THE

ONTARIO REPORTS,

VOLUME XI.

CONTAINING

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

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO,

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

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1886

EDITOR:
JAMES F. SMITH, Q. C.

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

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JUDGES

OF THE

HIGH COURT OF JUSTICE,

DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

Page 265, head-note, line 11, for "his" read "their."
Page 504, line 11 from bottom, for "wind" read "vessel."
Page 583, line 7, for "defendants" read "plaintiffs."
Page 673, line 17, for "*diversoriolum*" read "*diversorium*."
Page 700, line 9, for "R. S. O. ch. 3" read "R. S. O. ch. 111."

REPORTS OF CASES.

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

HOLDERNESS v. LANG.

Statutory lease—Covenant to repair—Alterations by tenant—Waste—Waiver—Forfeiture.

On December 5th, 1882, plaintiff by lease, made according to an Act respecting "Short Forms of Leases," R. S. O. ch. 103, demised to defendant certain premises for a grocery and liquor store, for a term of years. In April, 1883, defendant made a door through an inner brick wall, to get access from the store to a portion of the premises previously reached only from the outside. Plaintiff at first objected to this, but afterwards practically assented to it. A partition, partly glass and partly wood, in which was a door, separated the office from the store. In April, 1885, defendant proceeded to move this partition nearer the centre of the store, substituting wood for the glass, closing up the door, and converting a front window into a door, so as to make the office a liquor store, to comply with the new law requiring a separation of liquors from groceries. Plaintiff claimed an injunction to prevent further waste, and a right to re-enter for breach of the covenant to repair. The Judge at the trial found that no damage was done to the premises.

Held: 1. That the breaking through the brick wall, for the purpose of making the door, was a breach of the covenant to repair, but was not a continuing breach, and had been waived by the landlord.

2. That under the statutory covenant to repair, the tenant was bound to keep in repair not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make: that the right to erect such fixtures is to this extent, viz., that they shall not be such as to diminish the value of the demised premises, nor to increase the burden upon them as against the landlord, nor to impair the evidence of title.

3. The plaintiff's reversion not being injured by the acts complained of, there was no waste and no forfeiture.

ACTION for breach of covenant and for an injunction for waste.

The statement of claim set out that plaintiff was owner of the Albion Hotel in Toronto, and before 5th of December, 1882, he was the owner of the leasehold premises thereinafter mentioned; and by indenture of the date last named, made between him of the one part and defendant Lang of the other part, he demised to Lang that messuage consisting of the ground floor and cellars, having a frontage of 25 feet on Jarvis street by 60 feet in depth, immediately north of the lane running from Jarvis street easterly through the southern portion of the premises formerly known as the Johnston Hotel property, being part of lot 10 on the north side of Front street, together with the right of ingress and egress to and from the rear of the said demised premises, and also to and from the rear of the premises No. 96 Front street east, occupied by said Lang, and his servants, with or without horses, &c., railway drays excepted; and also the privilege of entrance by Lang through the lane to the rear of the Front street shop leased from Thomas Burkinshaw; and while he held the same—for the term of five years at the yearly rent of $1—the defendant covenanted to pay rent, to repair, maintain, assume and keep the premises in good and substantial repair; to keep up fences and walls; to give up possession, at the expiration of the term, in good and substantial repair, wear and tear and damage by fire excepted; with right of re-entry to the plaintiff on non-payment of rent or non-performance of covenants: that Lang entered, &c.: that in or about April, 1883, Lang, while in possession of the premises, in breach of his covenants and without the consent of the plaintiff, made a breach or cutting in a brick wall of the said premises, and made a door or passage through the same: that plaintiff objected to the making of the doorway, and requested Lang to repair the said breach, and to restore the wall to the same plight it was in when he took possession, but he refused so to do; and on or about the 20th of April last past, contrary to his cove-

nants and against the wish of the plaintiff, he cut a doorway through the front of the said store, and also without the consent and against the will of the plaintiff he pulled down a partition in the said building and erected another in a different position, and otherwise changed the same; and he intended to make other changes in the said building, contrary to his covenants, unless restrained by the order of the court. The plaintiff then claimed to be entitled to re-enter for breaches of covenant. He also claimed:

1. $500 damages for breach of covenants.
2. An injunction against further waste and alteration of the premises.
3. Possession of the premises.
4. The costs of the proceedings.
5. Such other and further relief, &c.

The statement of defence by defendant Lang was:

1. That at the commencement of this action he was carrying on, and still carried on, business under the name of M. Keilty & Co.

2. He entered into possession of the lease on the 5th of December, 1882, and he was entitled to possession of the premises under it until the 5th of December, 1892.

3. The lease was executed by plaintiff pursuant to the terms of an agreement entered into between the plaintiff and Lang for the sale by Lang to the plaintiff of certain other premises in Toronto. Under that agreement, and as part of the consideration for the sale and conveyance of the other premises by Lang to plaintiff, the plaintiff agreed to allow defendant to have the possession of the premises in question for a period of five years without payment of rent, and thereafter and for a further period of five years at a rental to be determined by arbitration.

4. That plaintiff had no real cause of complaint, but was endeavoring to deprive defendant of a portion of the consideration which he agreed to give defendant as in the next preceding paragraph mentioned.

5. The doorway, as the 6th paragraph of the statement of claim mentioned, was made with the knowledge and consent of plaintiff.

6. Defendant denied the allegations in the statement of claim, and said he had not in any way injured the premises.

Issue.

