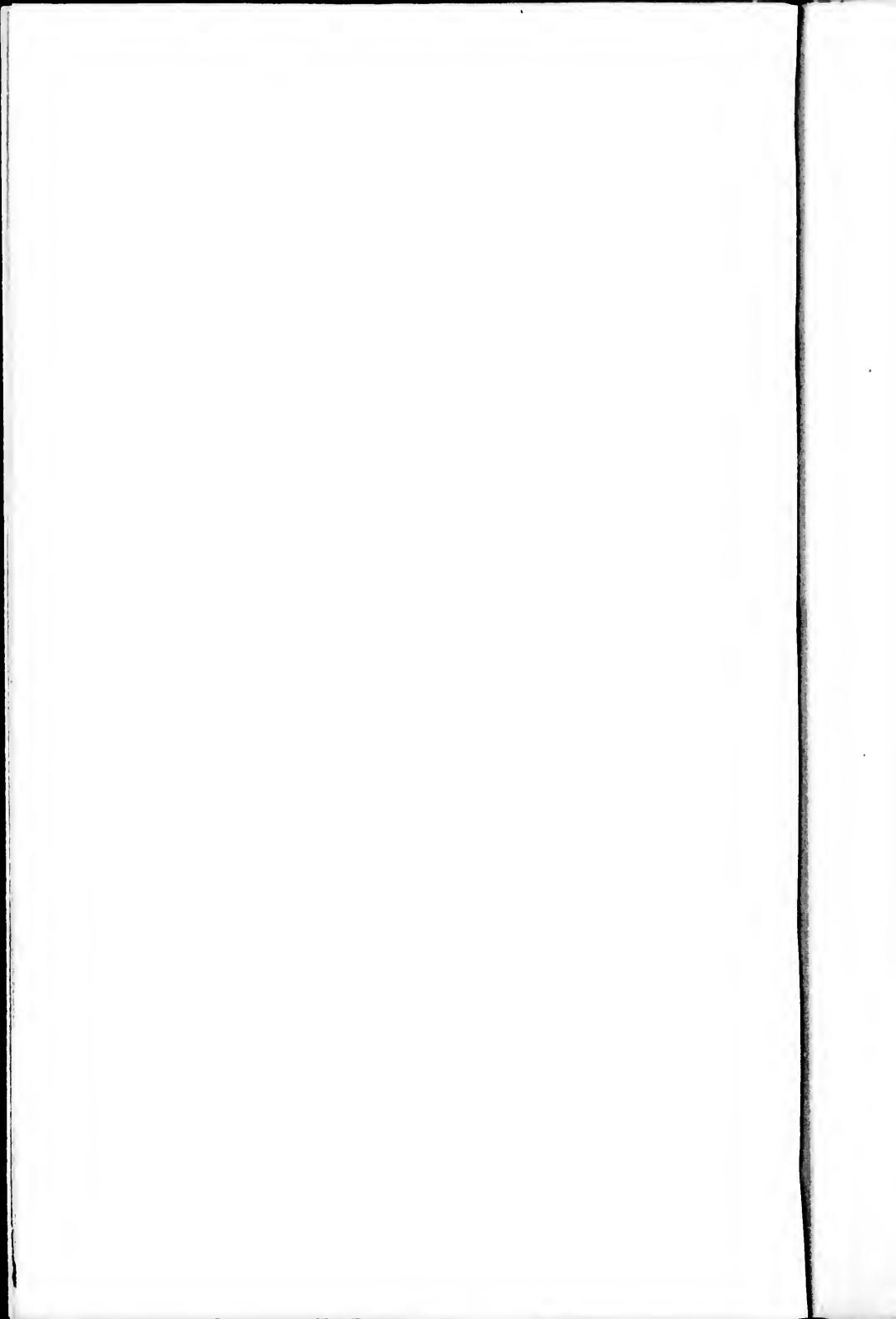
Issue.

The cause was tried at the Fall Assizes, at Ottawa, 1875, before Patterson, J., without a jury.

The ore was taken from lots 12 and 13, in the 6th range of the township of Hull, in the Province of Quebec.

17547





The patent of the same with other lands was made to Robert Randall, dated the 21st of September, 1807, in fee.

The will of Robert Randall, dated the 2nd of March, 1829, was produced, and the codicil dated the 1st of May, 1834; and the probate of the will and codicil granted in the Probate Court of Ontario, on the 7th of June, 1834, to William Lyon McKenzie and Thomas Horner, two of the four executors named in the will.

There was power given to the executors or the majority of them, or the survivor, to sell real estate; proceeds bequeathed—residue to be apportioned, &c.

There was also produced letters of administration with the will and codicil annexed, granted on the 20th of May, 1873, to Edwin Smith; and a deed from Edwin Smith to the plaintiff of the land in question, with other land, in fee, dated the 31st of May, 1873. The deed expressly assigned ores and timber detached.

The plaintiff, on the 4th of June, 1873, served a written demand on the defendant for the ores taken from the land, and he told him not to remove them.

The ore in question in this cause was that which was shipped on the barges "Delta" and "Thistle," on the 5th of June, 1873, and on the barge Shamrock on the day after.

The ore was put on board the schooner "Clara Youell," and the ore was taken while the schooner was in the Welland canal, with it on board:

A great deal of evidence was given by the plaintiff to prove the handwriting of Robert Randall, so as to establish the will and codicil; and a great deal of evidence to shew that the ore claimed came from the lands before mentioned, or from what was called "The Baldwin Mine," as distinguished from "The Forsyth Mine," which was on other lands, and which latter mine the defendant did own. The plaintiff gave \$12,500 for the lands; he had paid \$750, and the land was mortgaged for the purchase money. He knew when he bought that the defendant was in possession of the land, and that he had opened the mine, and had expended money in doing that.

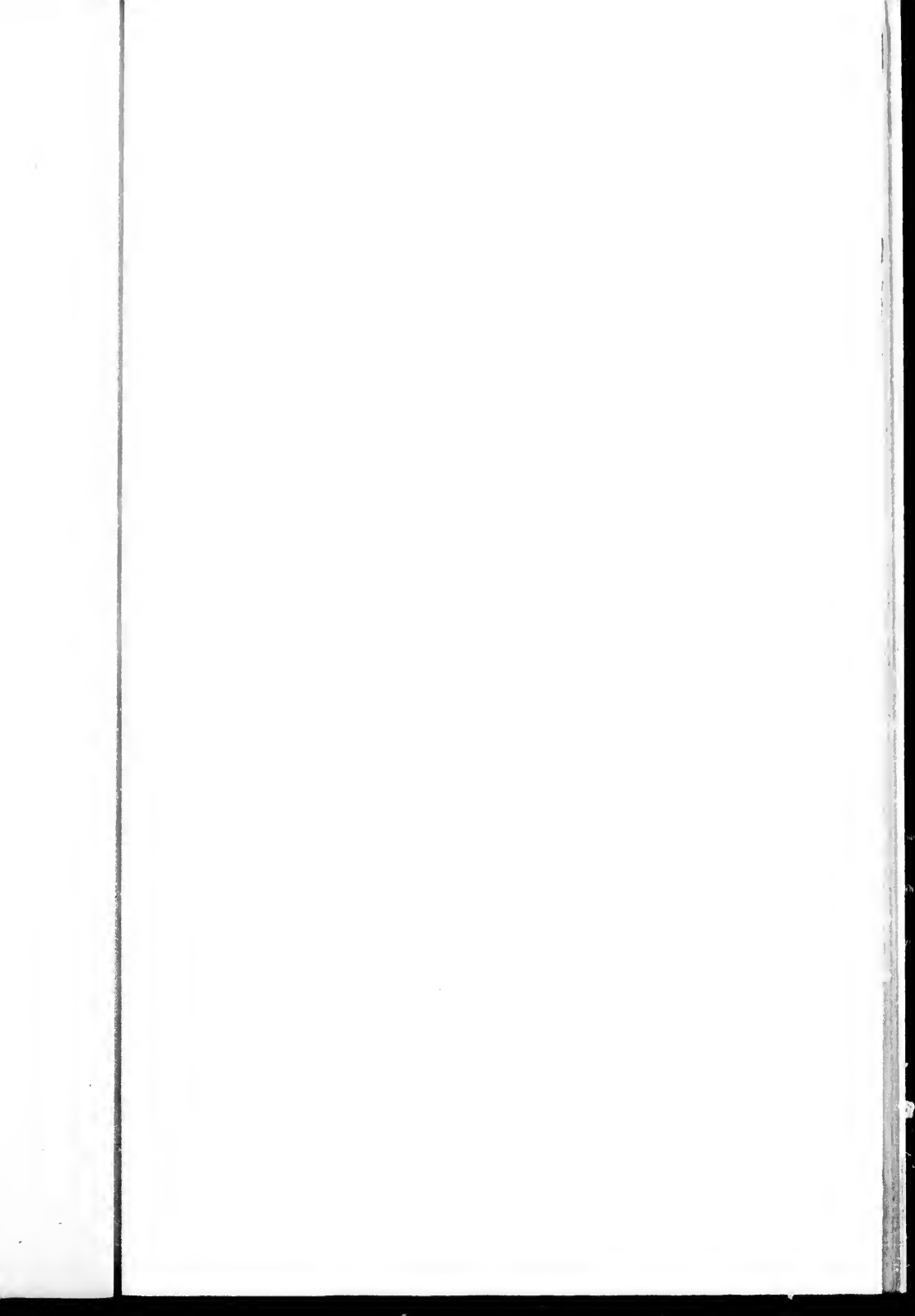
The penalty of the bond, on which the administration was issued to Edwin Smith, is only \$5000.

