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SUPREME COURT. DECEMBER 13TH, 1909.

AINSLIE MINING AND RY. CO. v. McDOUGALL.

Negligence — Injury to Workman in Mine — Nova Scotia Fatal Injuries Act—Action by Parents—Common Employment—Fellow-servant.

Appeal from Supreme Court of Nova Scotia. Reported 4 E. L. R. 275.

Present, GIROUARD, DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

E. L. Newcombe, K.C., for appellant.

Daniel McNeill, K.C., for respondent.

DAVIES, J.:—This was an action under the "Fatal Injuries Act" of Nova Scotia, brought by the plaintiff on behalf of himself and his wife to recover damages for the death of their son, a young man who was killed in the defendants' mine while working as one of the defendants' employees.

The jury awarded as damages $1,200, and divided it, giving to each $600, father and mother.

The death of the employee was caused by a stone or rock of several tons' weight falling out of the hanging wall of the mine upon the deceased workman, just after work had been resumed in the mine after it had remained unworked for some 18 months.

The jury found that the negligence of the defendants, which caused the death of their workman, consisted in "not having the overhanging wall cased and protected from

falling; timbering overhead in trench not sufficiently strong to hold a fall of stone liable to fall from overhanging wall." That "the working place was not safe," and that if the walls had been properly examined the stone which fell would have been noticed as dangerous; and lastly, that the unsafe condition of the working was discoverable by a reasonably careful inspection.

I agree with the opinion of Chief Justice Townshend and Meagher, J., that on these findings plaintiff was entitled to judgment.

Mr. Newcombe, on this appeal, invoked the doctrine of common employment as a complete answer by the defendant company; he contended that the mine which had laid unworked for some 18 months had been properly examined before work had been resumed by the superintendent of the mine, Kenty, and the managing director; that the inspection was careful and complete, but that whether it was negligent or not the company, having employed competent men, were not liable, and the evidence did not justify the findings.

As to the findings of the jury, I have no difficulty whatever in holding that the evidence was sufficient to sustain them.

The inclination of the hanging wall, as stated by Mr. Harrison, the managing director, was about 30 degrees. The workmen were working immediately below this overhanging wall blasting rock, and when the blasting operations were begun, and no doubt caused by them, the huge stones fell out of the top part of the wall, crushing through an artificial roof or covering built across the mine or excavation and killed the unfortunate miner, McDougall. The inspection made, as described by the superintendent, Kenty, was superficial and fully justified the jury's finding that it was not a reasonably careful one. Kenty says: "The wall was cracked along in places, ordinary cracks as you would see in any cut, I couldn't see anything to say it was dangerous. It was grassed over to the edge of the cuts; it was impossible to see without cutting away the surface." No cutting or prying into the surface was done and no testing of the cracks. Mr. Harrison, the managing director, who accompanied Kenty, gave similar evidence of the examination which, while it may have satisfied them, was not such an examination as the circumstances called for.

I am not able to accept Mr. Newcombe's contention with respect to the duty owing to the servant by the master in respect of the dangerous condition of the mine when the mine was reopened and the workmen were put to work on blasting. I have seen no reason to change the opinions I have expressed on this subject in Grant v. Acadia Coal Co., 32 Can. S. C. R. 427; McKelvey v. LeRoy Mining Co., Id. 664, and Canada Woollen Mills v. Traplin, 35 Can. S. C. R. 424. In substance they are, that while the master is not necessarily liable for the negligence of the superintendent of his works, he is bound to see that these works are suitable for the operations he carries on at them; and he cannot, by leaving their supervision to his superintendent, escape liability, for the duty is one of which he cannot divest himself.

In other words, I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable cannot be extended to cases arising out of neglect of the master's primary and indefeasible duty of providing, in the first instance, at least fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others.

The case of Bartonshill Coal Co. v. Reid, 3 Macqueen's App. Cases 300, was cited in support of the general proposition that a master employing competent servants and supplying proper materials to enable them to carry on the work, was not liable for injuries caused by the negligence of one of his servants to another while they were engaged in their common work.

But in giving his careful and elaborate opinion in that case, an opinion which Lord Chancellor Chelmsford said, in the next following case of the same volume, Bartonshill Coal Co. v. McGuire, at p. 306, had his entire concurrence, Lord Cranworth was at pains to point out the broad distincion between the exemption of the master from liability arising out of the carelessness or negligence of one fellow-servant causing injury to another, and the liability of the master for injuries to his servant arising out of his failure to discharge the duty the law throws upon him of providing a fit and proper place in which his workmen are engaged at work. Whether he has or has not discharged his duty in this regard, will be in all cases a question of fact. Mere proof that he

had employed competent persons to do his work is not enough.

Lord Cranworth points out that the two previous decisions of the House of Lords, Paterson v. Wallace, 1 Macqueen, p. 748, and Brydon v. Stewart, 2 Macqueen, p. 30, "turned not on the question whether the employers were responsible for injuries occasioned by the carelessness of a fellow-workman, but on a principle established by many preceding cases, namely, that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against unnecessary risks." The question in the former case of Paterson v. Wallace, he said, "was not as to an injury occasioned by the unskilfulness of a fellow-workman, but an injury occasioned by the fall of part of the roof," and in the other case of Brydon v. Stewart, the jury had found that "the death arose from the pit not being in a safe and sufficient state," and Lord Cranworth said, p. 288: "Your Lordships came to the conclusion that the men had a right to leave their work if they thought fit, and that their employers were bound to take all reasonable measures for the purpose of having the shaft in a proper condition so that the men might be brought up safely," and so a verdict was directed to be entered for the pursuer.

Defective places in which to work, defective machinery with which to work, and defective systems of carrying on work, are none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ. That exception as defined by Lord Cairns in his celebrated dictum in Wilson v. Merry, L. R. 1 H. L. Sc. 326, does not cover the duties owing by the employer to the employed in these respects, but does cover all risks which the workmen assume when they enter into their master's employment against the wrongful acts or negligences of their fellow-servants.

As Lord Herschell says, at p. 362, of Smith v. Baker (1891), A. C. p. 362:—

"It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to un-

necessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence and the creation or enhancement of danger thereby engendered."

Mr. Newcombe relied upon the case of Hall v. Johnson, 3 H. & C. 589, as supporting his proposition that an underlooker, whose duty it was to examine the roof and prop it up if dangerous, is a fellow-labourer with a workman in the mine, and the latter can maintain no action against the owner of the mine for injury occasioned by the neglect of the underlooker to prop up the roof, if the owner has not personally interfered or had any knowledge of the dangerous state of the mine.

It cannot, I think, be questioned, that an "underlooker," with such duties as those mentioned, would be held to be a fellow-workman with the ordinary workmen in the mine. In that case it appeared that the mine had been worked in the ordinary course for the previous six years, and the Court of Exchequer Chamber held that, under these circumstances, the workmen "undertook to run all the ordinary risks of the service, including negligence on the part of a fellow-servant," and that the case before them was within that undertaking.

That case does not involve any question as to the primary duty of the master to provide, in the first instance, places in and materials with which workmen may safely work, or systems under which they may so work, or whether with respect to cases where such duty is not fulfilled, and an accident happens to a workman in consequence, the master can invoke the doctrine of common employment and escape liability by shewing merely that a fellow-workman's negligence was the cause of his duty being unfulfilled. My holding is that in such cases he cannot, and that he is bound to shew that reasonable and proper skill and diligence were not wanting on his part or on the part of those to whom he delegated the performance of his duty in those regards.

In view of the disuse of the mine for a period of 18 months, I deem the position on the resumption of work, as regards the mine owners' duties to their employees, to be the same as if they were then for the first time placing their men at work in the mine. Their duty to their workmen in this situation was to provide them with a reasonably safe place in which to work. When that duty has been delegated,

any negligence of an employee to whom it has been confided must be imputed to the employer whether an individual or a body corporate.

Under these circumstances and holdings, without discussing the other branch of the case as to whether the general manager and director of the company was or was not a fellow-workman with the deceased, or was the alter ego of the company for whose negligence they would be liable, I think the appeal should be dismissed with costs.

IDINGTON, J.:—The whole point of this case, as appellant's counsel put the matter, without abandoning other and minor things, is whether the doctrine of common employment is applicable or not, and whether the jury should have been better directed in that regard than they were.

I do not think appellant can now complain of non-direction, after its counsel at the trial prudently and deliberately refrained from taking objection to the charge or submitting a proper question for adoption by the learned trial Judge or otherwise insisting on the point in question being finally and definitely brought to his attention with a view to having the jury pass upon it.

Moreover, on the facts that bear on the exact point raised, there is no dispute.

There is most conflicting evidence as to whether or not what the jury has found to have been negligence was so or not. But there is no dispute that the condition of things pronounced negligent and dangerous was seen and passed upon by three officers of the company, of whom one was manager and director, and another general mine superintendent, for the express purpose of either determining or reporting to the board of directors (it does not appear which) so that it could decide as to reopening the mining operations which had ceased for 18 months.

The condition of the place in and about which the workmen had to work, the nature of that work and the risks created thereby and to be suffered must be taken, I think, as adopted by the company on their reopening of the mine—as a place and things all known to it to be just what it was—and what was that? Was it not a dangerous place wherein the men were to work, and was not the employment of a dangerous character?

No proper system was adopted to protect the company's workmen, in life or limb, against these dangers. No adequate protection was supplied by the company and put at the service of those it placed in charge of the work.

Nor was the obvious need either to case the wall or remove the overhanging or other material liable to fall provided for by the company.

Nor, if that might have made a difference, was there assigned to any one (competent or not) the duty of supplying the necessary protection.

This is not the case of a work opened by a competent superintendent, appointed for that purpose, and its work continuously operated and developed by him within his authority, both as to the creation of its dangerous qualities and insufficient protection, but is distinct therefrom as if something new.

Whatever doubt or difficulty might exist in a case such as I have just stated, I fail to see how any can exist here if we have regard to the very cases cited by appellant without going further.

I think the appeal should be dismissed with costs.

GIROUARD, DUFF and ANGLIN, JJ., agreed with DAVIES, J.

Appeal dismissed with costs.

NOVA SCOTIA.

FULL COURT. DECEMBER 22ND, 1909.

ST. MARY'S SOCIETY v. ALBEE ET AL.

Assessment and Taxes—Exemption—Benevolent Society—Hall in Building Rented for Public Purposes—Basis of Valuation for Assessment—Lease—Construction.

Appeal from the judgment of LONGLEY, J., reported 6 E. L. R. 582, in favour of defendants in an action to recover an amount paid by plaintiff for taxes in connection with a portion of plaintiff's building occupied by defendants.

W. F. O'Connor, in support of appeal.

H. Mellish, K.C., contra.

TOWNSHEND, C.J.—The defendants, on the 14th September, 1907, leased from the plaintiff society a portion of their building on Barrington street for a term of 3 years, from the 16th day of December, 1907, at a yearly rental of $2,000, to be paid in monthly instalments. The building, at that time, under the city charter, in so far as it was used for charitable and such like purposes, was exempt from taxation. The entire lower story, or ground floor, had been from time to time let for public entertainments other than the purposes of the society, and was at the date of the lease to defendants assessed at $1,000 only. In 1908, after the lease to defendants, the assessment was increased to $10,000. This action is to recover from the defendants the amount of taxes caused by the increased valuation. The plaintiffs had hitherto paid the taxes on the lower valuation, but now claim, under the terms of the lease, that defendants are liable and bound to pay the increase, and this on the ground that it was by reason of the manner in which defendants used or occupied the lower story that the increased assessment was imposed.

This question must be decided on the true construction to be put upon the language of the lease. The words of that document, so far as necessary to quote here, are as follows:

"And also shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax, or chargeable against said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor however hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property belonging to the lessor."