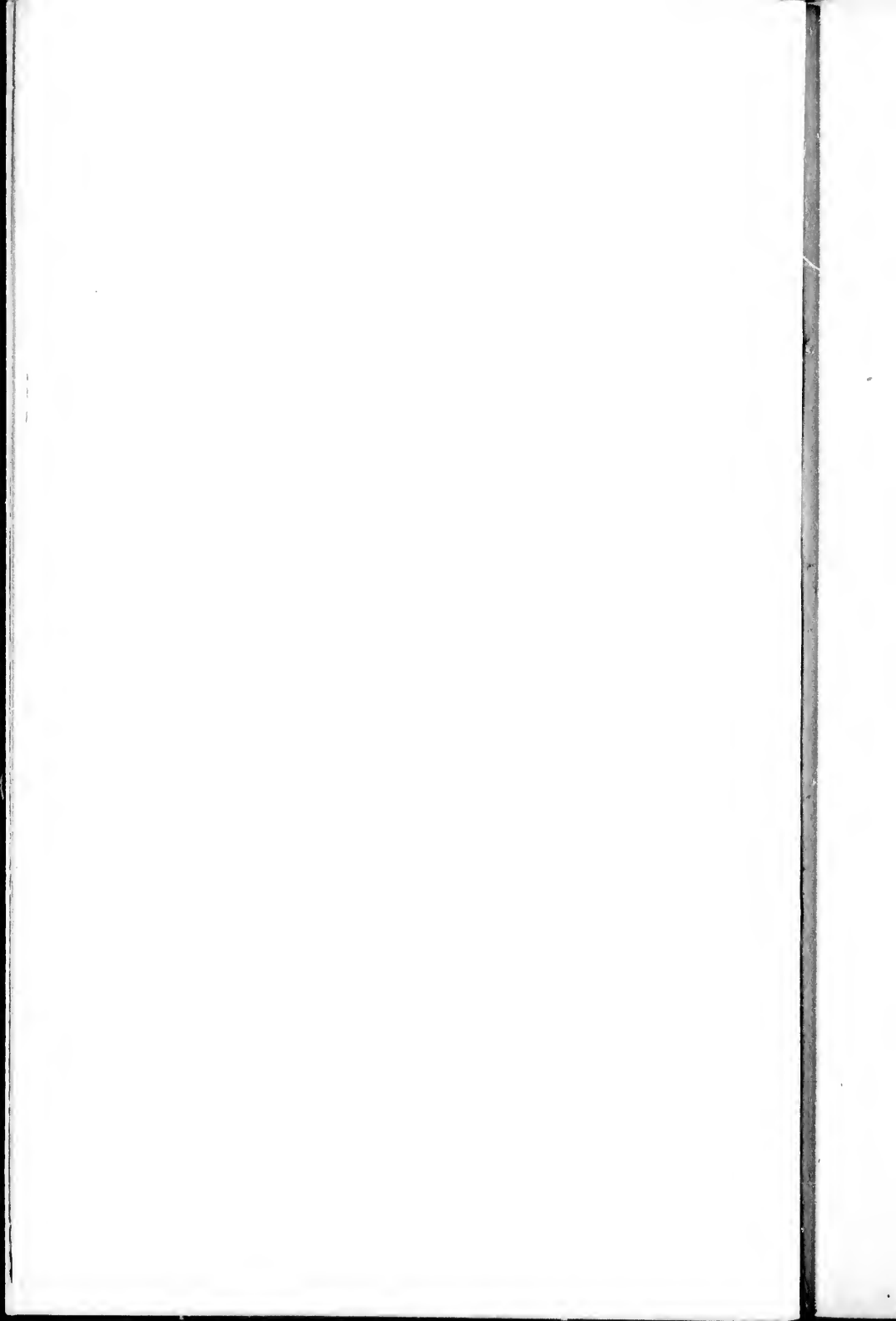
At the close of the plaintiff's case, the defendant's counsel moved for a nonsuit, because he contended that more evidence should have been given, to make a case to be stated for the opinion of a Court in the Province of Quebec, under the Imperial Statute 22 & 23 Vic. ch. 63; and to shew what the law of the Province of Quebec was and is, and whether it was different from the law of Ontario; 2. Because it was not shewn the patentee, Robert Randall, was the same Robert Randall who made the will and codicil; 3. Because the power under the will had not been properly exercised—the administrator, with the will and codicil annexed, Edwin Smith, could not under the 36 Vic. ch. 20, O., convey lands under the will and codicil, even in Ontario; but at all events he could not convey lands in Quebec, for the statute could not regulate the conveyance of lands in Quebec; nor could it have any force beyond the limits of the Province of Ontario; 4. Because the letters of administration were improperly issued; for the reason, among others, that the will proved not to have been produced in the Surrogate Court, and there was, therefore, no proper proof of the will; and, 5. Because the ore seized had not been identified as any part of the ore taken from the lands already mentioned.

The first objection was overruled, because it might be assumed, at that stage of the case, that the law was the same as to the matters in this suit in Quebec as it was in Ontario.

It was also stated that the trial was had on an understanding between the parties, that it was merely to find facts for the opinion of the Court in Quebec upon them, under the Imperial Statute. The other objections were merely noted and not ruled upon.

The defence was as follows, so far as it is material. The defendant was called. He stated: I have been in possession of the lots since the fall of 1871; from the date of the deeds, whatever date that is, I paid for the





lands, \$20,000 for 25 acres for the mine; and \$5 an acre for the mountain land, 149½ acres. The land was only valuable for mining purposes. Since purchasing, I have expended in opening up the mine, and before I began to mine, from \$5,000 to \$8,000. No one objected or disturbed me until the ore was seized at the dock, and the cargo in question was seized. The ore at the dock was seized under process from the Quebec Courts. The notice I received four or five days before the seizure, was the first intimation of objection I had. I brought an action against the plaintiff for the seizure of the ore at the Gatineau, in the Superior Court of the District of Ottawa, in the Province of Quebec. I produce a notarial copy of a deed to me from Charles Pink, Alexander Pink, and Robert Pink, dated the 22nd of November, 1871, covering the mine in question; I now remember that I was in possession the fall before I got the deed, as I had six months to examine the property; I know of my own knowledge that the Pinks had been in possession of the property ever since the winter of 1854-1855.

Cross-examination.—The purchase was made in 1870; the deed was made in 1871; I know all about the Pinks' title, and that it was a title only by possession; I had copies of the Randall deed and other deeds from the registry office; these lots and others were usually called the Randall lots; I could not say that the lots were generally mentioned in the neighbourhood by the name of the Randall property; I did not know the Pinks were in possession as representing the Randall estate; I never heard of that till after the present dispute; there were no improvements on the land, but the timber was cut off; I considered the title was good, or I would not have paid the amount of money I did; I had from ten to twelve men at work before I got any ore.

Alfred Driscoll, a prothonotary of the Superior Court of Quebec, residing at Aylmer, produced an exemplification of a record of that Court in the case of *Baldwin v. Stuart*.

This was produced as a judgment in rem respecting these lands.

In reply, *Jane Dawson*, said :—I am a daughter of the late Robert Bannister of Hull. I live on part of what is called "The Randall Estate"; I believe the plaintiff brought an action to dispossess me.

James Wadsworth, said :—I am a justice of the peace in the county of Ottawa; I live in the township of Hull; I know Robert Bannister; I have seen him write; I could not swear positively to the letter produced, but I think it is his signature; I should think the signature to a lease from Humphrey Culp to one Pink in 1847, now produced, is Bannister's writing; I knew Samuel Pink; I know Charles Pink's writing better than Samuel's; I cannot give an opinion as to the signature of Samuel Pink on the lease; Bannister and I went to the Chats frequently together lumbering; I recognize my own signature to a summons produced, obtained by Ruggles Wright against Samuel Pink on 21st February, 1850; as far as I remember Wright and Pink arranged between themselves; I should say the letter of the 19th February, 1850, is in Charles Pinks writing, addressed to I. H. Culp, Drummondville; it is signed Samuel Pink; if it is any of the Pinks it is Charles's; it is not Samuel's; the letter of 8th March, 1850, signed Samuel Pink, looks like the writing of Charles, and so does the letter of 17th December, 1852.

Cross-examination.—Charles and Samuel Pink were brothers; I cannot say if Samuel was in possession of the lands in question; I know he was living about the mines; Charles was a schoolmaster; I think he lived in Hull; I lived in Aylmer, nine miles above; I think Charles and Samuel are both dead, they would be full as old as I am, say 70 years old, or even perhaps 80 if living now; their families were grown up when they died; Samuel must be dead five or six years; I don't remember whether he or Charles died first; I knew Bannister very well; I could not after so long a time swear positively as to his signature.

Re-examination.—Some lots in Hull of mining property

have been known to the old residents in my time as the Randall property ; I do not know what property it was or whether Pink lived on it ; I heard Bannister say he was an agent for the Randall estate ; some mining property was claimed by the Wrights.

An exemplification signed in 1859 by Charles Fitzgibbon, surrogate clerk, of letters of administration, issued in 1844 to Isaac Humphrey Culp, of the estate of Robert Randall, was put in, and objected to as not legal evidence of the administration.

Daniel Pink, said :—I am a son of the late Charles Pink ; Samuel was my uncle ; Samuel lived on the property called the Randall property ; he is dead 20 or 21 years ; I never heard him say he was agent, nor that he had obtained a lease from any one to cut timber on it ; I know that his son did cut logs on the property.

Cross-examination.—Charles, Alexander and Robert are my cousins and sons of Samuel ; some years ago they lived in possession of the land where the mine is ; they had lived there over twenty years to my knowledge, from their father's death till they made the deed to defendant ; my father died about seven years ago.

John Currie said :—I knew the late Samuel Pink ; I was a connection of his ; I also knew Robert Bannister ; I never heard any conversation between Samuel Pink and Bannister about a lease ; I have heard some of his sons say that they held the property under a lease from Mr. Culp ; Samuel Pink was not present when the sons spoke of the lease ; it was William Henry who spoke of it.

Samuel Pink said :—I am a son of Charles Pink and nephew of Samuel ; as far as I know he went on to it ; I never heard him say he went on under a lease, and I never heard it in his family ; I never saw him write since I was a little boy.

Timothy Moffatt said :—I knew the late Samuel Pink and Charles Pink ; I knew their writing, but it is a long time out of my memory ; in my opinion the signature to the lease is like his hand-writing ; the letter 17th Decem-

ber, 1852, resembles Charles Pink's hand-writing, and so does that of 19th February, 1850; I have no doubt this is the hand-writing of Charles, but I am not sure; as to Samuel's name on the lease I certainly have a doubt as to its being his, though it resembles it; I helped Samuel Pink in 1840 to underbrush some land; he told me that he was in possession, but I do not remember what he told me; the property I understood to be called the Randall estate; Samuel mentioned once to my mother in my presence that he had a lease of the place; I do not remember that he said from whom he had it; I heard in the neighbourhood it was from Mr. Culp; I think Samuel Pink has been dead 25 years; he was a mechanic, and did not do much writing; when I was a boy he used sometimes to take a pen and write in my copy book; he did speak of a lease, I think in my mind it was about the Randall property; it was in 1849 or 1850.

Emanuel Redman said:—I knew Samuel Pink; he bought from me part of lot 13 in the 5th range, which adjoins 13 in the 6th range; he built his house on what he bought from me.

Cross-examination.—I think it was in 1839–1840 or 1841 I first knew Pink to be in possession; I do not remember the building of any house till of late years; there was some underbrushing done in 1841; the Pinks have been in possession ever since, using the place as their own, as I believe, cutting timber, &c., until they sold to defendant.

Re-examination: Since Samuel Pink's death, his sons have built a house and barn on the land; some of the young Pinks lived on it; forty or fifty acres of lot No. 13 have been cleared and cultivated; I do not know in what way they had possession of the rest of the lot; I supposed they held it all; I know the Pinks cut timber all over the land wherever they wanted.

John Currie, re-called, said: The house and barn are on lot No. 12, near the north line; 13 is west of 12.

Cross-examination: The Pinks cut timber over both lots for a number of years, and I have bought wood from

them, and so did others; the wood I bought was on lot 12, close to the new mine; there was no clearing where the mine is till within ten years ago.