In my opinion, there can be no doubt the defendants are not liable for the increased taxes. It was contended there was a latent ambiguity in the terms of this covenant which justified the admission of parol evidence to clear up such doubt, and some was in fact received. I do not think there is any ambiguity in the language used and parol evidence should not have been received.

The lessors bind themselves "to pay as heretofore all the regular and ordinary taxes . . . and assessments levied upon or with respect to said premises," &c. These words make

it clear enough that the lessors were bound to pay all "regular" and "ordinary" taxes and assessments, and it cannot be questioned that this increased valuation for assessment purposes comes under the class of "regular" and "ordinary." The lessors so interpreted this language when they paid the taxes on the $1,000 valuation, and they bound themselves to pay such class of taxes "as heretofore." Now, unless we can find words in the lease which qualify the above, the conclusion is plain that the lessor must pay this increased taxation. The plaintiff relies on the words "or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter." It is manifest that any such taxes, rates or assessments payable to the city "by reason of the use or occupation" of the lessees are not and could not be "regular" or "ordinary taxes," but extraordinary ones due to the manner of use or occupation. Then the rule of ejusdem generis applies here with full force. The kind or class of taxes which defendants bind themselves to pay are "all license fees, taxes, or other rates or assessments chargeable by reason of the manner in which they are used or occupied. Regular or ordinary taxes cannot be placed under such a category and are moreover expressly excluded.

I have said nothing about the fact that the increased taxation was owing to the increased revenue plaintiff society received, because, in my view, the reasons for the increase have no bearing on the question. The city assessors, except in so far as the building was exempt, were bound to assess it at the cash value which is the basis of the regular and ordinary taxation which under this lease, as I have already said, the plaintiff was bound to pay.

The appeal should be dismissed with costs.

GRAHAM, E.J.:—I concur.

DRYSDALE, J.:— I concur with the Chief Justice.

LAURENCE, J.:—The parties to this action entered into a lease dated September 14th, 1907, of the "main hall" of the building or premises owned by plaintiffs, Nos. 26, 28 and 30, Barrington Street, in the City of Halifax, with certain appurtenances belonging to said hall mentioned in the said lease.

The lease contained the following provision:

"The lessees will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments

which may be payable to the city of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)."

By statute the buildings or premises of the plaintiff company are exempt from taxation by the city of Halifax so long as they are exclusively used for the purposes of the plaintiff company as specified in their charter.

As a matter of fact, however, the assessors of the city only assessed that portion of these premises used from time to time for purposes other than the prescribed objects of the company, and on a basis or amount proportionate to the income derived from this temporary use of such portion. From 1896 down to the making of this lease, the company had been leasing this hall from time to time for purposes foreign to the objects of the company, and in view of that an annual assessment of $1,000 was imposed by the city officials. This was not the legal method of taxation under the statute granting the exemption to this company, but it was the method adopted and concurred in for many years by the authorities concerned, and probably served just purposes under the circumstances. It was upon this amount, $1,000, the plaintiff company was assessed at the time the lease was made.

Under these circumstances, and upon this state of facts, the parties sat down to prepare this lease, the above recited clause of which is presented for interpretation in this action. And I am of opinion that the proper construction of the clause in question is that the lessees should pay the "taxes or other rates or assessments" payable to the city of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, the lessor, however, agreeing to continue to pay as heretofore all the regular and ordinary taxes (that is, on the assessment of $1,000 previously paid by the said lessor). This, it seems to me, is the only construction which will give effect to the word "hereafter" in the one case and the words "continue to pay as heretofore" in the other case, and the

construction which gives effect to the obvious intention of the parties.

On the one hand, the lessees covenant to pay all license fees, taxes or other rates or assessments which hereafter may be payable to the city of Halifax. On the other, the lessors agree to continue to pay as heretofore all regular and ordinary taxes, water rates and assesments levied upon said premises. The obligation of the lessees is to pay license fees and all rates, taxes or assessments against the said hall (called in this lease "the premises"), hereafter chargeable by reason of the manner in which the same are used by the lessees, the lessor, however, agreeing to continue to pay as heretofore the assessments, &c., imposed on said premises. The provision might have been expressed more clearly, but to hold that the lessor should pay all the rates, taxes and assessments would entirely disregard and annul the clear provision that the lessess shall pay the rates and assessments hereafter imposed on the leased premises.

I think the appeal should be allowed.

MEAGHER, J.:—Concurred.

Appeal dismissed.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 3.

NOVEMBER 10TH, 1909.

NORTH v. MARTIN.

Animal Contagious Diseases Act—Sale of Cow Infected with Tuberculosis—Action for Price—Ignorance of Vendor—Defence.

W. G. Parsons, for plaintiff.

A. L. Davidson, for defendant.

The facts are set forth in the judgment.

By Order in Council of the 23rd day of December, 1904, in virtue of the provisions of sec. 29 of the Animal Contagious Diseases Act, 1903, a regulation respecting tuberculosis was made and established as follows:—

1. The disease of tuberculosis is hereby exempted from the operations of sections 3, 4, 5, 6 and 7 of the Animal Contagious Diseases Act, 1903.

PELTON, Co. C.J.:—Appeal by plaintiff from a magistrate's judgment in favour of defendant, heard before me at Bridgetown, without witnesses on either side, upon a very bald statement of admitted facts. The facts are as follows: Defendant, with full opportunity for inspection, bought a cow from plaintiff for $30, paid cash, $15, agreed to pay the balance in a month, took the cow away, but had not paid the balance. At the time of sale the cow had tuberculosis, which is an infectious or contagious disease under sec. 2 of the Animal Contagious Diseases Act, ch. 75 R. S. C., but, at the time of sale, plaintiff did not know that the animal had the disease. I assumed that defendant was in like ignorance, though the statement of facts is silent on that point. About four weeks after the purchase, defendant killed the cow without giving notice, under sec. 3 of the Act, and without examination by a veterinary. The day before the killing, defendant told plaintiff that the cow was sick. (It does not appear, from the statement, that he told the plaintiff that she had tuberculosis, or that the defendant then knew that such was the case), and asked plaintiff if he was willing to do something about it, but plaintiff refused to do anything, and said he would collect the balance of the price. Defendant did not offer to return the cow to plaintiff. Under the statement of facts, the contract of sale was admittedly an honest one, and made without concealment, and in complete ignorance that the animal was diseased. Having no evidence of the circumstances, outside of the statement, I am, of course, confined to the admitted facts.

Mr. A. L. Davidson, for the defendant, rests his defence upon sec. 38 of the Animal Contagious Diseases Act, above mentioned, which provides that "Every person who sells or disposes of, or puts off, or offers or exposes for sale, or attempts to dispose of or put off, any animal infected with or labouring under any infectious disease, or the meat, skin, hide, horns, hoofs or other parts of an animal infected with or labouring under any infectious or contagious disease at the time of its death, whether such person is the owner of the animal, or of such meat, skin, hide, horns, hoofs or other parts of such an animal, or not, shall, for every such offence, incur a penalty not exceeding two hundred dollars."

He contends that this section is absolute in its terms, that any person who sells, and so forth, is liable to the penalty, although he may not know of the existence of the disease in the animal; that, in this case, the plaintiff, notwithstanding his want of knowledge, was guilty of an offence created by the section, and is liable to the penalty, and the sale, being in violation of the Act, the plaintiff cannot recover the unpaid balance.

Mr. W. G. Parsons, for plaintiff, contends that the plaintiff, having innocently and in good faith sold the cow without any knowledge or belief that she had the disease, was not liable for the penalty, and could not be found guilty of the offence, and that there is, therefore, no violation of law which would render the sale void or prevent plaintiff from recovering the balance. He relies upon the doctrine or maxim of mens rea.

If I were trying the plaintiff for the offence, I would, probably, be inclined to hold in view of what I think, from examination of the numerous and somewhat conflicting decisions cited by counsel, is the weight of authority, that this maxim would apply in such case, and that the want of knowledge would be a defence to a prosecution for the penalty. The absence of the word "knowing" or "knowingly," in the section, having, as held by Day, J., in Sherras v. De-Rutzen (1895), 1 Q. B. 918, 72 L. T. R. 839, the effect only of shifting the burden of proof as to knowledge or want of knowledge, and I might have to adopt the reasoning of Wright, J., in that case, that, "in the present case, if knowledge were unnecessary, no farmer would be safe from the imposition of a penalty, no matter how innocent he might be of any intention of wrong."

In this case, however, I do not think it necessary for me to decide whether plaintiff could be made liable to the penalty under sec. 38. To my mind, the question here is not whether the mens rea doctrine applies or whether plaintiff, on the facts, could or could not be convicted or punished for the offence, but whether the sale is prohibited by the Act. If it is so prohibited, I do not think plaintiff can recover, even though he might not be, from want of knowledge, liable to the penalty. In this case, the sale of an animal having tuberculosis is, in my opinion, prohibited by sec. 38.

It is a well established principle that (adopting the words of Pollock on Contracts), the imposition of a penalty by

the legislature on any specific act or omission is prima facie equivalent to an express prohibition. Thus, for example, by the Court of Exchequer—"that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition." Cope v. Rowlands, 2 M. & W. 149, 157.

Where a penalty is imposed by an Act of Parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the Act. In re Cork & Youghal Railway Co., L. R. 4 Ch. App. 748.

"It is also settled that the imposition of a penalty for the contravention of a statute avoids a contract against the statute." Brown v. Moore, 32 S. C. R. 93, 97. See, also, Maxwell on Statutes, 3rd ed., p. 555.

But it is not necessary to multiply the citation of authorities which are numerous on this point. The sale of the cow was illegal because prohibited by statute, and plaintiff cannot recover the balance of the purchase money. There will be judgment for the defendant and dismissal of the appeal, but, under all the circumstances of the case, without costs.

I may say, if I may express an opinion apart from the legal question as to what was right and fair and equitable between these parties, both of whom were contracting in good faith and without any knowledge as to the existence of the disease in the animal, that, in my view, the loss should be divided about as it has been, and the plaintiff has received for the cow all he ought to expect, and probably as much as he would have realized if he had not sold the cow to the defendant.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 3.

NOVEMBER 10TH, 1909.

CHIPMAN v. DURLING.

Collection Act—Absence of Finding of Fraud—Appeal by Defendant from Order for Payment by Instalments—No Cross Appeal by Plaintiff—Right of Plaintiff on Appeal to Set up Fraud—Right of Wife to Employ Husband—Liability to Support Family before Paying Creditors.

Miller, for plaintiff.

Milner, for defendant.

Plaintiff recovered a judgment for upwards of seven hundred dollars against defendant and examined him under the provisions of the Collection Act, and the Commissioner made an order that the defendant pay the plaintiff fifteen dollars monthly, upon the judgment, and he verbally ordered the defendant to assign to the plaintiff his real and personal estate in trust for the payment of the debt. Although requested by the defendant to commit the plaintiff for fraud, he declined to do so. Defendant appealed from the order for payment.

Before the judgment was recovered the defendant had made an assignment to the official assignee of the county, and his farm and personal property had been sold at public auction by the assignee, and purchased by the wife of the defendant, and the defendant had since given his wife the benefit of his services without reward.

Mr. Milner, for the defendant, contended that the plaintiff was obliged to shew that defendant was in receipt of income over and above what was sufficient to support his wife and children, before an order could be made to pay the plaintiff, and he relied on Buckley v. Wells, 33 N. Y. 518; Gage v. Dauchy, 34 N. Y. 293, and Abbey v. Deyo, 44 N. Y. 343.

Mr. Miller, for the plaintiff, contended that the husband was entitled to receive wages, from his wife, under an implied agreement, and was, therefore, in receipt of income within the meaning of the statute.

PELTON, Co. C.J.:—Appeal by defendant from Commissioner's order under The Collection Act requiring defendant to pay to plaintiff fifteen dollars monthly on the judgment in this action.

After hearing evidence of plaintiff and defendant and other witnesses on the appeal and carefully reading the evidence taken by the Commissioner on the examination before him, and after argument of counsel, I have now to give my decision on the appeal.

I have nothing before me but the Commissioner's order to indicate what his conclusions were from the evidence, but as the order is for merely monthly payments, I take it for granted that his only finding against the defendant apart from his verbal order for assignment was that the defendant had sufficient means or income to pay the judgment by instalments. This verbal order made under sub-section 2 of section 28 of the Act would shew that he had determined not to commit the defendant under any of the provisions of section 27.

I must assume that so far as section 27 applies the findings were in favour of defendant, and it would seem, strictly speaking, where there is no appeal by plaintiff, as if I were confined to a consideration of the grounds set out in the notice of appeal, viz., the question as to the possession of means or income by defendant. Mr. Miller was allowed to contend on the hearing of the appeal that defendant was liable to commitment under sub-section b or section 27 for having contracted the debt without any reasonable expectation of paying the same.

I find, and in fact Mr. Miller in his argument admitted, that the debt was not fraudulently contracted (sub-section (a), the credit was not obtained under false pretences (b), there were not any other fraudulent circumstances in connection with the contracting of the debt (d), the debtor did not make any fraudulent disposition of his property (e).

As to the contracting of the debt without having at the time any reasonable expectation of paying same, I cannot find anything in the evidence that would in my opinion warrant me in sustaining plaintiff's contention or in committing the defendant on that ground. It is true the defendant had difficulty in financing his affairs, but when he contracted the debt he had a large credit at the bank and was floating his business along as usual, and it was only when the bank with-

drew or curtailed his credit that he began to see the end of his business career, and after the action of the bank in that way he purchased nothing from the plaintiff. I cannot, therefore, say from the evidence that when he contracted the debt he had no reasonable expectation of paying it, and I cannot order his committal on that ground.

The question remaining to be considered, and the one upon which the appeal has been taken, is whether the defendant is possessed of means or income sufficient to enable him to pay the debt by instalments.

The question of course must be decided by the evidence, and it is incumbent upon the plaintiff to show that the defendant has such means or income. This, I think, the plaintiff has failed to do.

The uncontradicted evidence of defendant and his wife is that he has nothing, he assigned all his property real and personal to the official assignee under the Assignments Act, and has acquired no property and has been in receipt of no income since the assignment.

His wife upon her own account and on her own credit, with funds of her own and with the help of indorsers, has managed to get most of the property into her possession, and is continuing the business upon a much smaller scale than formerly, with the advice and assistance, as is reasonable, of the defendant. But the defendant, according to the evidence, is not in the receipt of any wages from his wife; there is nothing to shew that the wife is making more than enough to support the family, and it certainly would be the defendant's first duty to assist in maintaining his family.

The authorities on this point cited by Mr. Milner, on behalf of the defendant, if authority were needed for so plain a proposition, are conclusive as to the obligation of the husband to support his wife and family in a reasonable manner in preference to payment of debts.

I should judge that with the excessively heavy incumbrances on the real estate, and the liability incurred by the wife in the purchase of the personal property, and the smaller business now carried on, husband and wife together will have all they can do to maintain their family and pay interest, to say nothing of reducing the incumbrances and other liabilities on account of the personal property.

I cannot see any prospective income out of which the defendant could possibly pay any instalments on the judgment. He is a comparatively old man broken down in health, and without any property, and he is not at all likely to accomplish much in the future.

I need not refer at greater length to the evidence. I have gone over it all, and considered it very carefully, and while I would be disposed to uphold the order of the commissioner if it were at all possible to do so, I cannot come to the conclusion from the facts before me that the defendant has sufficient or any means or income to justify an order for payment by instalments. Such an order if made would be of no avail to the plaintiff, there is nothing for him to get in satisfaction of it.

I am obliged therefore to set aside and reverse the order appealed from, but I order that the defendant do forthwith make and execute to plaintiff an assignment under section 28. If counsel cannot agree upon the form, I will settle it upon application.

I cannot now see that such assignment will be of any benefit to plaintiff, but it is possible that he may discover property not disclosed by the evidence acquired by defendant since the assignment to the official assignee, and in that case it would be of use.

I do not allow any costs of appeal.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 11TH, 1909.

THE TRUSTEES OF SCHOOL SECTION No. 8, RICHMOND v. LANDRY ET AL.

School Trustees—Action to Restrain Conveyance of Land and to Recover Property—Appointment of New Trustee—Adding Ratepayer as Plaintiff—Amendment—Conduct of Action where Trustees Decline to Proceed—Attorney-General as Plaintiff—Order Therefor—Trustees Joined as Defendants—Costs—Practice.

Appeal from the judgment of MCGILLIVRAY, C.C.J., ordering that Thomas D. Morrison, a ratepayer of the section, be added as a plaintiff in the action.

W. B. A. Ritchie, K.C., in support of appeal.

J. A. Wall, contra.

GRAHAM, E.J.:—There is a dispute between the ratepayers in this school section, and this action was brought by the trustees corporation to recover some property, and there is a restraining order granted to prevent the property from being conveyed away. But at a recent school meeting the defendant, Andrew Landry, was appointed a trustee in the place of one retiring. There is another proceeding pending before us as to the legality of that appointment, and now a majority of the trustees, backed up by a majority of the ratepayers, apparently do not wish to proceed with the action, and have given instructions to have it discontinued.

One Thomas D. Morrison, a resident ratepayer, applied to a Master of this Court to be made a plaintiff, and there was an order made to that effect. Something was said by the Master about giving him the conduct of the action, but that was not done, and could not be done.

There is an appeal from the Master's order.

It is admitted that the order cannot be supported. But it is contended that we ought still further to amend by adding Morrison as a plaintiff, suing on behalf of himself and other ratepayers. That seems reasonable, but then the trustees corporation would have to be made defendants, and it also appears to be a case in which it would be advisable to make the Attorney-General a plaintiff.

This seems to be a great extension of the power of amendment, and I would have some hesitation about granting the application, leaving the dissenting ratepayers to bring an independent action properly framed. But any independent action would have to deal with this action, which the parties may at any moment discontinue or compromise, and the present defendants will have two actions pending against them if, as the result of the other proceeding, the majority of the trustees corporation is turned the other way.

Practically, there will be no difference in the matter of costs.

The amendment should be granted, and the Attorney-General (if his consent is obtained) may be made a plaintiff on the relation of Morrison, and the trustees corporation will be struck out as a plaintiff and joined as defendants, and leave given to file a new statement of claim appropriate to the circumstances.

Leave to amend within sixty days from the order therefor.

The present defendant will have the costs of the present appeal, and of the application before the Master against Morrison. But the costs of the amendment and of the action will be disposed of by the Judge or Court on the final adjudication.

RUSSELL and DRYSDALE, JJ., concurred.

MEAGHER, J.:—I say nothing in this case.

NOVA SCOTIA.

SUPREME COURT AT SYDNEY. DECEMBER 4TH, 1909.

McKINNON v. MacPHERSON.

Contract—Agreement for Sale of Mineral Rights—Rescission—Undue Influence—Trespass.

R. F. Phalen, for plaintiff.

D. A. Cameron and N. McMillan, for defendant.

RUSSELL, J.:—The plaintiff and his wife executed an agreement in July, 1899, giving the defendant certain mineral rights in connection with the property which was owned by the plaintiff and his two sisters, but which the defendant supposed was the property of the plaintiff. Defendant says that the consideration for the agreement was that he would deed to plaintiff a piece of land adjoining plaintiff's and known as the Carberry lot. Plaintiff says that the arrangement as to the Carberry lot (which he had been renting from the defendant for a dollar a year) was that the plaintiff should clear the bushes off the defendant's land adjoining plaintiff's in consideration of receiving a deed of the Carberry lot. The claim of the plaintiff is to have the agreement rescinded, because of undue influence on the part of the defendant in procuring it. The plaintiff's evidence, as to what took place when the agreement was signed, is all quite consistent, with the exception that Margaret McKinnon, the sister of the plaintiff, older than he, who was examined de

bene esse, being old and sick and unable to attend Court, admitted in cross-examination that the defendant and plaintiff came into the house together on the day the agreement was signed. Her statement on the direct examination was that she was the only one in when Father MacPherson arrived: "All the rest were out at the potato field. They all came in a minute after Father MacPherson." This is inconsistent with the plaintiff's account of the matter, who says that he unharnessed his horse and put him in the barn before coming in the house and that the defendant was then already in the house. I do not consider this slight discrepancy of any great importance. It is quite possible that the old lady in cross-examination was led to use words that did not correctly represent her thoughts, and it is not very material, if she was mistaken, as to this detail. All the parties present, except the defendant, agree that there was no explanation made of the document, although it must be mentioned that one of the sisters admits that something was said about minerals or limestone or something of that kind. The plaintiff is seventy years old and can neither read nor write. His wife signed as well as the plaintiff by a mark, and it is beyond question, I think, that the document was never explained to her. I think the evidence preponderates that no explanation of the document was ever made at the house when it was signed. But the defendant claims that the arrangement with reference to it was made on a previous occasion, when the plaintiff was at his house paying the rent on the Carberry lot. The question of fact seems to be reduced to an enquiry as to what took place between the plaintiff and the defendant on this occasion. They are directly consistent and both were very plausible and apparently credible and "convincing witnesses," to use the overworked expression of the literary critics. I should have no reason for disbelieving either of the parties, if he were not contradicted by the other. The salient parts of the case seem to be as consistent with the defendant as with the plaintiff's account of the matter. The fact of it is a fact that the plaintiff ceased paying rent for the Carberry lot, after the lease, or whatever the agreement is, was executed, is consistent with the plaintiff's story that he was to clear the bushes off the defendant's land in exchange for the Carberry lot, and with the defendant's story that the Carberry lot was to be conveyed in consideration of the agreement.

The agreement in this case could not be satisfactorily explained to the plaintiff, because it is perfectly indefinite. No term of years is mentioned for which the lease, if it is a lease, is to continue, and the amount of the royalty to be paid to the plaintiff is left blank. It does not seem necessary to determine what effect these particulars would have upon the construction of the document, because I think that under the authorities, the burden was upon the defendant, arising out of the relations between them to show that the plaintiff clearly understood what he was doing. The document creates, I should think, at least a license to the defendant to go upon the plaintiff's lands and take minerals therefrom, and the defendant, not having established affirmatively that it was fully understood by the plaintiff and executed by him without his being affected in any way by the influence, assumes as possible from the relations of the parties. I think the agreement must be cancelled.

There is a counterclaim for trespass which has all the appearance of having been trumped up to meet the plaintiff's claim. It depends entirely upon the establishment of the boundary line between the parties, and the evidence is too vague and uncertain to enable me to determine that the plaintiff overstepped the established and long enjoyed line between the properties.

The counterclaim will therefore be dismissed.

NEW BRUNSWICK.

BARKER, C.J. DECEMBER 31ST, 1909.

SUPREME COURT IN EQUITY.

TAYLOR v. McLEOD, ET AL., TRUSTEES.

Will—Construction—Fund for Maintenance and Education—Time for Payment—Costs.

J. Roy Campbell, for the plaintiff.

C. H. Ferguson, for the defendants.

BARKER, C.J.:—In form this bill is one for the administration of the trusts of the will of the late Byron G. Taylor, but in substance and fact it is for the payment of a legacy

which the plaintiff, his son, claims from the defendants, who are the trustees under his will.