Re-examination.—I bought the wood and asked no questions as to their right to the timber; the property was called the Randall property.

Re-cross-examination.—I never heard any but 600 acres (11 in the 5th range and 12 and 13 in the 6th range) called the Randall property.

James Walker said—I knew Samuel Pink; after his death I dealt with his sons; I bought some white pine timber on 400 acres of land they claimed to have there; it was the property I have heard called the Randall property; they sold me the timber as if it were their own property; they said nothing of a lease, or of being agents; they sold to me as if they were owners; it was in February, 1855.

Cross-examination.—I had seen the family in possession of the property for forty-five years; both before and since they sold to me I knew of them selling timber off the land, which was cut and taken to market.

Charles Flynn said: I live in the township of Eardley; I own land in Hull; I was brought up in Hull about a mile from this land; I never heard the property called any particular name; I knew Samuel Pink; I went on the land once, and was chopping and improving; I had been working some four or five days when Samuel Pink told me not to chop any more on it, as he was in charge of it and would not allow it; that was about twenty-seven years ago.

Cross-examination: I think I can be positive he used the words "charge of the place"; I gave up at once.

Joseph Badan and *Charles B. Wright* said: They lived in Hull; that the property was called "The Randall Property." Wright, on cross-examination, said there was a good deal of the property there called "The Wright Property."

Alfred Driscoll said: I am clerk of the Circuit Court; I produce an original record and copy of judgment in a case of William H. Pink against Roger Sparks, in the Circuit

Court, of which I am clerk; the action was to obtain possession of lot 12 in the 6th range of Hull, in which action the plaintiff in that case failed. As prothonotary I produce a copy of judgment in the case of William Lyon McKenzie against William H. Pink, finding that the plaintiff in that case failed to establish his title as the executor of Randall, and the action was dismissed; costs were taxed to the defendant in that suit, and execution issued, a copy of which I produce, against the goods and chattels, lands, and tenements of the plaintiff in that suit; I look at an advertisement in the *Gazette* of the 30th October, 1860, which seems to be a sheriff's advertisement on this execution, and advertising these lands for sale; the sheriff's return is that on behalf of McKenzie the debt and costs were paid to Pink's attorney.

Cross-Examination: The judgment was in favour of Peter Ayler, the attorney, for Pink, and not in favour of Pink for the costs; the attorney gets judgment by way of distraction.

Augustus Keefer said: Mr. Culp, who has been mentioned, lived at Niagara Falls, and married, as I understood, a daughter or granddaughter of Randall; after McKenzie left the country, Culp came down here and represented that he had taken out administration, with will annexed, to Randall's estate; and he put Bannister in charge of the lands, and gave me a power of attorney as to these and other lands to take charge of and sell, lease, &c., on instructions from him; it is dated on 2nd of November, 1848, and I now produce it; previous to that, in July, 1847, there was a license of occupation to Bannister, which I now hold, and under it Bannister was in possession; I knew nothing of any lease to Pink; I have an indistinct recollection of seeing Pink, but no recollection of seeing him in connection with these lands.

Cross-examination: The power of attorney does not describe Culp as administrator; I had a letter of Culp saying that he had given up the lands to McKenzie on the latter's return to this country; it is dated on the 8th of

July, 1850; I produce it; another is dated June, 1850, saying he has surrendered his administration to McKenzie and reported to the Court, but had not transferred the deed of the iron mine, &c.; I left here in 1850.

Re-examination: I never heard before I left here of any one claiming adverse possession of the lands.

John Stuart, re-called, said: The letters of the Pinks which I have produced I received thus; the letters of the 19th of February, 1850, and 8th of March, 1850, I received from Mr. Delisle, who was the attorney of McKenzie in his unsuccessful action against Wm. H. Pink; that of the 17th of December, 1862, I received from Mr. Lindsay, of Toronto, son-in-law to McKenzie, and from whom I received some other papers; I received the lease and the patent also from Mr. Delisle.

At the close of the evidence *O'Connor*, Q. C., for the plaintiff, argued that the plaintiff had established a legal title to the land in question under the patent to Randall, and the will made by him, and the due execution of the powers of the will by Edwin Smith, the administrator with the will annexed; and that he had also shown that the ore, which was claimed, was taken from the land; that the question of possession set up by the defendant must be decided by the Court of Law in Quebec, to which the case might be referred under the statute; that it appeared that Samuel Pink had a lease from a person representing Randall's estate of a portion of the land, with the liberty to cut timber on the rest of it; and that neither he nor any of his sons ever claimed to hold otherwise than as agents or lessees.

Cockburn, Q. C., for the defendant, contended that the plaintiff's title had not been made out; that a case must be stated for the Quebec Court, and the opinion of that Court given upon the law of Quebec, before the cause could be decided; that Court must determine the important questions whether the evidence of possession upon which the defendant relied of Pink and of himself was or was not

a possession in good faith; and whether Pink held or not adversely to the Randall estate title. He denied also that the identity of the testator with that of the patentee had been established, and that the ore in question was proved to have been taken from the land in question.

The learned Judge found the facts as follow :—

By patent, dated 21st September, 1807, the Crown granted to Robert Randall, his heirs and assigns forever, in free and common socage, six hundred acres of land in the township of Hull, being lot No. 11 in the 5th range, and lots 12 and 13 in the 6th range, of that township.

2. The ore in question was taken from lot 13, in the 6th range.

3. Robert Randall made a will, in Upper Canada, where he had his domicile, on 2nd March, 1829, duly executed so as to pass both real and personal estate situated in the Province of Upper Canada, being signed by the hand of the testator in presence of three witnesses, who attested the same by signing their names thereto in the presence of the testator, and in the presence of each other, by which, *inter alia*, he appointed William Lyon MacKenzie, Thomas Hornor, and two others, his executors, and authorized them, or a majority of them, or the survivor or the survivors of them, to sell or convey, by deed or otherwise, all his estate, real or personal, for such consideration, upon such terms, and in such manner as they might judge best; and, from money, to be received from debts collected, or from sales of property, he bequeathed two specific legacies; and directed the remainder of his estate, if any, to be divided into ten equal parts, which he bequeathed in separate shares among a number of persons, including his daughter Levinia Culp, the wife of Isaac Culp, of Stamford, one Edwin Smith, and William L. MacKenzie and Thomas Hornor; and he also made a codicil, on the 1st May 1834, not affecting his Lower Canada lands.

4. Robert Randall died before 7th June, 1834, and, on the last mentioned date the will and codicil were proved in the Probate Court of Upper Canada, by William L. MacKenzie and Thomas Hornor. The probate was registered in the county of Ottawa, in Lower Canada, on 8th January, 1836. On 20th May, 1873, all the executors named in the will being dead, letters of administration, *cum testamento annexo*, were granted by the Surrogate Court of the county of Welland—which was the Court having jurisdiction so to do—to the same Edwin Smith, who was residuary devisee under the will, the administrator giving a bond, an exemplification of which is put in.

5. By the law of Upper Canada, and of Ontario, the executors,

appointed by the will of Robert Randall had power to sell and convey all the real and personal estate of the testator in that Province, and, by an Act of the Legislature of Ontario, passed in the year 1869 (33 Vic. ch. 18), the said Edwin Smith, as administrator, *cum testamento annexo*, had power to convey the real estate, as well as the personal estate, of the testator, and any estate or interest therein, in as full, large, and ample a manner as the executors might have done.

6. Until the passing of the said Act an administrator had no power, in the said Province, to sell freehold lands of a testator or intestate, but had full power of disposition over the personal estate. On the 31st of May, 1873, Edwin Smith, the administrator, made a deed to the plaintiff, conveying to him lots 12 and 13 in the 6th range, and assigning, also, all timber and ores which had been detached or severed from the land. The consideration money for the purchase is \$12,500, which the plaintiff secured to Smith by mortgage on the land, and of which he has paid about \$500.

7. In the winter of 1872-3, the defendant took from lot 13 a large quantity of iron ore, which, during that winter, had been drawn away from the lot, and piled at a distance from the lot, on the bank of the river Gatineau, in the Province of Quebec, where it lay when the deed from Smith to the plaintiff was made.

8. On 4th June, 1873, the plaintiff served defendant with a notice (which is put in), and demanded the ore; shortly after which a portion of the ore—being about 420 tons—was removed by the defendant into the Province of Ontario, and was seized by the plaintiff, in that Province, under a writ of replevin.

9. That ore forms the subject of this suit.

10. The plaintiff has no title to the ore other than the title, if any, conveyed to him by the deed from Edwin Smith.

11. The defendant claims to be entitled to the lands and ore in question, and he has the title, if any, shewn by the following statement of facts, and no other title:

12. In 1847, Thomas Hornor, one of Randall's executors, being dead, and William L. MacKenzie, the other executor who had taken probate, being out of the Province of Canada, Isaac Humphrey Culp—the same person mentioned in the will as Isaac Culp—acted in exercising a general oversight over the estate of Randall. It is not shewn that Culp had any interest or authority other than what belonged to him as the husband of one of the residuary devisees, except that administration was granted to him, *cum testamento annexo*, but expressly limited to the purpose of enabling him to be a party to, and to prosecute, some proceedings in Chancery; and this administration he surrendered on the return of Mr. MacKenzie to Canada, in 1850.

13. In 1847, one Samuel Pink was, and had been for some time, in occupation of about twenty-five acres of improved land on the southwest angle of lot 13, and one Robert Bannister was also in occupation of some part of lot 11 in the 5th range, and of lots 12 and 13 in the 6th range.

14. On the 29th July, 1847, Culp gave to Bannister a deed giving him license to occupy the three lots, at one shilling per lot per annum, especially stipulating that Bannister should not cut timber on the lots, and that he should give notice of any trespass on the lots to Augustus Keefer, the agent of Culp; and, on 13th August, 1847, Culp, with the assent of Bannister, made a deed to Samuel Pink, granting to Pink license to occupy the southwest corner of lot 13—which he had theretofore occupied—and giving him leave to cut timber (not saying from what land) only for the purpose of fencing and enclosing the leased premises; Pink to surrender possession at any time, on receiving six months' notice, and to pay fifty shillings a year.

15. In 1848 Culp gave a power of attorney to Augustus Keefer to do certain acts, including the prevention of trespass on the lands in question.

16. Samuel Pink corresponded with Culp about the lands, informing him of trespasses upon them, until 1850, when Culp handed over the management to William L. MacKenzie, and the latter, who lived in Toronto, assumed the care of the Randall estate, including the lands in question.

17. On the 17th December, 1852, Samuel Pink addressed to William L. MacKenzie a letter, promising, in reply to a letter received by him from MacKenzie, to take charge of lots 12 and 13, but declining to take charge of the lot occupied by Robert Bannister, because, he says, there was no timber on it worthy of notice, and he asked from Mr. MacKenzie the privilege of cutting a few saw-logs on the lot which he occupied, for a few boards for his own use.