The testator died on the first of October, 1895, leaving him surviving a widow and one child—the plaintiff—who was then about seven years old. The will contains the following provision: "And I hereby will and bequeath all my estate, real and personal (of which I may die possessed) to my said executors and trustees for the following purposes—that they shall in the first place convert all property into cash within one year from the date of my death, and after the payment of my just debts shall invest the remainder in safe interest paying investments and out of such investments I direct that the sum of one thousand pounds (£1,000) or the equivalent thereof be set apart and used by my said executors and trustees for the purpose of educating and giving a profession to my son Gordon Winslow Taylor, providing he has not already been educated and received a profession." The will then contained directions as to the disposal of the residue of the estate, and provides that the plaintiff's share of it shall be paid over to him on his attaining the age of twenty-five years, the income of the share being in the meantime available for his support and maintenance. This £1,000 fund was set aside and it is in the defendants' hands invested as follows:—$5,000 in City of Saint John debentures, $500 in Kings County debentures and $45.66 on special deposit in the Bank of New Brunswick. This is the unexpended balance of the original fund and accumulations after deducting $1,500 allowed the plaintiff by the defendants to enable him to travel in Europe in 1907.

The plaintiff reached the age of twenty-one years on the 2nd September, 1909, and he has filed this bill by which it is prayed that this estate be administered under the direction of this Court. The plaintiff claims that he is entitled to have paid over to him, now that he is of age, the £1,000 fund, and to secure that is the sole object of this bill. There is no dispute as to the facts, and the only point upon which I intend making any observation is the question of costs. Section twelve of the bill is as follows:—"That since the said plaintiff has attained the age of twenty-one years as aforesaid he has applied to the said defendants, George Otty, Dixon Otty and James A. Belyea, to have the balance of the said fund and interest, or the securities representing the same, transferred to him the said plaintiff, but the said

two last mentioned defendants informed the said plaintiff that the defendants were unwilling and would not do so without the sanction of this Honourable Court." The defendants admit this statement to be true. I think the plaintiff is entitled to the payment of this fund. It is clearly a legacy for his benefit and in the absence of any provision postponing its payment to a later date, as in the case with the remainder of the estate, would be payable to the plaintiff on his coming of age, when he could give a valid discharge to the trustees. The authorities cited by Mr. Campbell, and there are many others which might be cited, sustain the plaintiff's claim. There must therefore be a decree for the payment of the fund to the plaintiff.

As to the costs: To make them payable out of the fund, as would be the usual course, is simply so far as the plaintiff's costs are concerned, to order his costs to be paid out of his own money. I asked the plaintiff's counsel if he claimed that the defendants should pay the costs of this suit and he distinctly said that he did not. There is therefore no one to pay them but himself, and there seems no order necessary as he is liable on his own retainer. An order might be made for the trustees to pay them out of the fund and pay the balance over to the plaintiff. There is no object to be gained by that, more especially as a security would have to be sold for the purpose, and that no one wanted done. As to the defendants' costs, in what position do they stand? I asked their counsel to point out why the defendants refused to pay, and in what way doubts as to the plaintiff's right to the money had arisen. He frankly told me that in his opinion the money ought to be paid, and the two defendants Otty and Bolyea, both of whom are lawyers, were apparently of the same opinion. These proceedings therefore have been rendered necessary, not by any doubt the trustees had or could even suggest as to the plaintiff's right, but because they refused to pay without the sanction of this Court. I am disposed to think that there are authorities which in such a case would render them personally liable for the costs of the proceedings, but that is not asked here and so the only question is whether they should have costs. I have come to the conclusion that they should not.

In Knight v. Martin, 1 Russ. & Myl. 70, a trustee who refused to pay a legacy without the direction of the Court in a case which admitted of no doubt was refused his costs,

and only escaped an order to pay costs because he might have been ignorant an did not act from any improper motive. Campbell v. Home, 1 Y. & C. 664, and cases cited in the note at page 670 are to the same effect.

The same rule has been applied to trustees paying the fund into Court under the Trustees Act to escape some fancied liability. They have been obliged to pay the costs of getting the money out of Court. In re Elliot's Trusts, L. R. 15 Eq. 198, Malins, V.C., says,—" By the present proceedings the fund will be greatly diminished, and I am sorry to find that the trustees were not taught a better lesson when, in deciding the case in July last, regarding the sister's share, which they also paid into Court, I ordered them to pay the costs. I decided that they were not then bound to make inquiries about the encumbrances on the fund. I think these proceedings were perfectly unjustifiable, and although it is clear that the Court will incline towards the payment of the costs of trustees when they act in a bona fide way, still, on the other hand, it is most important that trustees should not incur unnecessary expenses for the mere purpose of relieving themselves of all liability, and particularly so when there is no reasonable doubt in their way. . . . I can find no excuse for their having paid the money into Court except a restless anxiety to get rid of it, and I cannot relieve them from the payment of costs. See also In re Cater's Trusts, 25 Bea. 361; In re Knight's Trusts, 27 Bea. 45.

The same rule has been adopted in the case of trustees unnecessarily seeking advice or opinions of the Court on questions of management.

While the Court will afford trustees every assistaace and protection when they are acting bona fide and are in doubt on reasonable grounds as to the proper course to pursue, it is obvious that, if the trust funds are to be utilized in proceedings and applications to meet cases where the trustees themselves cannot even suggest a doubt as to the course they should take or when there is no substantial doubt as to what should be done, trustees would be of little use; they would be little more than clerks or ministerial officers of the Court paid out of the trust funds.

There will be a decree for the trustees to pay over the fund as invested with accumulations of interest.

There will be no order as to costs.

No order as to administering the estate in this Court. There seems very little to be done and the Probate Court can pass the accounts. Under the circumstances there is no reason for taking the administration over.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY. DECEMBER 23RD, 1909.

HUTCHINSON v. HUTCHINSON.

Will—Devise to One of Testator's Sons to be Selected by Widow—Death of Widow without having made Selection—Joint Tenancy or Tenancy in Common—Partition Refused—Administration Ordered.

A. C. Saunders, for complainant.

Neil McQuarrie, K.C., C. R. Smallwood and B. W. Tanton, for defendants.

FITZGERALD, V.C.:—Patterson Hutchinson by his will gave, devised and bequeathed "all my real and personal estate of every kind and description and wheresoever situated unto one of my sons his lawful heirs and assigns absolutely forever, hereby appointing my wife Barbara Ann Hutchinson to choose which one of these two is the more worthy to have it."

There are other provisions in the will providing for his mother, his wife, and the education of all his children.

The testator left him surviving two sons and one daughter. After his death one of his sons died unmarried, and subsequently his wife died without making any appointment under the power given her in the will.

This bill is now filed by the surviving son and daughter asking for partition and sale of the real estate consisting of 85 acres of freehold lands, and administration of both real and personal estate.

The intitial question is, has the daughter any interest in either the real or personal estate?

To decide this it is necessary in the first place to construe this will.

There can be little doubt, I think, that the testator by it intended to devise all his property to one of his two sons to the exclusion of the other of them, and of his daughter, leav-

ing it to his wife to select which of such sons and "his lawful heirs and assigns absolutely" should have the property.

I will now consider the doctrine established in Brown v. Higgs, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561, and the later cases hereafter referred to.

I have no doubt that under the authority of that case and of Burrow v. Philcox, 5 My. & Cr. 72, Wilson v. Duguid, 24 Ch. Div. 244, and in Re Weeks Settlement (1897), 1 Ch. 289—there appearing in this will a general intention in favour of a class, and a particular intention in favour of an individual of a class—that the particular intention failing, by reason of the mother not having made the selection required of her, the Court will carry into effect the general intention in favour of the class.

And further that, as there is no time limited for the execution of the power by the wife, and that it was (as Chitty, J., in Wilson v. Duguid expresses it), "not more or less her duty to exercise the power just before her death, than it was to exercise it at any other time, the Court will now execute the power in favour of the class as existing at the date of the testator's death: Lambert v. Thwaites, L. R. 2 Eq. 151, and not at the time of his wife's death; and, as by this will an absolute gift is made to a class, with only a power of particular appointment to one of that class, the property in this case therefore vested in both sons, on the death of the father, and the power not being exercised it remained so: Lambert v. Thwaites.

The more difficult question remains, however, namely, whether it so vested in them as tenants in common, or as joint tenants?

Morley v. Bird, 3 Ves. 629, and Withy v. Mangles, 4 Beav. 358, as followed and approved by the more recent cases, settle the law, that a devise to two or more persons, simpliciter, of realty, or a bequest of chattels, whether it be made to them as individuals, or as a class, will confer a joint tenancy, unless there are words of severance—as "equally among," or an intention of a contrary desire on the part of the testator.

As I have construed this will, the intention of the testator was not to divide his property equally among his two sons, but to give it to one of them absolutely. It is a gift to one

only; the testator leaving the selection of that one to the donee of the power coupled with a trust.

None of the authorities I have been able to find, including those cited by me, have had in review a will in such terms as this one. All indicate in some way a division amongst children in such manner, at such times, and in such proportions, or as most deserving, &c., as the donee of the power should think best, as for example in Re White's Trusts, Johns. Ch. 656, Lambert v. Thwaites, Wilson v. Duguid (where the Court expressly finds that this was a trust for all the children in equal shares), Brown v. Higgs, Chesterton v. Sutherland 9 Ves. 445.

In Re Phene's Trusts, L. R. 5 Eq. 346, Lord Romilly draws attention to the reason for holding that such bequests should go to the devisees as tenants in common. He says: "Then the testator says to his executors: 'You may give it amongst that class (of children) as you see fit.' That does not create a joint tenancy, because his meaning clearly is that the executors are to divide the fund, and the Court standing in their place must also divide it, that is, give it to the objects of the testator's bounty as tenants in common."

Following that reasoning, there being no intention on the part of the testator here, to make any division, a joint tenancy would be created; for, though both sons are the class designated, the idea of division among them is expressly negatived.

Under such authority, and construing the will as I do, I am compelled to hold that the two sons took a joint tenancy on their father's decease, and that now the survivor, Cyril Stanley Hutchinson, is alone entitled under the devise in his father's will.

I have fixed the time for ascertaining the class, at the death of the testator. There is, however, a clause in the will —not brought to my notice—which reads as follows, speaking of the testator's mother: "While she lives with my wife here she must be consulted with respect to the management of the affairs, but if she goes somewhere else to live, my wife Barabara Anne Hutchinson will have full control till her death, when the son she chooses will have charge."

If this means that the time for ascertaining the class is on the death of the wife—which is open to much doubt—it does not alter the estate of the survivor, for his brother predeceasing his mother, he, Cyril S. Hutchinson, was the

only one of his class entitled on his mother's death; and whether she made an appointment or not, he took the estate solely and absolutely.

There can therefore be no partition, and the bill must fail in that respect.

The bill however asks for administration. That will be granted, in view of the necessity for having the question of the interests of the two infant children settled by a Court of competent jurisdiction, and of the title to the personalty being disputed by the defendant Hugh Patterson.

There will be a declaration that the said Cyril Stanley Hutchinson is solely entitled under the devise in his father's will to all the testator's "real and personal estate of every kind and description, and wherever situated," subject to other the bequests and conditions therein contained, and a further declaration that the said testator Patterson Huchinson died seised and possessed of one undivided half interest in the stock, cattle, farming implements, crop and other personal property, and the increase thereof, as the same were transferred and assigned to him by deed of assignment of the 18th April, 1895, and made between the said testator and one Matilda Hutchinson now deceased. And that Hugh Hutchinson, one of the defendants herein, has no title or interest in such one undivided half share as the same existed on the decease of the said Patterson Hutchinson.

Ordered, that the estate of Patterson Hutchinson deceased be brought into this Court and administered, and that administration be made accordingly.