18. Samuel Pink died in August, 1854, and, in December, 1854, Robert Bannister wrote to William L. MacKenzie respecting threatened trespasses, and informed Mr. MacKenzie that he had warned the parties that Mr. MacKenzie was the only person who had authority to deal with the lands.

19. The letters and documents referred to, with others, are put in as evidence.

20. The letters, written in the name of Samuel Pink, were written in the hand of his brother, Charles Pink, with his authority, and as his *amanuensis*.

21. Up to the death of Samuel Pink, in August, 1854, he had no possession of the lands in question, except that part described

in his license of occupation of 1847, and never claimed any title to any part of the said lands, except the title under the said license ; and, except the part so occupied by the said Samuel Pink, no part of lots 12 and 13 was, up to the death of Samuel Pink, occupied by any one, unless so far as Robert Bannister may have occupied those lots without enclosing or improving them, or cutting timber upon them ; there is no evidence that there was any such actual occupation either by Bannister or any one.

22. Samuel Pink did not live on the land in question, but on adjoining land, which did not form part of the Randall estate.

23. Samuel Pink never disputed the title of the representatives of Randall to the lands in question, or claimed any right or title adverse to them.

24. After the death of Samuel Pink, his children continued to occupy as he had done in his life time, knowing, as I find the facts to be, that their father had and claimed no title except as licensee of the Randall estate, and having themselves no title except what descended to them from their father, or was, after his death, acquired by them by their own possession.

25. After the death of Samuel Pink, his sons cut timber off the lots 12 and 13, and sold timber to others to cut, without the consent of any of the representatives of Robert Randall, and in the same manner as if they had themselves been owners of the lands ; and they also erected buildings on some portions of the land.

26. The lands hereinafter mentioned as conveyed to the defendant were never cleared or improved, and were not included in the corner let to Samuel Pink, nor in the parts of the lot on which the sons of Samuel Pink erected buildings, and were never in the actual possession or occupation of the sons of Samuel Pink, further than as possessed or occupied in the cutting and selling of timber from them.

27. In the fall of 1871, the defendant bargained for the purchase of a part of the said lots 12 and 13, containing the mine from which the ore in question was taken, from Charles Pink, Alexander Pink, and Robert Pink, sons of Samuel Pink, and on the 22nd November, 1871, they made a deed conveying to the defendant their interest in the land, and gave him at that time possession of the land, and the defendant has, ever since he so obtained possession, remained in actual possession and occupation of the land ; the defendant paid for the land upwards of \$20,000, and expended upwards of \$5,000 more in opening the mine and preparing it for being worked, in addition to the expense of working it.

28. The defendant, when he purchased the land, knew of the Randall title, having obtained information thereof from the

Registry office of the county of Ottawa, and he knew of the possession which the sons of Samuel Pink had since the winter of 1854-5.

29. The defendant was not disturbed in his possession and enjoyment of the lands or the mine, until the notice was given to him by the plaintiff in June, 1873.

30. The defendant brought an action against the plaintiff in the Superior Court for the Province of Quebec, in the District of Ottawa, an exemplification of the judgment wherein is put in evidence.

The learned Judge reserved the cause, and postponed the giving of a verdict until a *Case* should be transmitted to one of the Superior Courts of the Province of Quebec for their opinion thereon, according to the statute in that behalf. This case the learned Judge subsequently prepared in accordance with the foregoing findings.

The following were original documents accompanying this case and forming part thereof:

1. Letters of administration with the will and codicil annexed thereto, of the said Robert Randall.
2. Copy of deed, Edwin Smith to the plaintiff, John Stuart.
3. Deed of Pink and others to the defendant, Alanson H. Baldwin.
4. Exemplification of judgment in the Superior Court of Quebec, for the District of Ottawa, between the said parties.

Copies of other documents produced and proved at the trial, and forming part of this case:

(1)

I, Isaac Humphrey Culp, of the township of Stamford, in the Niagara District, C.W., do hereby grant license of occupation to Robert Bannister, of the township of Hull, in the county of Ottawa, in the district of Montreal, Lower Canada, to occupy lot No. 11, in the 5th range, and also lots Nos. 12 and 13 in the 6th range, of the said township of Hull, until countermanded by the said Isaac H. Culp or his attorney, at the yearly rent of one shilling per lot from the time he, the said Bannister, took possession; and it is further understood that the said Bannister will not cut any timber on the said lots above mentioned, and if any other person should interfere with the said premises, the said Bannister will forthwith give notice to the said Culp's attorney at Bytown, Mr. Augustus Keefer, of the same.

In witness whereof, I hereunto set my hand and seal, this 29th day of July, 1847.

Signed, sealed and delivered in
presence of } (Signed) ISAAC H. CULP.
Witness (Signed) ROBERTSON LYONS. }

(2)

I, Isaac Humphrey Culp, of the township of Stamford, in the district of Niagara, Canada West, do hereby grant license of occupation to Samuel Pink, of the township of Hull, in the county of Ottawa, to occupy the southwest corner or angle of lot No. 13, in the 6th range of the said township of Hull; the said premises having heretofore been occupied by the said Pink; and the said premises contain on or about the quantity of twenty or twenty-five acres of improved land; and it is further understood that the said Pink has license to cut timber only for the purpose of fencing and enclosing the said premises; and it is also understood that the said Pink will surrender possession of the said premises to the said Culp, or his attorney, at any time hereafter, on giving a notice of six months; and the said Pink agrees to pay an annual rent of forty shillings per annum to the said Culp, or his attorney, the said annual sum to be paid on the first day of August in each and every year during the term of occupation or occupying of the within described lands.

In witness, the parties have
hereunto set their hands } (Signed) ISAAC H. CULP. [L.S.]
and seals, this 13th day of } (Signed) SAMUEL PINK. [L.S.]
August, 1847. Witness, }
(Signed) ROBERT BANNISTER.

Received one year's rent on the above agreement.

Township of Hull, Lot No. 11, in the 6th range.

(Signed.) ISAAC H. CULP.

(3)

Hull, February 19th, 1850.

Sir,—I have to inform you that Mr. Ruggles Wright, Jr., has made timber on the land that I have rented from you. I have taken the trouble to forbid them either to make any more or to take away what they have made. I would wish to know if that Mr. Keefer, your agent, has authority for to sell the timber without either your sanction or mine. Write immediately, and let me know how I am to act, as a few days will take off all the timber.

I am, Sir, yours truly,

(Signed) SAMUEL PINK.

Direct—Samuel Pink, care of Mr. Geo. Marston, Postmaster, Hull, L. Canada.

(4)

District of Montreal. } JAMES WADSWORTH, Esquire, one of Her Majesty's Justices of the Peace in and for the said District, to SAMUEL PINK, of Hull, Farmer.

Whereas information and complaint has been lodged against you :—That, on the twentieth day of February instant, you, together with another person, each armed with a double-barrelled gun, proceeded to Lot No. Twelve, in the Sixth Range of Hull, and then and there unlawfully forbid and prevented certain men there employed, of Ruggles Wright, Jr., from working, and that you further stopped the road made by the said Ruggles Wright, Jr., by felling trees across the same.

These are, therefore, to require and command you to be and appear before me, or some other of Her Majesty's Justices of the Peace in and for the said District, on Friday, the twenty-second instant, at Conroy's Hotel, Aylmer, at the hour of eleven o'clock a m., to answer to the complaint as the law directs.

Dated at Aylmer, this 21st day of February, 1850.

(Signed) JAMES WADSWORTH, J.P.

(5)

To Mr. Culp.

Hull, March 8, 1850.

Sir,—About three weeks ago I wrote to inform you concerning the timber on the land that I have rented from you. I mentioned that Ruggles Wright, jr., was making timber in opposition to repeated notices I gave him. Since that I blocked up the road he had cut, and he then went to Mr. Keefer, your agent, in Bytown, and purchased the timber, on all the lands, at Government price. He then summoned me before the Court at Aylmer, for trying to stop him from making the timber on the land I hold from you. I put Mr. Wright on oath at the Court, and he confessed that he had trespassed on the premises before he had made any arrangement with Mr. Keefer.

I have taken the trouble to inform you of the particulars so that you may take any steps you think the most advisable.

I am, Sir, with respect, yours, &c.,

(Signed), SAML. PINK.

Please write immediately. Direct to Saml. Pink, care of Bytown postmaster.

(6)

Hull, 17th December, 1852.

Sir,—I received your letter dated 3rd December, on the 14th, authorizing me to keep off all trespassers on six hundred acres of

land belonging to the late Mr. Randall. I have to inform you in reply, that I will take charge of 12 and 13 lots, but I should beg to decline taking charge of the lot occupied by Robert Bannister, as I consider there is no timber on it worthy of notice. Should a case of trespass occur, I shall give you immediate notice.

As to Mr. Leamy, who applied for the timber, he is a worthless character, and a man not to be depended upon.

If you would be so good as to allow me the privilege of cutting a few saw-logs, on the lot I occupy, for a few boards for my own use, you would oblige me very much. My best respects to you and your family.

I am, Sir, your obedient servant,

(Signed) SAMUEL PINK.

To W. L. MacKenzie, Esq.

P.S.—If you will have the goodness to answer this as soon as possible, you will oblige me very much.—I am, Sir, yours,

(Signed) S. PINK.

(7)

Hull, October 5th, 1854.

Mr. Wm. Lyon MacKenzie, M.P.,

Sir,—I have lately been called upon by a person, calling himself McCallum, who is acting as agent for the Hon. Peter McGill, to look after lands in different parts of this country, and, among the rest, an undivided sixth part of the Randall property, which he obtained by a transfer from the late Thomas Mears, of Hawkesbury. Immediately after he left I went to Aylmer and found he had been at the Registry office, with another person that I suppose to be connected with a company that have purchased an ore bed from Mr. Ruggles Wright, which lies one hundred rods to the northeast of No. 12 in the 6th Range, which belongs to the Randall estate. They have examined every lot on the mountain, but, as they could find no ore on the surface, they selected No. 11 in the 7th Range, where they have commenced operations, and as the road is now opened to the rear of your lots, and as they are contracting with persons who live backward, I think it very likely they will be trespassing on your lots, as few of these people have timber on their own land adapted for railroad purposes, and some of them have been with me wanting to know if you had anything to do with the land, or if I thought you would sell it. I told them that if they were found trespassing on any part of the land I would write to you, and they would then find that you were the only person had any power to do anything with it in any shape. I have paid the taxes on the

back lot, and you will have the goodness to let me know if statute labour must be done on absentee lands in Lower Canada, when they are not crossed, nor any road within a half-mile of them. Mr. Pink is dead since the beginning of August, after eight months' illness. Please direct to Robert Bannister, Hull, P. Q.—Yours truly,

(Signed)

ROBERT BANNISTER.

The opinion of the Honourable Her Majesty's Court of Queen's Bench for the Province of Quebec, at the city of Montreal, is requested with reference to the law of the said Province of Quebec, as administered by that Court, and so far as the same is applicable to the facts set forth in the above case, in terms of the statute of the Imperial Parliament, 22 & 23 Vic. ch. 63, upon the following

Questions :

1. Do the powers of the will of Robert Randall authorize a sale of lands in Quebec (1) by the executors named in the will or the survivors, or (2) by the administrator, *cum testamento annexo*?

2. Is the deed, made by the administrator *cum testamento annexo*, to the plaintiff, valid by the law of Quebec, to sell and convey the said land and ore in pursuance of the terms of the said will?

3. Has the defendant any title to that portion of the said lands claimed by him, or the ore in question taken therefrom, sufficient to defeat the title of the representatives of the testator, Randall, or of the plaintiff?

4. What effect, if any, has the judgment of the Superior Court of the District of Ottawa, of which an exemplification is a part of this case, upon the plaintiff's title, if any he has?

5. Could the plaintiff have maintained an action or actions in the Courts of the Province of Quebec, against the defendant herein, for the said land and the said ore, or either of them, before the same was removed from the Province of Quebec; and could the plaintiff, in such action or actions, have recovered the said lands and the said ore, from the defendant herein?

(Signed)

ROBT. G. DALTON,

C. C. & P. Q. B.

During Michaelmas term, November 18, 1875, *Hector Cameron*, Q. C., for the plaintiff, obtained a rule calling on the

defendant to shew cause why a case should not be prepared setting forth the facts of this case as ascertained by the finding of the learned Judge who tried the cause without a jury, and why such case should not be settled and approved of by this Court, and the questions of law arising out of such facts according to the law of the Province of Quebec be settled by this Court; and why an order should not be pronounced remitting the same, together with the case, to the Court of Queen's Bench of the Province of Quebec, sitting in ———, or such other Court as to this Court might seem proper; and desiring the same Court to pronounce their opinion on the questions so to be submitted to them.

During Hilary term, February 26, 1876, *Bethune*, Q. C., shewed cause, and *MacLennan*, Q. C., supported the rule.

The following rule was made: Upon reading the rule *nisi* issued in this cause in Michaelmas term last, and the evidence taken herein by the Honourable Mr. Justice Patterson, before whom this cause came on for trial, without a jury, at the last sittings of Assize and Nisi Prius at Ottawa, in and for the county of Carleton, and upon hearing the parties; it is ordered that this *case* and the questions of the law of the Province of Quebec arising out of the same, which have been settled and approved by the said the Honourable Mr. Justice Patterson, and are set forth in the schedule to this rule annexed, be remitted to Her Majesty's Court of Queen's Bench for the Province of Quebec, sitting at Montreal. And the said Court is hereby respectfully requested to pronounce its opinion on the questions contained in the said schedule upon the law of the Province of Quebec administered in the said Court of Queen's Bench for the Province of Quebec as applicable to the facts set forth in the said *case*, the said *case* being remitted pursuant to the Imperial Statute 22 & 23 Vic., ch. 63. And it is further ordered that this rule and the said case and the exhibits therein referred to, certified copies, and the questions settled as aforesaid, be transmitted forth-

with by the clerk of the Crown and Pleas to the proper officer of Her Majesty's said Court of Queen's Bench in the Province of Quebec.

The following answers were returned from the said Court of Queen's Bench, to which the case and questions were remitted:

CANADA:	}	Court of Queen's Bench,
Province of Quebec.	}	(Appeal side.)
Montreal, Friday the twenty-second day of September,	}	
one thousand eight hundred and seventy-six.	}	

Present:

The Honourable	Mr. JUSTICE MONK,
"	" Mr. JUSTICE RAMSAY,
"	" Mr. JUSTICE SANBORN,
"	" Mr. JUSTICE TESSIER.
"	" Mr. JUSTICE BELANGER, <i>ad hoc</i> .

In the case transmitted from Her Majesty's Court of Queen's Bench for Ontario for the opinion of the Court of Queen's Bench for Lower Canada (appeal side) upon certain questions as to the law of the Province of Quebec under the provisions of the statute of the Parliament of Great Britain and Ireland, 22 & 23 Vic. ch. 63, in a cause between:

JOHN STUART, Plaintiff,
and

ALANSON HOVEY BALDWIN, Defendant.

The Court of Our Lady the Queen now here, having heard the plaintiff and defendant, by their counsel, respectively, on the interrogatories submitted, and mature deliberation being had, decides and answers as follows, viz.:

First Question.

Do the powers of the will of Robert Randall authorize a sale of lands in Quebec by the executors named in the will or the survivors, or by the administrator *cum testamento annexo*?

Answer to the First Question.

Yes, subject to modifications stated in answer to the fifth interrogatory.

Second Question.

Is the deed, made by the administrator *cum testamento annexo*, to the plaintiff, valid by the law of Quebec, to sell and convey the said land and ore in pursuance of the terms of the said will?

Answer to the Second Question.

Yes, as explained in answer to the fifth interrogatory.

Third Question.

Has the defendant any title to that portion of the said lands claimed by him, or to the ore in question taken therefrom, sufficient to defeat the title of the representatives of the testator Randall, or of the plaintiff?

Answer to the Third Question.

No, except as explained in answer to the fifth interrogatory.

Fourth Question.

What effect, if any, has the judgment of the Superior Court of the District of Ottawa, of which an exemplification is a part of this case, upon the plaintiff's title, if any he has?

Answer to the Fourth Question.

The Judgment of the Superior Court of the District of Ottawa, of which an exemplification is a part of this case, has no effect on the plaintiff's title, if any he has.

Fifth Question.

Could the plaintiff have maintained an action or actions in the Courts of the Province of Quebec, against the defendant herein, for the said land and the said ore, or either of them, before the same was removed from the Province of Quebec; and could the plaintiff, in such action or actions, have recovered the said land and the said ore, from the defendant herein?

Answer to the Fifth Question.

By the law of the Province of Quebec, the plaintiff could maintain an action for both the land and the ore, or for either of them, before the ore was removed from the Province of Quebec, but such an action for the ore would be an incident to the petitory action to vindicate the title to the land.

If the title were maintained the plaintiff would recover the ore *deductis impensis*, in accordance with articles 415, 416, 417, 418, and 419, of the Civil Code of Lower Canada.

If any action were instituted to recover the ore before or otherwise than by a petitory action to vindicate the title to the ownership of the land, it should be suspended until the title to the land is established. In regard to the suit pending in the District of Ottawa in the Province of Quebec, which would appear to be a possessory action, such possessory action while it is pending would prevent the plaintiff Stuart from instituting before a competent Court a petitory action according to article 948 of the Code of Civil Procedure of Lower Canada.

(True copy.)

[L.S.]

(Signed)

L. W. MAUBARY,

Clerk of Appeals.

Upon the return of the case, and the answers of the Court of the Queen's Bench of the Province of Quebec to the questions submitted accompanying the case, the learned Judge, who tried the cause, then gave his verdict on the 22nd November, 1876, for the plaintiff, and he assessed the damages for the plaintiff at \$5.

During Michaelmas term, November 28, 1876, *Bethune*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict for him obtained herein should not be set aside, and a verdict entered for the defendant, pursuant to the Law Reform Act and the Administration of Justice Act, on the ground that the plaintiff is not entitled to recover; and on the further ground, that upon the answers to the questions submitted to the Court of Queen's Bench for the Province of Quebec the plaintiff is not entitled to recover; and on the further ground, that Edwin Smith had no power to convey the land in the Province of Quebec under the statute of the Province of Ontario, it not appearing that in his application and affidavit he stated the value or probable value of the lands devolving as including this lot; and it appears that the value of the lands in Quebec is \$12,500, and the penalty of the bond filed is \$5,000. And

on the further ground, that the ore in question was severed before the exercise of the power of sale by Smith, and a right of action to recover the ore was vested in the heirs at law of Randall the testator, which could not be transferred by Smith to the plaintiff, so that if the lands were in Ontario the right of action could not be transferred; and that under chapter 91 of the Consol. Stat. L. C. the plaintiff could not maintain this action in Quebec.

MacLennan, Q.C., shewed cause. The will gives power only to the executors to sell. The effect of that devise in equity is, to convert the realty into personalty, which is made subject to the power. The 33 Vic., ch. 18, sec. 1, O., enables the administrator with the will annexed to execute any power of sale which the executors could have executed if they had been living. The 36 Vic. c. 20, O., does not apply, because the letters of administration here were issued before the passing of that Act. The Judge who tried the cause was of opinion the effect of the answers of the Court of Quebec was, that the plaintiff was entitled to a verdict. The Court of Quebec has decided that the action there brought by Stuart against Baldwin, and decided against Stuart, has no effect whatever upon or against Stuart's title. It was contended that Edwin Smith, the administrator with the will annexed, had no power to sell, because it was not stated in his application for administration what the value or probable value of the land was over which the powers of the will were to be exercised. It was contended the application and affidavit should have been produced at the trial to shew that the same were in accordance with the statute. It was not necessary to do that, because even if the administration can be impeached by some process taken for that purpose it is good so long as it stands. The Consol. Stat. L. C. ch. 91 enables a foreign administrator to act in Quebec: *Irwin v. Bank of Montreal*, 38 U. C. R. 375. The 33 Vic., ch. 18, sec. 2, O., requires a bond to be given by the administrator before he can sell. That was done, and it was proved. But it is said the bond is not sufficient, for it is taken only for the sum of \$5000, while the land was

of the value of and was sold to the plaintiff for \$12,500. The administrator could not tell when he gave the bond for what price he might be able to sell the land: Consol. Stat. U. C. ch. 16, secs. 63, 64; Imperial Act, 20 & 21 Vic. ch. 77, secs. 81, 82; *Re Powis*, 34 L. J. Pr. & Mat. 55; *Re Gent*, 1 Sw. & Tr. 54.

It is said the ore in question was severed by the defendant from the land before the plaintiff bought the land. The Court of Ontario has decided that the plaintiff is entitled by the law of Quebec to recover such ore, although severed.

In addition to that, the administrator had power to sell and did expressly sell the ore, whether severed or not severed.

It is said that the title to the ore was and is in Randall's heirs, but it must be remembered that the ore lay in Quebec at the time the plaintiff got his conveyance, and by the law of Quebec that ore although severed passed to the plaintiff.

Bethune, Q.C., supported the rule. The defendant had the ore in Quebec, the plaintiff seized it in Ontario, and he must prove his title to it when and where he took it. The Court of Quebec say the plaintiff cannot try any possessory action there until his title has been established in a petitory action, nor while he has any possessory action pending. If that be so, this action cannot be brought but upon the same terms and conditions on which the suit could be maintained in Quebec. The Court of Quebec assumed the possessory action was brought before the present suit. If that fact is in doubt the case should be again remitted to the Court of Quebec. The plaintiff is prosecuting his claim under the laws of Ontario, and he must shew a title to the ore sufficient according to that law. The ore belonged to the heirs at law of Randall at the time of the plaintiff's purchase, and the action should have been brought in their name. The plaintiff as purchaser from the administrator with the will annexed cannot sue for it. It is important, too, that the administration was not granted conformably to the statute, because the application for it and the affidavit required in obtaining it were not sufficient, and that affects the validity of the grant.