Further ordered, that the executors file their affidavit of accounts in form required by general order of 1st December, 1908, and that the usual order of reference be made to Master Hunt to ascertain what debts there are against the estate of the late Patterson Hutchinson.

NOVA SCOTIA.

SUPREME COURT.

DECEMBER 15TH, 1909.

ANGLE v. MUSGRAVE.

Land—Title—Crown Grant — Adverse Possession — Will— — Proof—Rents and Profits—Improvements.

This is an appeal from the judgment of Longley, J., reported ante p. 83.

W. F. O'Connor and A. D. Gunn, for appellant.

D. A. Hearn, K.C., for respondent.

GRAHAM, E.J.:—This is an action to recover land, with a claim for mesne profits, and it is nothing else. The plaintiff claims the land as devisee under the will of George J. Bradley, who died at Montreal, on the 28th day of April, 1907.

I agree that the will is sufficiently proved by a copy under s. 27 of the Evidence Act, R. S. (1900), c. 163.

There is oral evidence showing the death and that the will was made during his last illness, and tending to show that it must have been the last will. It purports to have been signed by the testator in the presence of two notaries, witnesses, present at the same time, and in all respects is a sufficient compliance with our Statute of Wills, and sufficient to pass real estate in this province. The judgment to recover the land cannot be impeached.

The learned Judge, in respect to the claim for mesne profits, has allowed the same for nine years, covering a period in the testator's lifetime. Against this, he has allowed to the defendant a large claim for improvements under the American doctrine.

I think the plaintiff, who is a devisee, cannot recover for mesne profits, which accrued to the testator, but is only entitled to recover those which accrued during the period of his own title.

In Sedgewick on Damages, s. 912, it is stated: "Heirs or devisees recover (mesne profits) only from the time of the ancestor or testators' death."

Besides, I think there is some testimony, more or less satisfactory, tending to show that the defendant was a tenant at will of the testator. Of course this would be put an end to on his death. There was a demand of possession in this case on the part of the plaintiff.

This would also dispose of the question of improvements. But in any view, the law as to that doctrine is thus stated in 16 Eng. & Am. Encyc. 101, as follows:—

"But he, the defendant, cannot be allowed to recoup against the mesne profits for improvements made before the plaintiff's title accrued."

The case of Ocean v. Ilford (1905), 2 K. B. 493, affords a starting point for the mesne profits, i.e., it shows that after

entry or recovery the right of possession relates back to the time at which the legal right to entry accrued.

And the case of South Post v. Gandy (1897), 2 Q. B. 66, shows that mesne profits may be allowed after action brought and up to the time when the plaintiff obtains possession.

Roughly, there would be accruing mesne profits for over two years, and at the rate fixed by the Judge, they would amount to $240. Against this, the defendant Musgrave has expended during the same period, in repairs and for taxes, about $120.

The balance, $120, is a larger sum than the Judge at the trial allowed to the plaintiff, viz., $68. The plaintiff has not taken a cross-appeal, consequently the judgment will remain at the sum of $68.

The appeal will be dismissed with costs.

RUSSELL, J.:—The principal question of importance on this appeal relates to the admission of evidence to establish the will of George J. Bradley. The Evidence Act, R. S., vol. 2 (page 682), s. 27, provides that:—

"A copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any Court in place of the original, and shall have the same force and effect as the original would have if produced and proved."

No proof of the handwriting or official position of the person certifying is requisite, and we must therefore take it that a true copy of whatever it was that was executed before the notaries public in Montreal, has been produced in compliance with section 27. In order to have any effect upon the transfer of land in Nova Scotia it must be shown to have been executed in compliance with the formalities required by the law of this Province. If this section had been intended merely to say that the original document should be received in evidence quantum valeat, it might well have closed with the phrase directing that it should be received in evidence in place of the original. In that case the question might still be left open whether, although admissible in evidence and effectual for some purposes, it could be effectual to operate on the title to lands in this Province. When the clause goes

further and enacts that the document so received shall have the same force and effect as the original would have if produced and proved, I think it must have been intended to say that the party producing the document should be in the same position as if he had produced the original and proved with respect to it all the facts certified with respect to it by the notary public. It is to have the same force and effect as the original would have if produced and proved. Proved how? Proved to have been executed in the manner in which it puports to have been executed. The language might have been more explicit, but I think it means nothing if it does not mean this. The notary public has certified, in fact two notaries public have certified, that the will was subscribed by the testator in their presence, and that they signed it in his presence and in presence of each other. They do not describe themselves as witnesses by the use of that term, but they were witnesses and attest the facts that make them witnesses, and shew the due execution of the testament. I see no reason, therefore, why the instrument could not properly be received. If it be said that it cannot, because the section does not apply to wills, there being other clauses in the Evidence Act which provide for the proof of wills, there are two answers; first, that section 22 of the Evidence Act only applies where there has been probate of the will, which I admit is not a conclusive answer, because it happens that there can be probate of some kinds of wills in Quebec. That, however, is an accident, and, in fact, we have no proof in the law of Quebec, as to which I am not sufficiently well informed, to be able to say whether there could or could not be probate of a will executed in the form in which this will was executed. In fact, I should rather infer from the statement of Osler, J., in Re Maclaren, 22 O. A. R. 19, that this particular kind of will has not been presented for probate, but was to remain with the notary public. But what the procedure in Quebec may be in this respect is of no great consequence, because the best answer to the argument that you must cut out wills from the operation of section 27, because wills are specially provided for by section 22, is the equally cogent contention that you must cut Quebec out of section 22 because that province is specially provided for in section 27. I do not consider either contention valid. I think that section 22 applies to Quebec and would have to be invoked where there was a will that was or could be admitted to probate and was

not executed before a notary, and that section 22 applies to wills executed before a notary whether they could or could not have been admitted to probate.

The decision of Osler, J., in Re MacFarlane, 22 O. A. R. 18, is distinctly in favour of the views here presented. He held that ancillary letters of administration could not be granted on mere production of the certificate, such as that produced in this case, but he conceded that the certificate made proof of the will, its contents and execution. That was all that the party producing it desired to prove by means of the certificate in the present case. The death of the testator was proved by other evidence as it must necessarily have been, and the will having been proved must, of course, be taken as the last will and testament, none other having been produced.

On the other branch of the case, I find my views expressed in the opinion of my learned brother Graham.

TOWNSHEND, C.J. (dissenting):—This is an action for the recovery of lands and trespass for mesne profits in which judgment was given for plaintiff and from that decision defendants appeal.

The defendants make two contentions: (1) that the alleged will of George J. Bradley, a necessary link in plaintiff's title, was improperly received in evidence, and (2) that mesne profits were improperly allowed against him.

The will had not been admitted to probate in this province. It purports to have been made in the Province of Quebec before two notaries, and was duly certified by one of such notaries as a true copy of the original will on record in his office. No proof was offered or given except the production of the copy as certified. The learned trial Judge admitted this document, as he states, under the provisions of ch. 163, sec. 27, R. S. N. S., which reads as follows:—

"A copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled, or enregistered by such notary, and certified by a notary or prothonotary to be a true copy of the original thereof, certified to be in his possession as such notary or prothonotary, shall be received in evidence in any Court in the place of the original and shall have the same force and effect as the original would have if produced and proved."

It will be seen that if wills are included, or intended to be included in this section, the mere certified copy as produced fulfilled all its requirements.

It is contended for the defence that the section has no application to wills, which are fully dealt with under sec. 22, sub-sec. (1) and (2). That section provides that:—

"The probate of a will or a copy thereof certified under the hand of the registrar of probate, or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the Court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition, and the correctness of the prepared copy."

Sub-sec. (2). "This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in Courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills."

If this will was properly received in evidence, then it comes to this, that, in respect to the Province of Quebec, a different rule prevails regarding the transfer of property in this province by will from that which prevails as to any other province or country. In this province, and so in regard to any other province or country, under the sections applicable to wills, a copy of the original will can only be received in evidence when it has been shewn to be a true copy, duly recorded in a Court having jurisdiction over the proof of wills and administration of intestate estates. If plaintiff's contention is right a copy of a will which has never been proved in any Court, provided it is certified by a notary public in Quebec, is to be accepted as the true will of the testator. Thus, a transfer of land could be made without any record in the province, and without any of the proofs required by our statute for authenticating the due execution of wills. I cannot believe that such was the intention of the statute, especially in view of the provision of sec. 22, which, in express terms, is made applicable to all wills proved elsewhere than in this province. I am rather disposed to think that sec. 27 is applicable to all instruments other than wills, be-

cause of the express provision for wills made and probated elsewhere.

This view of the section in question seems to be in accord with the general law of the subject as laid down in Dicey on Conflict of Laws, at p. 520, where he says:—

"The formalities required for the devise of immovables, whether realty or personalty, the restrictions, if any, in such devise or bequest, and generally the validity of a will of lands, are wholly governed by the ordinary testamentary law of England (lex situs)." And again:—

"The general principle of the common law is that the law of the place where such immovable property is situate exclusively governs in respect to the rights of the parties, the mode of transfer, and the solemnities which should accompany them. . . . All questions concerning the property in immovables, including the forms of conveying them, are decided by the lex situs." Does the language of sec. 27 displace the above statements of the common law as heretofore in this province? If not, and I think it does not have that effect, then in this case there was no evidence before the Court that the original of this will was properly executed with all the solemnities and formalities required by our statute of wills. It has never been admitted to probate or had the sanction of any Court having jurisdiction in matters of probate and administration of estates, and I think only in such cases could a copy of the original be received.

It is not necessary in establishing title to lands that probate of a will should be first granted. The original will may always be proved on the trial in the usual way and be evidence, but no copy of such wills could be received unless the original had been admitted to probate. Under sec. 27, if applicable to wills, a certified copy of a will not admitted to probate, or authenticated in any Court, must be received, and will have the same force and effect as the original if produced and proved. Moreover, in sec. 22, which enables a copy of a will duly admitted to probate to be received in evidence, there is a clause providing for the production of the original will where the Court is satisfied it is necessary to test its validity and character, but if wills are admitted under this section there is no such power or safeguard. A will admitted under this section would transfer property which, if the original were inspected by a Court or jury, would be

rejected for many reasons which would not appear in a copy, such as erasures, interlineations, forgeries, want of mental capacity and other imperfections. Again, if this section applies to wills, it does not appear that the will as executed before a notary must necessarily be executed as our statute requires. It might be witnessed by one person only, yet, if certified by a notary to be so registered in his office, this would be enough to give it validity here. Moreover, we have no evidence here what the law of Quebec is on the subject of wills, and therefore do not know whether, even in that province, a will so certified could be acted on without proof in some Court having jurisdiction over the subject.

The only case of any authority with respect to such a clause is In re Maclaren, 22 O. A. R. 18, where Osler, J.A., in confirming the decision of the Surrogate Judge, refusing to admit a will executed as this one, under a similar clause in the Ontario Statutes, appears to treat it as applicable to wills, although that question was not raised before the Court. It may be that in Ontario there is no section corresponding to sec. 22 in our Act, which would, in some measure, account for his language.

However that may be, I am of opinion that such a fundamental and dangerous change from the common law should not be recognized unless the statute supposed to make such a change is clear and definite beyond controversy. In veiw of the extraordinary results which will follow if wills executed and proved as here should be received as evidence of title I think we should long hesitate before giving effect to a clause interpolated at such a recent date into our statute without due and full consideration of its effect. I may be in error, and if so it is high time, in my view, that the attention of the Legislature should be directed to it, so as to prevent further mischief.

Holding this opinion, I come to the conclusion that the copy of this will was improperly admitted in evidence, for want of due proof of its execution in accordance with our statute and because the original has not been probated in any Court having jurisdiction in matter of wills and administrations of estates. The appeal should be allowed.

Appeal dismissed with costs.

NOVA SCOTIA.

FULL COURT. DECEMBER 22ND, 1909.

REX v. BUCHANAN.

School — Board of Commissioners — Trustees — Legality of Appointment — Quo Warranto — Public Instruction Act, sec. 37 — Construction — Election — Irregularity.

Proceedings in the nature of a quo warranto to determine the validity of the election of school trustees. Appeal from the judgment of LAURENCE, J., dismissing the information.

W. F. O'Connor, in support of appeal.

A. A. Mackay, K.C., contra.

GRAHAM, J.:—This is an information in the nature of a quo warranto to determine the legality of the appointment in 1906 of three school trustees made by the board of school commissioners for the district of Victoria and North Inverness, owing to the alleged failure of the school section No. 5, Baddeck Forks, to make the election at the school meeting held for the purpose in that section for that year.

By the Public Instruction Act, section 37, it is provided as follows: "When the annual meeting fails to elect three trustees or to fill the annual vacancy occurring in the trusteeship, or vacancies from other causes then existing, the district board may, upon the written requisition of five ratepayers in the section, accompanied by a certificate from the inspector of schools that to the best of his knowledge and belief, founded on an inspection of the minutes of the school meeting—or if necessary upon personal enquiry, that the alleged vacancy or vacancies actually exist, appoint a trustee or trustees who shall hold office in all respects as if elected at the annual school meeting."

I agree with the learned Judge who tried the cause that the annual school meeting was held at the time fixed therefor. If there had been no meeting, there is another form of procedure to be adopted in order to have the necessary trustees appointed, but as I have said, there was a meeting of the ratepayers and poll taxpayers held; that it did not accomplish any very definite object does not affect that fact.

There had just been a consolidation of parts of school sections, and number 5, Baddeck Forks, comprised the former Forks section and a part of Mill Brook section. Three new trustees were required and unfortunately two almost evenly divided parties of ratepayers met at the place appointed on the 25th of June, 1906, to hold the annual school meeting. The Rev. P. K. McRae, a member of the district board, having with him a list of the ratepayers certified by a number of members of the board, nominated one A. B. Watson for chairman of the meeting, and M. E. McKay, the sheriff, nominated one Anderson for chairman. They divided the house but had to divide it again as poll taxpayers had been counted. Mr. McRae and Mr. McKay each relying on a majority in favour of his nominee, declared him elected. Anderson had a de facto majority, 17 votes in all—the other claimed a legal majority, because two men of the other party were not ratepayers in that section, but the vote of one of that party was also challenged because he was not a ratepayer, that it was his father of the same name who was the ratepayer. But Watson had sixteen de facto votes. Each proceeded to take the chair. Anderson was first in the chair, and Watson took a chair behind him. The learned trial Judge has found as follows, and I see no reason for disturbing that finding: "An hour or thereabouts followed in contention, wrangling and dispute, chiefly as to which chairman had been elected by a majority of qualified votes—no business apparently could be transacted, and someone moved the adjournment of the meeting, which, being seconded, was put and declared by chairman Watson, whereupon a majority, or certainly half of the ratepayers, withdrew. Then those remaining appointed a secretary and proceeded to elect trustees and transact other business."

The first question to be considered is the validity of the votes of the two persons who voted for Anderson, who it is claimed were not ratepayers in that section. I refer to McDonald and Morrison.

Now, I think that this question is largely one of fact, and I see no reason for disturbing the finding of the trial Judge. In the description contained in the minutes of the school board of commissioners when section No. 5 was created, there is this description of the part of Mill Brook, which is to be taken for the new Forks section: "And that Mill Brook section be divided as follows, namely, all north

of the brook to be joined to centre section No. 8, and those south of the brook, viz., Alexander Macaulay and Charles McPhee, to be joined to Forks section." Unfortunately the brook winds and the places of residence of Morrison and McDonald are, it is contended, by one side, northerly from some parts of the brook and by the other side southerly from some parts of the brook. Taking the points of the compass as stated by the witnesses who tried the locality with a compass, I should think they were northerly from the brook. Take Daniel Morrison's own testimony. He was a witness for the defendant, and to the counsel for the defendant he testified: —Is it possible that your house is north of that brook as the brook runs by it?" Answer, "It might." And on cross-examination: Q. "How far is this 'X' bridge from this 'O' one? A. About half a mile; and from 'X' to 'M' about two miles, that's by the road."

Q. Doesn't the brook take quite a sweep from the bridge "X" to "O"? Well, a little.

Q. It takes the sweep as shewn there on the plan? A. Yes.

Q. If this brook was running in a straight line, on what side of the brook would you say McPhee and Macaulay would be? On the southern side, wouldn't they be? A. Yes, I suppose they would. I would be on the north-west side if the brook took a straight line.

Q. What part of the brook are you speaking of? A. The shortest from my place; that is from the brook to the bridge "O" to my place.

Q. Would you say that your house was pretty nearly west from the bridge "O" according to that sketch? A. By looking at it it is.

Q. If you go below that and take the brook between the bridge "X" and the bridge "O" wouldn't you get McPhee and Macaulay to the south-west of the brook and you to the north-east? The brook between "X" and "O"? A. Yes, that's if it was run clear out.

Q. If they continued the brook between the bridge "X." and "O" in a straight line, McPhee and Macaulay would come to the south-west of that line, and Morrison, McLeod, and McDonald would be to the north-east? A. Yes."

There is more difficulty about whether McPhee and Macaulay are south or southerly from the brook. But there is another part of the desciption which includes them and impliedly excludes Morrison and McDonald. I have read the

evidence over in this case, and I have come to the conclusion that the first part of this description, the general description, depending upon courses by compass, is an uncertain one, and therefore that the special description of men by name, which is certain, ought to be taken. I refer to Griffiths v. Penson, 9 Jurist, N. S. 385.

The Courts are every day rejecting courses and distances in favour of monuments because courses and distances are so liable to be erroneous.

The certain description which is added here includes Macaulay and McPhee as all of the ratepayers of the Mill Brook section who are to be included in the new section No. 5.

The next question relates to Charles McPhee, who voted for the chairman Watson. By section 23 of the Education Act, "the ratepayers, male and female, of the section present at any school meeting, shall elect from their own number or otherwise, a chairman to preside over the meeting, and a secretary to record its poceedings." By the definitions, unless the context otherwise requires, "ratepayer" means "a person assessed and rated upon the municipal rate roll." The father of Charles McPhee, now deceased, bore the same name. Being an old man, he, nine years before, transferred part of his farm and all the stock upon it, to his son. Thereafter the son paid the rates and also the school taxes, and the father paid none. The entry on the assessment is in the name of "Charles McPhee." The real estate is assessed and the personal property is assessed, and for nine years that description at least as to the personal property, is inapplicable as applied to the father. The father could not have claimed the benefit of that assessment. The son could. All of the acts, such as voting for nine years at the election for members, had been done by the son on the strength of this assessment. The dealings of the assessor and the tax collector were with the son, not with the father. I think, when the assessor states that it was the old man McPhee that he had in mind when he was making the assessment, which is the only testimony of the identity of the father with the name on the assessment roll, that this is not legal evidence, apart from the fact that the assessor was one of the other party in this unforunate dispute, and the condition of his mind in the past is a very difficult thing for the other party to contradict. I also am of opinion that testimony

as to the admissions of the son, unless he was first confronted with them and a foundation laid for this kind of evidence, was not admissible and was properly ruled out by the trial Judge. The majority of legal votes having been given in favour of the appointment of Watson to the chair, I think it must be held that he was the legal chairman and competent to put and declare carried the motion to adjourn.

I am of opinion that the election of trustees made by those who remained was not a legal one. The appointment as one of the trustees, of Daniel Morrison, who was not a ratepayer in that section (if I am correct in the former part of this opinion), was illegal.

I think that there was a failure to appoint trustees within the meaning of the section cited, and a case for the appointment of trustees by the district board.

The appointment by the board, which under the provisions of the Act already cited it is its duty to make, ought to receive due weight and respect when it comes before a Court. This is the resolution of the district board:—

"A requisition from ratepayers of the Forks section was presented to the board, praying that the board appoint three trustees from that section, alleging that no trustees had been elected at the meeting convened on the 25th of June. The inspector gave a statement to the effect that from the information received by him by minutes of meeting he was not satisfied that trustees had been elected. A. J. McDonald, barrister, made statement before the board representing the views of the Hon. the Provincial Secretary in reference to appointing trustees, and suggesting an investigation by the superintendent of education. The Board, by unanimous vote, appointed the following trustees for Forks section viz., Duncan Buchanan, Alexander McKenzie and John Rice, but suggesting that no official act be performed for one or two weeks, to give time for the enquiry by the superintendent of education as suggested by the premier."

Under the Act the inspector acts as the secretary of the board, but another person may be appointed in his absence. In this case he has been dead for some time. There is no certificate forthcoming of the failure to appoint, and the learned counsel contends that there was no certificate in writing from the inspector alleging that there was a vacancy in respect to trustees, under Section 37 of the Act, already quoted. The resolution of the board, already quoted, shews

that there was a statement but does not say that it was in writing. In my opinion that provision of the Act prescribes that a mere certificate of the inspector to the best of his knowledge and belief will be sufficient proof of the vacancy to enable the board to make the appointment. But it is not intended to make that the exclusive mode of ascertaining whether the meeting has failed to elect the trustees. In my opinion the provision is an enabling one and directory as to the certificate. The statute is not a conferring of "jurisdiction," but a mere power is conferred upon a body in no sense a judicial tribunal, nor is the act of appointment a judicial act. There is no necessity at common law to have a judicial investigation, and a decision that a contingency which creates a vacancy in an office has happened before the power to fill the vacancy may be exercised. And I think that the statement of the inspector, personally present when he may be subjected to questions, quite as useful as a certificate. There is nothing in the Criminal Code or anywhere else, as far as I know, which would import more value to the certificate than to the oral statement.

A decision that the absence of a certificate and consequent illegality of the appointments of the board would not give the office to anyone else. Another election or appointment of trustees would have to be made. It is difficult to say which, and in what mode it would be made. And now it is over three years since the last appointment was made, and all three have been retired by lapse of time and their places filled by the annual meetings.

I think great confusion would result if this question of a certificate is allowed to defeat the appointments. In 26 Am. & Eng. Encyc. of Law, page 689, it is said: "Statutory prescriptions in regard to the time, form and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity and despatch in the conduct of business." I refer to R. v. Tofthouse, L. R. 1 Q. B. 433; Caldow v. Pixell, 2 C. P. D. 562; R. v. Ingall, 2 Q. B. D. 199; Morgan v. Parry, 17 C. B. 334.

The appeal should be dismissed with costs.