June 30, 1877. WILSON, J.—The title of the plaintiff to the ore in question has been disputed.

He claims under the will of Robert Randall, who was the patentee of the Crown.

The will was made on the 2nd March, 1829. By it the testator devised as follows:—"I hereby authorize my said executors, or the majority of them, or the survivor or the survivors of them, to sell and convey by deed or otherwise all my estate, real and personal, for such considerations, upon such terms, and in such manner as they may judge best. * * * And the moneys which they may receive on account of debts due to me, or on account of sale or sales of my said personal or real property, after deducting therefrom so much as shall be necessary to pay debts, I hereby give and bequeath in the following manner, that is to say, to Maria Stark, £150; to Bellage, of Montreal, shop-keeper, £200. The remainder of my estate, if any, I wish divided into ten equal parts and disposed of in the following manner, that is to say," two-tenths to his daughter, Levina Culp and her four sons; three-tenths to Frederick Smith and his six children; two-tenths to his nephew G. G. Wilson and his sisters; one-tenth to his nephew Randall Wallace; and the remaining two-tenths to five persons therein named, two of them being executors of the will.

By a codicil the testator afterwards devised to his daughter, Mrs. Culp, and Maria Smith, therein named, "all the property owned by me in the said township of Humberstone after my expenses are paid; the said property with all my accounts coming to me from the canal company to be divided equally between the two above named legatees; and all the rest of my property, subject to the will being previously made to this one, to remain as it is."

There is nothing else in the will material in this case to be considered.

It appears that of the four executors named in the will one of them left the Province before the death of the testator, and never returned to it, and is no doubt long since dead; one of them renounced, and afterwards left the

Province, and is since dead; and two proved the will; one of these two died in 1834, and the other died in 1861; and that administration with the will annexed was granted on the 20th May, 1873, to Edwin Smith, a devisee named in the will of the testator, and he it was who conveyed the land in question to the plaintiff.

It was objected that the grant to Edwin Smith was invalid because in his petition (which is not now with the exhibits), and in the affidavit accompanying it for administration, he stated the value or the probable value of the lands devolving—according to the 33 Vic. ch. 18, sec. 1, O.—at only \$5,000; and because the penalty of the bond he then gave is only in the sum of \$5,000, while the value of the lands in Quebec was shewn to have been \$12,500.

These objections do not affect the validity of the administration as long as it stands. They may be cause sufficient for the surrogate to cite the administrator to shew cause why the administration should not be recalled, or to give better and greater security, but they cannot avoid every act which persons dealing with the administrator under the authority of these letters have done and have been induced to do by virtue of the administration.

There are many cases on that point referred to in the case of *Irwin v. The Bank of Montreal*, 38 U. C. R. 375, 387, 388; see also 36 Vic. ch. 20, sec. 45, O.

There is no evidence that the affidavit was not honestly made, and the value of the property therein not truly stated at the time.

And I presume the Surrogate would have authority, in the case of mistake as to the value of the estate, or of a very great rise in its value, to require the administrator to give more security to insure and effect the purposes of the grant, without in any way affecting or avoiding the force of the administration then existing.

The plaintiff's counsel argued that the administrator, with the will annexed, had full authority under the 33 Vic. ch. 18, sec. 1, O., to sell the land in question to the plain-

tiff, and that the 36 Vic. ch. 20 did not apply, because the grant of administration was made before the passing of that last Act.

The rule of the defendant does not contain that ground of exception to the verdict; and I have no note of his counsel having argued it as if it were in the rule.

It may be better to consider that subject, because if it be that the statute confers no authority to sell, the case of the plaintiff at once fails.

In the first place it is clear that under the power in the will contained, and by the other provisions of the will, the executors have a clear authority to sell and convey the real estate, and to deal with the proceeds of it as with ordinary personalty.

Then the 33 Vic. ch. 18, sec. 2, O., enacts, "Whenever, after the passing of this Act, there shall be in any will or codicil thereto of any deceased person, whether such will be made or such person shall have died before or after the passing of this Act, any power to any executor or executors in such will to sell, dispose of, appoint, mortgage, encumber, or lease any real estate, or any estate or interest therein whether such power be express or arise by implication, and whenever from any cause letters of administration with such will annexed shall have been by a Court of competent jurisdiction in Ontario committed to any person, and such person has given, or shall hereafter give, the additional security in the next preceding clause mentioned * * such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, encumber, or lease such real estate, and any estate or interest therein, in as full, large and ample a manner, and with the same legal effect for all purposes as the said executor or executors might have done."

The 36 Vic. ch. 20, O. repeals the above Act, but sec. 40 of it is precisely like the clause above stated. It was passed on the 29th of March, 1873, and before the administration was granted to Edwin Smith.

Under the above Act there appears to be no doubt that

the administrator with the will annexed had full power to make the sale to the plaintiff.

Then arises the question, whether the deed which the administrator made on the 31st of May, 1873, to the plaintiff, passed to him the ore in question, which was severed from the land before that day?

It is a conveyance not only of the land but of all "wood, timber, iron and other ores, and other property respectively of any and every nature and kind soever, which may have been severed or detached from the freehold of the said lands * * by any person or persons whomsoever, at any time or times, before the execution and delivery of these presents, and as well all those portions of the same respectively which shall or may be still remaining on the said lands * * as such other portions thereof which shall have been removed therefrom; and wheresoever the same respectively shall now or happen hereafter to be found, and all rights of action in respect thereof, or of the value thereof, or for trespass to and for the *mesne* profits of the said lands."

It was not contended that the devise conferred more than a power upon the executors to sell the lands and all the other property of the testator. It was not argued that any estate or interest in the land passed to the executors. That, no doubt, is the meaning, effect and operation of the will.

It is an absolute direction to sell, and not a mere discretionary right, which the executors may or may not exercise at their pleasure. It is therefore a conversion of the realty into personalty. It is a trust to sell.

On the death of the testator, under the trust to sell under the power, the legal title vested in his heir at law. He would be the person to bring ejectment or to defend the legal estate at law.

He would, however, be a trustee for the executors.

Where the testator had given power to his executors to sell, and after the making of his will he contracted to sell the lands to a purchaser, who required the heir-at-law of

testator to join in the conveyance, the Court, under the Trustee Act of 1850, made an order vesting the estate which was in the heir in the executors: *Re Badcock's Trusts*, 2 W. R. 386. So where it was doubted whether there was sufficient legal power of sale implied in the executors, or a sufficient charge of debts to enable him to convey the legal estate to a purchaser, the Court, under the Trustee Act of 1850, made a vesting order of the heir's estate: *Hooper v. Strutton*, 12 W. R. 367.

By holding that the executors who have power to sell lands have a legal power to convey "the difficulty is obviated of getting a reluctant heir to join in the sale; the testator having disinherited his heir could never mean him to act as trustee": *In arguendo*, *Bentham v. Wiltshire*, 4 Madd. 44, 47.

Upon the severance of trees or ores from the land the owner of the land had the right to treat the articles severed as goods and chattels against the wrongdoer, and to sue for or in respect of them as such: *Farrant v. Thompson*, 5 B. & Al. 826.

The plaintiff has got all the rights, powers, and interests which the donee of the power, the administrator with the will annexed had. The administrator had in strict law no right, by any legal title in himself, to take or to sell the ores which were severed from the land. If he had done so after his own appointment and before the execution of the power, it would have been done strictly by him as *cestui que trust*, or perhaps more correctly by reason of the relationship which was between him as *cestui que trust* and his trustee—or, in other words, by reason of the connection between him as agent and his principal the heir-at-law, or the person having the legal estate, and who in equity was trustee of the land and ores. And when he executed the power he passed the land to the purchaser who took directly under the will from Robert Randall, the donor of the power.

But at that time the ores in question had been severed from the freehold, and were then goods and chattels, which

the heir-at-law could at law sue for and recover, and if he died after such severance the title at law to such ores would have passed to his personal representative as part of his own and not as part of his ancestor the testator's estate, and would not have descended to his heir. Yet the heir, notwithstanding such severance, would have had only a fiduciary interest in the ores so severed; the beneficial interest in them would still have remained in and with the donee of the power.

If the heir at law sued for such severance he would have sued because the ores remained vested in him as part of the inheritance: *Pomfret v. Ricroft*, 1 Wms. Saund. 322 d., n. 5, ed. of 1871, p. 557, 566, n. 5.; *Co. Litt.* 57 a.

The donee of the power could have sued at law any one for or in respect of these ores in the name of the heir, and he could have sued any one in respect of them in equity in his own name. So he could in the execution of the power sell and convey to the purchaser of the land the interest which he had as such donee of the power in the ores.

Substantially, as between the donee of the power and the heir, the ores, notwithstanding the severance, remained after such severance just as they were before their removal from the soil.

I am of opinion the conveyance by the administrator did not by the mere power of his own appointment, except in equity, pass the legal title to the ores so severed. If it did not pass the ores as part of Robert Randall's estate, it may be assumed that the donee of the power as *cestui que trust* had authority from the heir or person having the legal estate as trustee to deal with such ores as his agent, in such manner as he pleased, and so to take possession of them, or to sell and assign them to the plaintiff.

That presumption has been made in many such cases, and as against a merely formal objection it may very reasonably be raised in favour of the substantial right.

The tenant under a lease from the *cestui que trust* may be considered as the tenant of the trustee, the act of the *cestui que trust* being deemed to be the act of the trustee,

the former being held for the purpose to be the agent of the latter: *Vallance v. Savage*, 7 Bing. 595.

In *Pope v. Biggs*, 9 B. & C. 245, a tenant of the mortgagor made after the mortgage executed is bound to pay rent to the mortgagee after notice given to the tenant by the mortgagee to do so, although, as Tindal, C. J., said in the case just referred to of *Vallance v. Savage*, 7 Bing., at p. 600, "their interests are adverse." See *Keech v. Hall*, Doug. 21; See also *Trent v. Hunt*, 9 Ex. 14, which is very highly approved of by all the Judges in *Snell v. Finch*, 13 C. B. N. S. 651, pp. 651, 656, 659.

In this case too, as the ores so severed became goods and chattels, a title to them might pass without any deed or writing from the heir to the donee of the power; and in presuming that they may have passed, or in holding that under the circumstances they may and should be considered as having become the legal as they were the equitable property of the donee of the power, we are doing, in my opinion, no violence to any real opposing right or interest, and are not dispensing with a deed where a deed as the means of conveyance would be necessary to confer and to transfer a title.