RUSSELL, J.:—An annual meeting was duly called of the ratepayers and poll taxpayers of School Section No. 5, Baddeck Forks, for the purpose, among other things, of electing

school trustees. The ratepayers alone would be qualified to vote in the election of a chairman, and when the meeting proceeded to organize it was found to be nearly, if not quite, evenly divided. The consequence was that two persons claimed to be elected. One of these seems to have stood on the chair for at least part of the time, while the other stood behind the chair, and both endeavoured to act as chairman of the meeting. Confusion reigned for the space of an hour or thereabout when a motion to adjourn was made and put to the meeting by one of the persons claiming to be chairman, and was declared carried, whereupon the ratepayers who had voted for him, about half of those present, retired from the meeting and those remaining proceeded to elect trustees. The first question that presents itself is—irrespectively of the question whether the chairman who put the motion to adjourn and declared it carried was duly elected or not—whether it can be said that the meeting so assembled failed to elect trustees within the meaning of section 37, so that the District Board could proceed under the provisions of that section to appoint trustees. The appellants claim that within the meaning of section 28 of chapter 52 the annual meeting was not held and that the consequence was, not that the District Board could appoint trustees, but that a special meeting should have been called as provided in section 28. In the alternative they claim that the chairman who put the motion to adjourn was not duly elected chairman, and that there was no valid adjournment at the stage at which the adjournment was declared carried, and the ratepayers remaining could proceed with the business of the meeting as they did and elect trustees. I think that there was a meeting held and that it failed to elect trustees. It may be that it was so evenly divided in voting strength that there was not a majority even to elect a chairman, so that it broke up without effectively transacting any business at all. But it would not follow from this that there had been no meeting. There must be a meeting before there can be a chairman selected. It is the meeting that selects the chairman when one is selected. And many meetings take place and do business without any chairman ever being chosen. Suppose that the meeting had proceeded to select a chairman by ballot and an equal number of ballots had been deposited for each of two candidates. Neither could claim to be the chairman, and the meeting might in such a case

disperse without transacting any business. I think that in such a case it could not be said that a meeting had not been "held at the time fixed by the chapter" (sec. 28), and that it could be said that the meeting "had failed to elect three trustees" (sec. 37).

When votes were taken at the meeting for chairman there appeared to be seventeen for the chairman Watson, who put the vote to adjourn and declared it carried, and twenty for the other chairman Anderson, who with his party remained after the adjournment and proceeded with the business of electing trustees. It is not disputed that there was one poll taxpayer in Watson's poll and three in Anderson's. These votes being struck off would leave Watson with sixteen votes and Anderson with seventeen. The appellant seeks to strike off McPhee from Watson's poll and the respondent to strike off Morrison and McDonald from the Anderson poll. The learned trial Judge has found that McPhee was qualified and that Morrison and McDonald were not, which leaves the vote sixteen for Watson and fifteen for Anderson. He therefore held that Watson was duly elected chairman, and that the adjournment was duly carried before any trustees were elected. The question as to the qualification of Morrison and McDonald depends upon the question whether they were or were not in the school section No. 5, Baddeck Forks. This section was newly constituted by taking into it a part of another section. In fact, there was a re-arrangement of a number of sections, but for the purposes of the present question it is sufficient to say that a number of ratepayers were taken from what was called Mill Brook Section, some of whom were to be put in the "Forks Section," so called in the resolution for division, more fully described as school section No. 5, Baddeck Forks, and the rest put into a section to the northward. In defining the division line the following terms were used: "that Mill Brook section be divided as follows, viz., all north of the brook to be joined to centre section No. 8, and those south of the brook, viz., Alexander McKay and Charles McPhee, be joined to Forks section." The appellant contends that Morrison and McDonald were south of the brook and must, therefore, be counted in the Forks section, and he asks us to examine the mass of testimony for the purpose of determining as a matter of fact that Morrison and McDonald were resident south of the brook. I think we must take the resolution of the commissioners who

divided the section as it stands and understand it in the sense which they meant it to bear so far as can be collected from its terms. I think nothing can be clearer than that they understood and meant it to be understood by all concerned that the only ratepayers they were adding to the Forks section from the Mill Brook section by that resolution were Alexander Macaulay and Charles McPhee. If it were necessary to determine the question whether Morrison and McDonald are in fact on the north or the south side of the brook there is no satisfactory evidence before us on this point. There are no plans except sketches drawn by witnesses, from memory or imagination, and even copies of these have not been furnished. Most of the evidence of the witnesses is unintelligible without these sketches, and some of it would, I am confident, be unintelligible with them. Witnesses speak from their impressions as to the points of the compass relatively to known objects on the land and differ materially from one another in this respect. Dr. Bethune, one of the commissioners, says that Morrison and McDonald are north of the brook, or rather that no others are south of the brook except Macaulay and McPhee, and even they are not in his opinion south of the brook. The brook itself runs north and south, in his judgment, but if it is, and there is some evidence that it is a very winding sort of a brook, it may well be that although McPhee and Macaulay are on the same side as McDonald and Morrison, the latter may be north and the former south in the sense in which the commissioners must have understood the terms. Sheriff McKay says that McDonald and Morrison are south of the brook, but he admits that two might be on the same side of the brook and still one might be to the north of it and the other to the south, because of the brook being, as he says it is, very crooked. Alexander Anderson says the same as McKay as to these two men being south of the brook, except that as he explains he would not call it exactly south. Ominously enough Daniel Morrison, one of the ratepayers whose vote was objected to because he was not on the south side of the brook, admits that it is possible that his house is north of the brook as the brook runs by it, but he is conducted through a long examination about the location of a bridge relative to certain points spoken of as "X" and "O," which I could not follow at the argument for want of a plan and do not now profess to be able to understand. There is

rebuttal evidence to shew that Morrison and McDonald are north of the brook and thus out of the school section on any reading of the resolution. The learned trial Judge has found that they were not resident in the school section and I think one should not under the kind of evidence offered reverse his finding.

I cannot feel so clear as to the finding that the young man McPhee who voted was in fact a ratepayer. He owned property, and paid rates, it is true, but I am not sure that he was assessed. The assessor says that it was the old man that he assessed and there is some circumstantial evidence that the young man who voted considered that it was the old man who was being assessed, though the evidence to that effect is not conclusive. On his cross-examination the assessor admits that as far as the McPhee property went it was only McPhee junior that he ever had anything to do with. There is an assessment of stock and the only Charles McPhee that owned stock was the young man. On the whole, therefore, I do not think that there is sufficient evidence to warrant us in reversing the finding on this point of the learned Judge.

I should like very much, in view of the interests at stake and the confusion likely to ensue from a reversal of the judgment of the trial Judge, to be able to agree with him as to the sufficiency of the certificate, and I cannot disguise from myself that I have endeavoured to persuade myself to concur on this point. But I cannot bring myself to think that the statute has in this respect been complied with. As a condition precedent to the appointment of trustees by the district board there must be a written requisition of five ratepayers, accompanied by a certificate from the inspector that to the best of his knowledge and belief, founded on an inspection of the minutes of the school meeting or of the copy forwarded to him by the trustees, or if necessary on personal inquiry, that the alleged vacancy or vacancies actually exist. There was no certificate accompanying the requisition, but the inspector gave a statement to the district board to the effect that from the information received by him by minutes of meeting he was not satisfied that trustees had been elected.

Assuming even that the personal presence and oral statement of the inspector supplied the want of the certificate, which I think must have been intended to be a writing accompanying the requisition, there is not in this oral com-

munication of the inspector any expression of a positive belief that trustees had not been elected, or that vacancies existed. If he was in fact unable to certify to a belief that trustees had not been elected, and that therefore vacancies existed, or even if he really believed it to be probable that they had been elected, he might still truthfully use this form of words, meaning to say merely that he was not perfectly certain that trustees had been elected. I think the statute contemplates a positive statement of belief put in writing accompanying the requisition, and it may well be that this was the very condition which the inspector felt himself unable to comply with.

I am also unable to regard the provisions requiring the certificate of the inspector as merely directory. I fear a decision to that effect would enable the district board in some cases to successfully overrule the vote of the annual meeting. Suppose the board should undertake to do this where there had been a perfectly valid election and the right of the nominees of the board were challenged by quo warranto proceedings. The very first contention that would be made on behalf of the relator would be that there had been no certificate by the inspector. Would it be competent to set up against this the contention that the provision was merely directory? I think not, and yet I am not able to say why the contention could not be just as admissible in the case supposed as in the present case. I do not profess to be able to draw the distinction between what is directory and what is imperative, and I find that I am not alone in suspecting that under the authorities a provision may become directory if it is very desirable that compliance with it should not have been omitted when that same provision would have been held to be imperative if the necessity had not arisen for the opposite ruling.

The temptation is very great where the consequences of holding a statute to be imperative are seriously inconvenient, to strain a point in favour of the contention that it is merely directory, and I notice that Hardcastle quotes Mr. Sedgewick to the effect that "the practice of correcting the evasion or disregard of statutes by treating them as merely directory has been carried beyond the line of sound discretion." In this case the effect of the certificate in question may be to take the election of trustees away from the ratepayers at large and place it in the hands of a nominated

body. I think that before the power conferred upon such a body is exercised the conditions precedent to its exercise must exist, and one of these is a certificate as to the affirmative belief of the inspector that a vacancy exists.

It remains to consider whether, even so, the Court is bound to give a judgment of ouster. I find in the American and English Encyclopedia a statement that the interests of the public and innocent parties may be considered, and where the proceeding would result in injury or inconvenience without any corresponding benefit and no private right of a relator is involved leave may properly be refused. Of course in this case leave was not refused to issue the writ, but the same authorities add that "where leave is improvidently granted the Court may, upon the hearing, refuse relief upon the same ground for which it might have refused leave to file the information;" 23 Am. & Eng. Ency. 604, 605.

If the Court when it was asked for leave to allow the writ had known that the trustees claiming to have been elected had been elected after a motion to adjourn had been carried by the majority of duly qualified ratepayers, and when what began as a meeting had become a mob, I do not think that the writ would have been allowed, and I think that the Court can under these circumstances properly refuse to proceed to judgment under the very especial circumstances of this case. Those circumstances are that there are no persons, other than those whose title is attacked, who can claim to have been elected, that there can be no machinery by means of which any persons, other than these de fa to trustees, could have been elected, that the inspectors ought the technical requirements of the statute have not been complied with, the same result has been reached as if those requirements had been complied with to the letter. I therefore think that the appeal from the judgment of the trial Judge should be dismissed with costs, but I also think that the defendants having failed to establish their legal title to the office should not have the costs of the trial.

MEAGHER, J., was of the opinion that the certificate must be in writing and was a pre-requisite.

Appeal dismissed with costs.

NOVA SCOTIA.

SUPREME COURT AT ARICHAT. DECEMBER 16TH, 1909.

BOUDROT v. MORRISON.

Land—Action for Recovery—Sale—Deed—Consideration — Adverse Possession—Husband and Wife—Agency.

A. D. Gunn, for plaintiff.

G. W. Kyte, K.C., for defendant.

MEAGHER, J.:—This is an action to recover a piece of land of about five acres.

The plaintiff's title is founded on a deed from Justin Bona to his son Albert, dated May 12th, 1900; registered June 19th following, and a deed from Albert to the plaintiff dated December, 1903, registered the next February. The latter purchase was made a year or so before the deed and part of the price paid and possession obtained thereunder.

Justin Bona and Albert have been dead several years. The elder died first.

There is a denial of the plaintiff's title and right to possession—and a freehold and possession and right of possession in defendant, are averred.

There is a special defence, limited to two acres averred to have been enclosed &c., by Justin Bona, but no description thereof is given founded upon an alleged purchase thereof made (it is averred while defendant was in possession) with plaintiff's agent in March, 1906, for $20, half cash and half in labour as she required the latter, and of which he paid $5 in cash and did some work, and further, that in November, 1906, the plaintiff's agent requested the defendant to procure from one Sampson a piece of land adjoining that on which she resided, for which defendant was to pay and the price was agreed to be credited to defendant on such purchase, and to that extent was accepted in lieu of the labor and money to be paid under the first purchase that he arranged for the purchase with Sampson, and notified her agent that Sampson was ready and willing to measure such lot whenever her agent desired to select it, but he refused to accept it.

There is a material difference between the defence thus pleaded and the defendant's story. There is no description given and none was agreed upon as to the limits, area, or value, or the price of the Sampson lot, and not a word about its even having been selected—or agreed upon—though the defendant in his evidence sought to make it appear that it was selected. If the fact were so defendant would have pleaded it.

There is no counterclaim for specific performance and it could not be decreed even if a case were made out.

Justin Bona occupied and used the entire lot for at least forty years; his house was towards the rear, and it was fenced on each side down into the pond as far as it could be built. The greater part beyond that was swamp and beach and road, but even in that area there was a cultivated field. Fences could not have been maintained across the beach and the water served as a fence in front. It seems unlikely he would use the rear and not the front of his property over which he went in his almost daily occupation of a fisherman. The two side fences extending to the front as far as they could be carried indicated to his neighbour, Donald McDonald, the extent of his occupation. In this respect it is not unlike the case of Moore v. Jameson. I think it was an eastern passage, a Cole Harbor controversy, decided some years ago where an island was held to be in possession of the occupier to the rear, though merely connected by a causeway; animals were occasionally pastured upon it.

Albert Bona had possession under color of title at least for two years or so, and plaintiff has had possession under her deed ever since she got it except in so far as her possession was intruded upon by the defendant.

Donald McDonald at one time owned the locus as part of two hundred acres. In 1869 he conveyed the whole area to John McDonald, and the latter in May, 1884, reconveyed to Donald by the same description. In May, 1900 Donald conveyed it to the defendant, excepting thereout a lot conveyed to one Bissett, but no proof was given where the Bissett lot was, nor of its size. That deed contained this exception as to the locus: "As also any portion of the above granted land and premises as up to the date of this instrument may, or have been enclosed and fenced and improved by Justin Bona." This deed was subsequent to that from Justin Bona to Albert, and upon which plaintiff's title rests.

During John's ownership he purports to have conveyed to Simon Bona, son of Justin, then living with his father, by deed dated April 2nd, 1875, but not recorded until June, 1899, a lot corresponding in some respects with the two acres. The deed did not mention any quantity, and there is no proof of the blazed line mentioned in it nor that it was ever made. In April last Simon Bona, after this dispute arose, and after proceedings were threatened against the defendant, and after he had admitted the plaintiff's title to the whole area, and which he had recognized as he admits to 1906, gave the defendant a deed which purported to convey the same lot as in the deed to him, but made no reference to the blazed line, and fixed the area at two acres. It contains all usual covenants. Simon, since 1879, resided on Madain Island, and miles away from the locus. I do not believe he ever went into possession under his deed, not to the exclusion or disturbance of his father's possession at any rate, and never exercising any control over it. He never asserted a claim to it for upwards of thirty years and never would have been heard of in connection with it; if he had not been sought out by the defendant in his endeavour to defeat the plaintiff's title, I am confident Simon never believed he had any claim or title in his own right. It is strange if he paid the money to Donald McDonald, as he says, that McDonald's deed to defendant did not except the property so conveyed by special reference to that fact. It matters not whether Simon at one time had title or not—if he had it was defeated by long adverse possession, and therefore it does not assist the defendant in the least. It is somewhat singular too that when John reconveyed to Donald McDonald he made no exception of the lot described in Simon's deed. If he believed that it formed part of the property, and he had conveyed it, he would have excepted it out of his reconveyance. I did not believe Simon's evidence as to the circumstances surrounding the deed to him. He showed a partisan spirit, and a strong desire to uphold the deed he gave the defendant without much reference to the truth. McDonald, the defendant grantor, did not believe he owned any part of the locus; so much is clear from the evidence some time before the agreement to purchase from Albert Bona; the plaintiff's husband discussed purchase with the old man Bona. He saw Donald McDonald on the subject of ownership and enquired who was the rightful owner of it, and was told by McDonald that

Justin Bona was, that he had bought it from him and paid him for it. That was years before the defendant bought from McDonald.

Fitzgerald, a disinterested party, and an intelligent and fair witness, testified that McDonald recognised Bona's right to the control of the beach in front twenty-five years ago, while the evidence of Alexander Sampson, a reliable party, conclusively shows that McDonald recognised Justin Bona's title to the whole five acres in 1900. This in my judgment estopped himself at any rate from ever asserting title in himself against Albert Bona, and perhaps also against any one claiming under him as well. Sampson's interview was quite a while before defendant's deed to Sampson; upon that occasion the draft of the deed in evidence was from Bona to Albert to McDonald, including the description which embraced the whole five acres, and McDonald said the deed was all right, and that Justin Bona had paid him honestly for it, and that he was advised a deed from Justin was as good as one from himself. He said this apparently because of his recognition of Bona's title, founded, it may be, on Bona's possession and payment. Therefore Bona's conveyance would be good, even although he received no conveyance from him. Be this as it may be, he distinctly recognised Bona's title and power to convey it on that occasion.

I have not investigated the question how far McDonald's statements thus made, while he was out of possession, and another one in, affected the defendant, and therefore do not decide it. It is not necessary I should; but if he is bound, then he is without title to any part unless through Simon Bona. I have disposed of that already.

There is no pretence by the pleadings or otherwise that defendant was a bona fide purchaser for value without notice. The facts would not permit it. The exception in his own deed, apart from all else, put him upon enquiry. His deed gave him no title to any part which any time was enclosed, &c., by old man Bona, and one would think, in view of that, he should have negatived the fact that Bona had ever enclosed, &c., any part of that which he claims in order to cut down the plaintiff's title. I do not lay any stress on this view.

The papers M/4 and M/5 cannot be regarded as evidence in any view. They were subsequent to the deeds from John to Donald and from the latter to the defendant. I

mention this merely to exclude an inference that I gave effect to them in any sense.

It is suggestive that while the special defence up to the close of the defendant's evidence was limited to two acres only, and as to that depended upon the alleged purchase from the plaintiff, yet in all the negotiations he details about the alleged purchase he does not say a word about them being limited to two acres. It was the Bona property purchased from Albert Bona which formed the subject of discussion and proposed purchase. His statement giving the conversation on the ice when he says the bargain was first made, proves clearly what I have just said, and that fact makes his story about Boudrot's seeking permission to cut ice on the pond all the more improbable. If he had said in explanation that he believed the purchase from Albert was limited to two acres the position would have been different.

I find as a fact that the plaintiff has and the defendant never had any title, to the land sought to be recovered.

The defendant and Boudrot are in conflict in respect to the alleged purchase on the ice in March, 1906. It is enough to say that burden was on defendant to prove the bargain, and the husband's agency, power to make it, and the evidence, as I give credit to the witnesses, falls a long way short of satisfying me on either point. I say this independently of any question of burden of proof and because I do not believe such a bargain was made.

The evidence of the plaintiff, who was called by the defendant, in one aspect shows agency in her husband to make a bargain touching the land, but not in the sense required to aid the defendant. She is very pointed and specific in her statement, however, in the denial of an agency to sell or receive money on the property.

I pass by the question as to whose money was paid to Bona for the property. St. Charles Andrea, 41 N. S. 190, fully disposes of it. If Boudrot choose to pay for the land and have a deed made to his wife defendant cannot question it. With respect to the alleged agreement to exchange, any that was ever made was made so the plaintiff, her husband and defendant say, in 1903. The husband says that it was only an offer, that he told the defendant if he would buy him five acres of land he would make an exchange. The defendant is silent as to that. Boudrot also said that nothing was said at any time about value or about a sum of money in

exchange, and his wife said referring to the arrangement spoken of in 1903, that defendant was to have the piece measured they were to get and have the deed made to her, neither of which he did; and it never was located, defined, or bargained for by the defendant. This probably was the arrangement she referred to when talking with McNeil.

The defendant's first entry was upon Albert Bona's possession, and was in fact a trespass, and his conduct shows he so regarded it.

The same is true of his entry upon plaintiff's possession, beginning with 1903, and ending with 1905; he cut the hay upon the halves and gave the plaintiff half, or an equivalent. His possession so far as he had any was referable thereto. He avers in his pleadings that he was in possession when the alleged bargain was made in March, 1906. Whether this is so or not he was never given possession, nor did he obtain it, in part performance of any contract or bargain by way of sale or exchange, for the whole or any part of the locus.

Notwithstanding that before the haying season of 1903 he asked Boudrot if he had bought the Bona property, and was told he had, and then asked him if he would sell it, yet when the haying season arrived he went on as he had done in Bona's time without leave and cut the hay, which was a pretty high-handed trespass. When Boudrot found him cutting the hay they had an altercation which ended in defendant making the hay on the halves, and that by tacit consent continued for years afterwards.

I do not believe the defendant's story about Boudrot seeking permission to cut the ice upon a pond which he believed was his wife's, and which the deed covered to his knowledge, and for the purpose of which, according to defendant's own story, he negotiated at or about that time, that is, as I have said for the Bona property, which plaintiff had bought. The defendant I fear has allowed his temper or cupidity to get the better of his conscience.

He is a man of considerable means while his opponent and her husband are very poor, and if the agreement which he says was made on the ice in 1906 was made—the part which he says was payable in cash would have been paid at once, and the transaction completed promptly, and he, shrewd man as he is, would have obtained his deed without delay. This statement as to the time in relation to the ice cutting

at which the agreement was made is not consistent—but it is of little moment.

As to the alleged variation made the following November even if I accepted his statement of it, it does not shew a definite nor a concluded bargain in any particular; certainly not one definite enough to be enforced. If, as I find, there was not an earlier bargain, then the later one by itself is of no moment, even if fully proved, which it was not. Speaking of that affair the defendant said, in reference to what was to be acquired from Sampson, "We couldn't tell what it would cost. . . I wouldn't have it at all if it cost more than $5. I never bought it from Sampson." That was the first step and he never took it.

As to the alleged payment of $5 in 1908, I need not say much. There was no bargain in existence to which it could be applied, while there was an undoubted liability on his part to give hay or its equivalent.

Mrs. Morrison didn't hear all the conversation on that occasion. She says she heard most of it, but it is impossible she should have. It extended over four hours, and meanwhile she was about her household work. But although admittedly she didn't hear it all, yet she was willing to swear she heard all that was said about the Bona field, and that, I think, was far too much for any careful witness to say.

It is equally impossible to believe the eleven-year-old girl, who was running about the house and in and out of it, while Boudrot was there, heard it all. She did not pay much attention to it, and it would not be expected she did. She admits frankly what her mother hedged about it, that just before her father went upstairs and got the money he and Boudrot were talking about hay, thus to this extent corroborating Boudrot. Unless schooled in the matter it is not at all likely she would have remembered with so much precision what was said when the money was paid. It is quite probable, too, the witnesses, mother and daughter, may not have caught the import of the words used, which I think were far more likely to have been to pay for or on account of the hay from the Bona field or Bona property, for which there was a liability—than for or on account of the Bona property itself for which no liability existed.

I do not attach any importance to the evidence of Nicholson and Dugas as to the admissions made by Boudrot. He

was but an agent, and to make such admissions evidence it should have been shewn at what particular time they were made and that so near to the period of agency and the business done as to bind the plaintiff.

Neither has been shewn. Nicholson, a very dull, stupid sort of witness, placed his conversation in April following the severe winter recently experienced. The heavy winter was in 1905, a year before the alleged bargain was made. Consequently Boudrot could not then have truthfully said what he imputes to him.

With respect to any expenditures made by defendant he had no right to make any, and was a trespasser in making them, and has no claim to be allowed for them. Moreover, if his contention in one respect is allowed that he owned the pond and south of it, the bulk of them were made in or outside of the pond and in this view upon his own land.

Regarding the facts as I do and giving credit to such of the witnesses as I deemed reliable and discrediting those whom I regarded otherwise, I feel obliged to find the facts in the plaintiff's favour, and to award judgment with costs accordingly.

I should, perhaps, add that Boudrot and defendant were in conflict as to the reason why some work was done by the defendant. One says it was under the bargain. The other says it was not.

It was argued that because the plaintiff did not seek hay in 1906-7-8 (she did in 1908), it corroborated the fact of a sale, but if there was a sale in 1906 she was equally negligent in seeking the cash payment thereon. The argument has no force.