I am of opinion then that a title to the ores so severed, as part of the estate of Robert Randall, may upon the facts, be presumed to have passed to the plaintiff by the conveyance of the administrator with the will annexed, or as part of the personal property of the heir or person having the legal estate to the land, by reason of the beneficial ownership which the donee of the power had, and the implied power he may be presumed to have had, in the absence of all evidence to the contrary, to take, sell, and deal with the ores as the agent of the trustee or person having the mere legal estate.

And it must be remembered throughout that the defendant bought with a knowledge of the Randall title, and from persons who were the children of one Samuel Pink, who occupied a part of lot 13, and who exercised a species of control under authority of persons acting for the Randall estate.

So far the case has been considered as if the lands were situate in Ontario, and as if the ores at the time the power was executed were in this Province. At that time the ores were severed, but still they were in the Province of Quebec where the lands were situated, and as I understand the opinion of the Court of Queen's Bench transmitted to us, these ores were the property of the plaintiff under the deed on which he relied. It appears then, however the law may be if the ores had been in Ontario at the date of the deed, that the plaintiff acquired a title to them in the Province of Quebec where they were then situated; and either title is sufficient for the purpose of the action.

There remains still the matter to be considered upon which the opinion of the Court of Queen's Bench at Montreal, in the Province of Quebec, was taken under the Imperial Statute 22 & 23 Vic., ch. 63. As to cases sent for opinions under that Act see *Topham v. Portland*, 32 L. J., Ch. 257; *Wilson v. Moore*, 12 W. R. 1137.

That Court has decided upon the case which was transmitted to them for their opinion, that the will of Robert Randall authorized a sale of the lands in question, which are situate in Quebec, by the executors or the survivor of them, or by the administrator with the will annexed: that the deed to the plaintiff is a valid deed by the law of Quebec to sell and convey the lands and ores under the will, and that the defendant has no title to the land or ores sufficient to defeat the plaintiff's title.

These answers are all subject to the special circumstances stated in the fifth answer.

The fourth answer is, that the judgment recovered by the now defendant as plaintiff in a suit brought by him against the now plaintiff as defendant has no effect on the title of the now plaintiff, if he has any.

The now defendant declared in effect in that action that the lands in question belonged to him, and that the now plaintiff had troubled him by a suit in respect of the land, and by seizing the ore taken by the now defendant from the land, and by damaging and prejudicing the now defendant's title to the said land.

And he prayed that by the judgment of the Court he should be declared to have been, during all the time therein mentioned, and to be still duly seised and possessed of the land as proprietor thereof; and that he be maintained therein and the enjoyment thereof; and that the now plaintiff should be ordered, adjudged, and condemned not to trouble or disturb the now defendant in his possession in the future; and to pay the now defendant his damages, laid at \$10,000, with interest and costs of suit.

The now plaintiff appears, as defendant, to have demurred to the declaration, as I may call it, and to have stated specially his cause of demurrer, and also to have pleaded in fact to the declaration setting up title to the land.

The now defendant demurred to the plea, setting out the causes of demurrer, and upon these demurrers the Court dismissed the now plaintiff's *defense en droit* (demurrer) as unfounded in law, and maintained the *defenses en droit* (demurrers) to the now plaintiff's plea, with costs. And upon such pleadings the Court of Queen's Bench, to whom this matter was referred, has declared that such judgment has no effect on the now plaintiff's title, if he has a title.

Upon that finding, which we must adopt as our guide upon a matter specially and peculiarly within the knowledge and jurisdiction of the Court, the question of title is still open and controvertible between these parties.

By the fifth answer of the Court, which is the governing one, and is explanatory of the other answers they have given, they have declared the plaintiff could, by the law of the Province of Quebec, maintain an action for both the land and the ore, or for either of them, before the ore was removed from that Province. But the action for the ore would be one incident to the petitory action to vindicate the title to the land.

If the title were maintained, the plaintiff would recover the ore, *deductis impensis*, in accordance with articles 415, 416, 417, 418, and 419, of the Civil Code of Lower Canada.

And if an action were instituted to recover the ore before

or otherwise than by a petitory action to vindicate the title to ownership of the land, it should be—perhaps it was meant it would be—suspended until the title to the land was established.

That answer establishes that the plaintiff, by the law of the Province of Quebec, where the land is situated, could, while the ore was in that Province, have maintained an action for both the land and the ore, or for either of them.

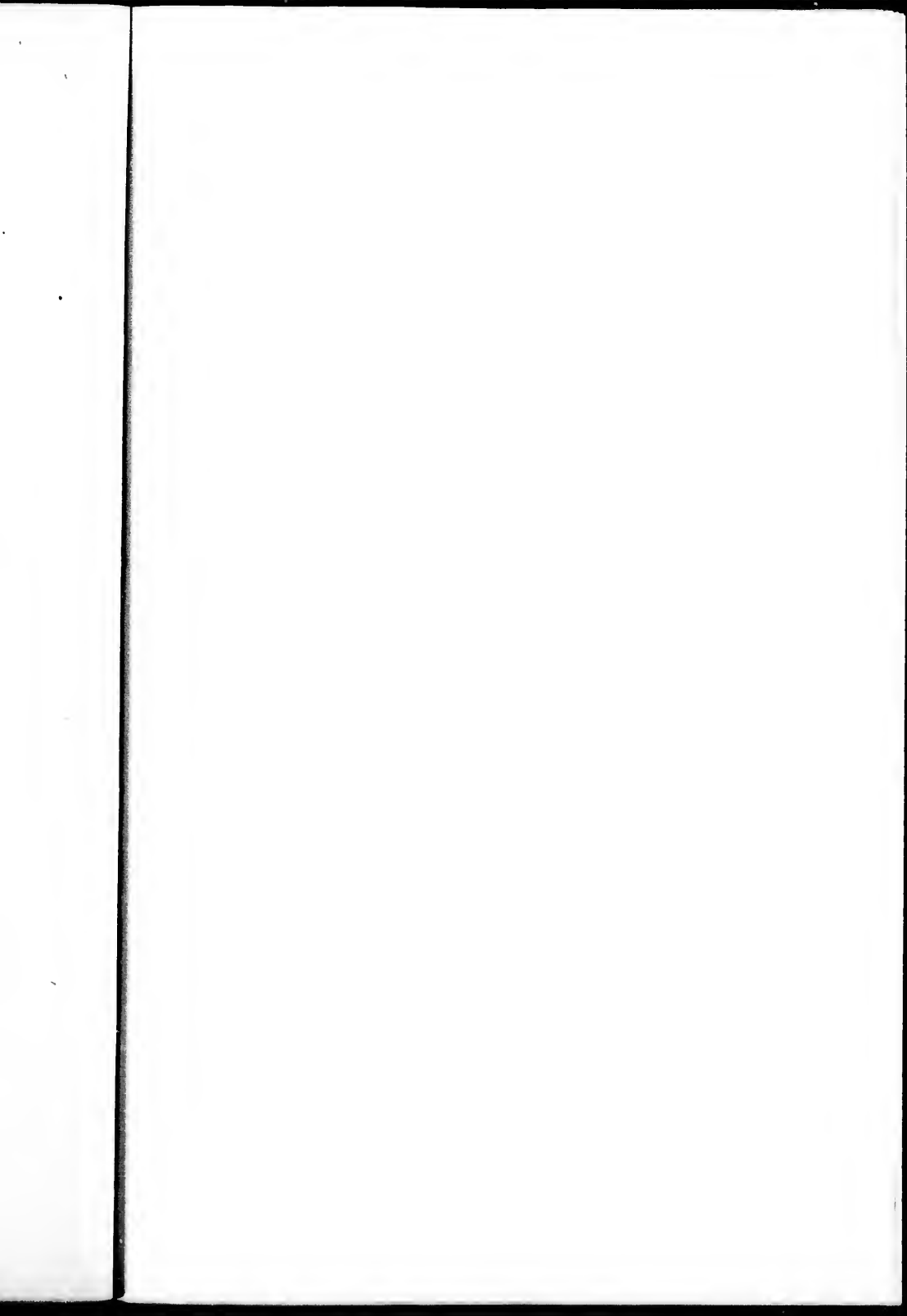
If the action were brought for the ore alone before or otherwise than by a petitory action to vindicate the title to ownership of the land, it would be stayed until the title to the land was established.

That is, as I understand it, if it were necessary to establish the title, but not otherwise. If, for instance, the plaintiff were in possession, and a mere trespass had been committed, the act or fact of trespass alone might be in controversy without any claim being made to the land by the defendant, or without the title of the plaintiff to the land being disputed.

If the title to the land is in contention, then the ore may be sued for separately from any claim of title being put forward to the land by the plaintiff, or a petitory action may be brought. In the former case the proceedings for the ore will on such separate action be stayed by the Court until the title to the land be first settled by a petitory action. That is an action I believe somewhat like an ejectment in which the title to the land is in question. If the plaintiff succeed in it, and if he had before brought an action for the ore, he would be at liberty then to continue it. But he may, instead of prosecuting separately for the ore, recover as an incident in the petitory suit compensation for the ore which had been taken from the land by the defendant.

Such incidental claim is, I believe, in the nature of our claim for *mesne* profits, but it is adjudicated upon in the petitory action if the plaintiff desire it, or it may be sued for in a separate action, as by our law for *mesne* profits he would be obliged to do, if the plaintiff elect to do so.

We are in effect trying the title to the land, because we



cannot determine with respect to the ownership of the ore until we have determined who is the owner of the soil from which the ore was taken.

In the Province of Quebec the Court would not try the title to the ore until the title to the ownership of the land, in such a case as is presented to us here, between those parties was first established.

And it is insisted on by the defendant that we should not adjudicate with respect to the ore, until the title to the realty has been tried and determined in the Courts of Quebec, where that question should only be tried.

This is not a real action, or one in which the venue is local. If it were so we could not in Ontario decide upon a matter which was by its locality confined alone to Quebec.

In *Doulson v. Matthews*, 4 T. R. 503, it was held that trespass could not be maintained for breaking and entering a house in Canada.

In that case Buller, J., said, p. 504: "We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local."

In *Whitaker v. Forbes*, L. R. 1 C. P. D. 51, it was determined that an action of debt could not be brought in England under the law which existed, as to venue, before the late Judicature Act, for arrears of a rent charge due upon land in Australia.

It is every day's business of the Courts to try questions of foreign law. In actions on bills of exchange and other contracts, in questions of descent and marriage, and every other matter which is the subject of judicial enquiry. And it may arise in many forms. Here, in an action as to the proprietorship of the ore, we have to determine the preliminary question, as to the proprietorship of the land from which it was taken.

We could not entertain an action for breaking and entering into these lands, but we can entertain an action for the ore which by its severance has become chattels, to try who is the owner of it.

An action for assault and battery could be tried here, although the defendant pleaded he committed the alleged trespass in defence of his possession of a house situate in a foreign country, and issue was joined upon the title.

I presume also an action for damages for not completing a purchase of land situate in a foreign country upon a good title being shewn, on an averment, that a good title was shewn, could be tried here, although the Court would have to try whether a good title to the land by the law of that foreign country had been shewn.

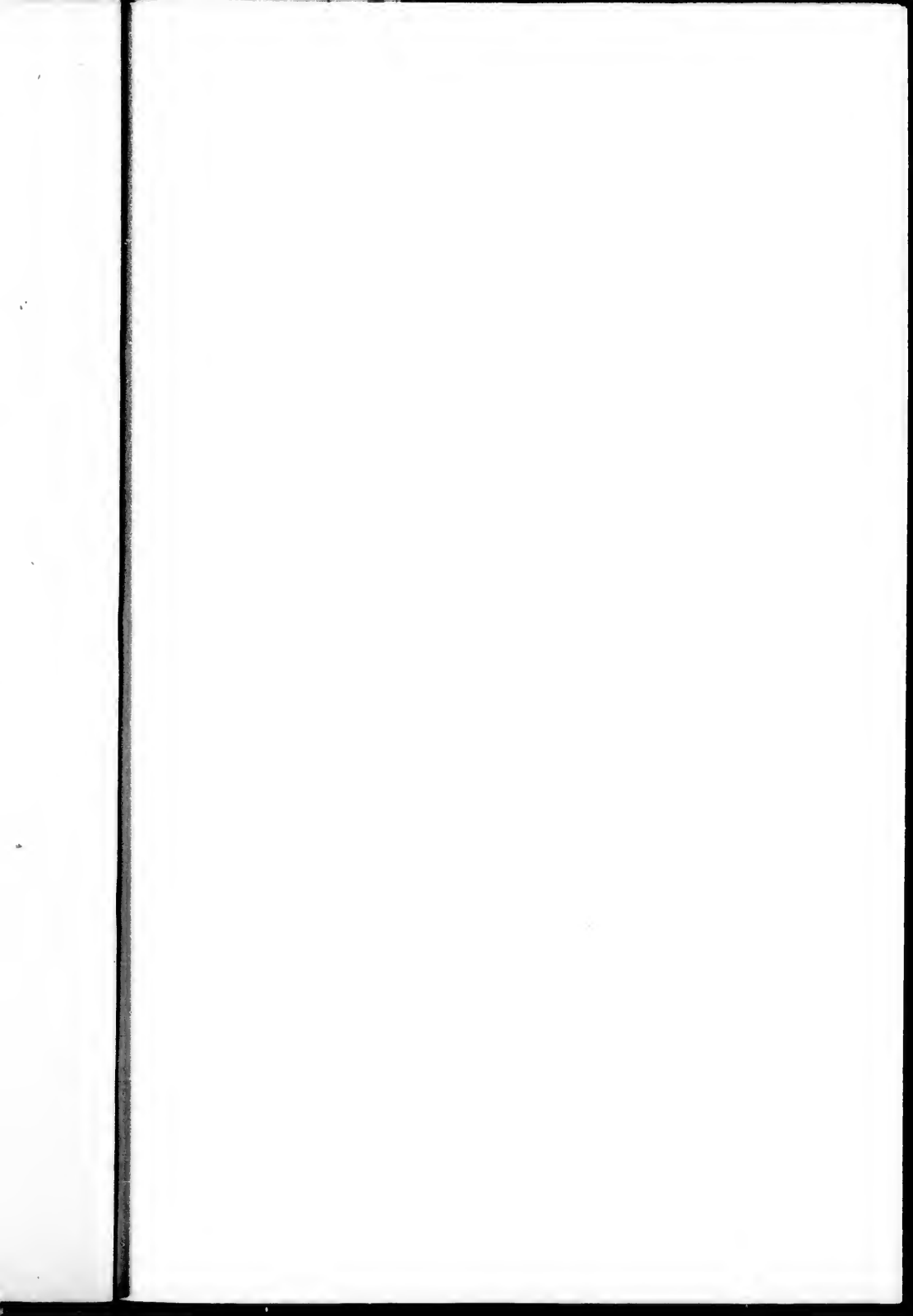
This action for the ore being maintainable in some form in Quebec can be maintained here. That it is maintainable there only as incidental to an action which tries the right to the realty, or after that right has been determined, is of no consequence, for we are in this action for the ore trying the question of title to the land as governing the right and proprietorship to the ore—not directly but as incidental, although essential, to the decision upon the personalty.

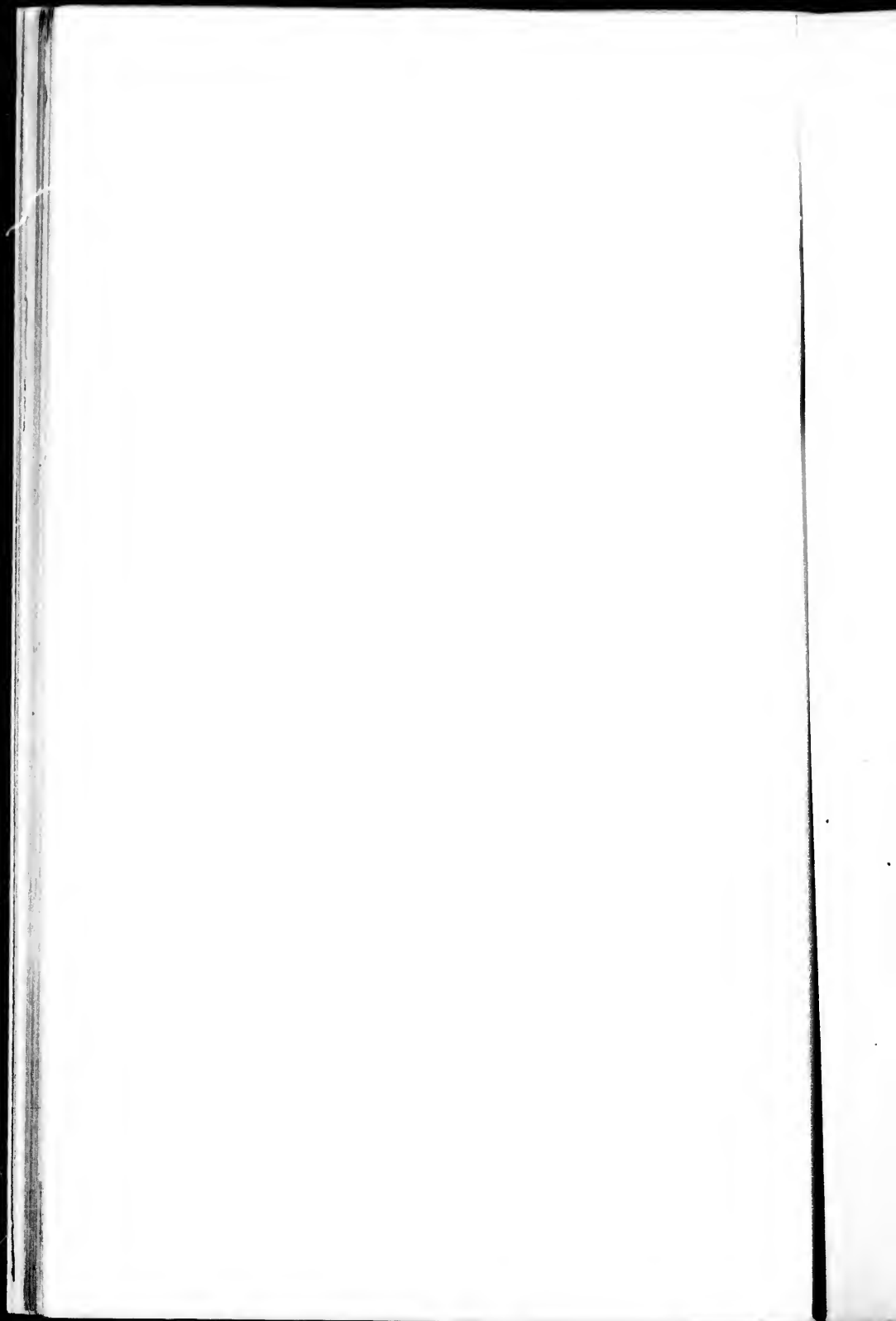
In *Scott v. Seymour*, 1 H. & C. 219, in Ex. Ch., an assault and imprisonment took place in a foreign country. The plaintiff sued in England for them. Pleas were pleaded.

Wightman, J., said in his judgment, p. 233:—"We are all of opinion that the second and third pleas in this case are bad, and afford no answer to the action. They admit the right to compensation in damages by such trespasses, but they state that by the Neapolitan law they cannot be recovered until certain penal proceedings have been commenced and determined there. This is an objection to procedure merely, which must be determined by the *lex fori*, and not by the *lex loci*."

Blackburn, J., said, p. 237:—"If, indeed, the plea had averred that by the law of Naples no damages are recoverable for an assault however violent, that would have raised a question upon which I have at present not made up my mind. I doubt whether it would be a good bar."

I am of opinion this action is well brought here, although it could not in the same circumstances be brought in the





Province of Quebec, in the like form, or in the like order of time in which it is brought here. The case of *The Buenos Ayres and Ensenada Port R. W. Co. v. The Northern R. W. Co. of Buenos Ayres*, L. R. 2 Q. B. 210, D., has some relation to this part of the case.

I may say that the articles 415 and 419 in the *Code Civile*, referred to by the Court of the Province of Quebec, will have full effect given to them in that Province, when the plaintiff takes proceedings to recover the possession of the land, or to disturb the defendant in his occupation. They have no application at present in the action before us.

Something was said of the defendant being a *bona fide* possessor, and therefore not liable to account for the profits of the land during the term of his occupancy, according to the law of Quebec.

We have not that properly before us. If it were intended that matter should have been considered, it should have been specially referred to the Court of Quebec with the other questions.

So far as we can see what it is in our law, it being an equitable rule only, I may refer to *Dormer v. Fortescue*, 3 Atk. 124, where it is said, "Where a man shall be said to be *bona fide* possessed is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title, which could not be here as Fortescue had all the deeds and the very settlement on which the title depends." See also *Hicks v. Sallitt*, 3 DeG. M. & G. 782, 813, 18 Jur. 915, and *The Lord Advocate v. Drysdale*, L. R. 2 Sc. App. 368.

According to article 412 of the *Code Civile* "A possessor is in good faith when he possesses in virtue of a title the defects of which as well as the happening of the resolutive cause which puts an end to it are unknown to him. Such good faith ceases only from the moment that these defects or the resolutive cause are made known to him by proceedings at law." See also article 411.

I very much doubt whether the defendant could establish an occupancy in good faith according either to the *Code*

Civile or to the doctrines of the Court of Equity, whichever rule of law he might have claimed to avail himself of in this action. But he has made no such claim.

I may also refer on the subject of foreign law, when and to what extent it is applied to the rights of litigants: *Shaw v. Gould*, L. R. 3 H. L. 56; *The Halley*, L. R. 2 P. C. 193; *Ex parte Melbourne*, L. R. 6 Ch. 64.

I think, upon the whole, the rule should be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

Rule discharged.