The action was tried at the Toronto Summer Assizes of 1885, before Armour, J., without a jury, when the action was dismissed, with costs.

The evidence shewed that the plaintiff fitted up the premises as they were let, in December 1882, as a grocery store, to the defendant. The frontage on Jarvis street was described as 25 feet. The plaintiff put up for the defendant a partition the length of the shop, of a few feet in width, as an office, with an opening into it from the shop, and with a window in it, so that those in the office could see from it into the shop.

The front door on Jarvis street was at that time in the centre of the building, with large windows at each side of the door. There was at the rear of the south part of the shop at that time a small square space surrounded by a brick wall of about 5 by 6 feet, quite shut out from the shop, the access to which was by a door from the lane or archway at the south of the demised premises. It had been intended, and was for a time probably used as a well for a stairway leading from the hotel rooms overhead to the lane below, but it was not used for any such purpose at the time the lease was made to the defendant, and it was part of the subject of demise to the defendant.

In April, 1883, that is, about four months after the defendant got his lease, he opened a doorway from his shop, through the north wall of this small room, of 5 by 6 feet, so as to gain access to it from his shop, and in which he placed some of his store goods, and he closed by boarding over the doorway from that small room which led on to the lane or archway.

The part of the wall the defendant cut through to make the entrance from the shop went no higher than as a support for the roof, which covered that part which was, so far as appeared, not above the level of the ceiling of the shop.

It formed no part of the main wall of the building. The defendant began that work without the knowledge, consent, or approval of the plaintiff. The plaintiff spoke to the defendant about it.

In cross-examination the plaintiff said: "I told him he had no business to do that. He said something about he would put it in the same shape again, and I said I did not want that wall touched."

Counsel—"He said he would put it in the same shape at the termination of his lease, I suppose?" A. "That is what I understood him to say."

Counsel—"And you left?" A. "Yes."

* * * * *

Q. "You have never spoken to him about it since then?" A. "No."

Walter Jones, for the plaintiff, spoke to the defendant about the doorway made in the wall. He said: "We talked about the cutting of it; Mr. Lang argued it would not weaken the wall or would not be much of an injury. Mr. Holderness had said to me, it did. We (*i.e.*, Mr. Lang and the witness) discussed the matter about the damage and so on, and finally we dropped it at that."

The defendant said about the same cutting of the wall: "Mr. Holderness came in and grumbled a little. I said I don't think it is doing any harm, but I am willing to make it right when I am leaving the premises. I will make it right if there is anything wrong. He made a little grumble, but did not tell me to stop the work * * Since then I have heard nothing more from him about it until this." Mr. Jones spoke to the defendant, too, about it, but he left saying, "Oh it will be all right, it will be all right."

The next act complained of was, that the defendant had removed about one half vertically of one of the large front windows and put a door in place of the part removed, so that there were two door entrances from Jarvis street, into the demised premises, and in doing that the former window sill about five by eight inches was cut through.

That was done just before the bringing of this action, which was brought on the 21st of April, 1885.

At the same time, while that was being done, the defendant removed the wooden partition the plaintiff had put up for him for an office, so as to take in a little more of the shop than it formerly did. That was done so as to divide it completely by all means of internal communication from the other part of the shop, so as to enable the defendant to carry on his liquor business, according to the provisions of the late Ontario Statute separately from his general grocery business.

The new front door mentioned above was made as the entrance to the part newly partitioned off, in which the liquors were to be sold.

It was also complained of by the plaintiff, that in fitting the new front door, the defendant chipped or cut off an inch or more in depth of the top surface of the stone sill upon which one of the iron pillars rests, which supports the front wall of the building, to enable the door to open fully back.

The removal of the one half of one of the large front windows and putting a door in its place, the cutting down of the surface of the iron pillar stone sill, and the removal of the former partition, and the putting up of the new one in a different place, were acts which were done without consent, and against the will of the plaintiff.

The plaintiff said when he heard of these works being carried on he forbad the workmen from proceeding with them, and ordered them to replace all that they had removed, but they did not do it. He said he did not see Mr. Lang about these works, but he notified him. He leased the premises to be used for a grocery and liquor store, and he knew the defendant made the changes to comply with the new law by separating his liquor business from his general grocery business. He said he thought that putting in the new door and cutting the surface of the stone down, as stated, "hurt the property a good deal in its appearance; it did not do the building any good anyway."

He was asked:

Q. "But are you prepared to say it does the building any harm?" A. "I am not prepared to say it does it any good. I think it does harm."

He also said: "The stone had no business to be cut. I do not suppose that what was done to it hurt it so far as it supported the column."

Q. "What harm does turning the window into a door do?" A. "I do not know, but I think it does a good deal of harm. I think it spoils the look of the building altogether."

Q. "What is the difference in the looks?" A. "Well, I tell you there is a door there instead of a window, and I do not think it corresponds with the other."

Q. "Does not correspond with the other door or with the other window, which?" A. "Both. I just wanted it left as it was."

The general evidence was, that the changes made upon dividing the shop into a liquor department for the sale of liquors, and into another for the sale of groceries was not an injury to the building, and that everything could be replaced as it was for about $50 or $60.

The learned Judge reserved the case and subsequently gave the following judgment:

ARMOUR, J.—It may well be doubted if the acts done by the defendant and complained of as breaches of the covenant to repair, assuming them to have caused damage to the plaintiff, are really within that covenant, which is to well and sufficiently repair, maintain, amend, and keep the demised premised with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made, when, where, and so often as need shall be (reasonable wear and tear, and accidents by fire or tempest excepted.)

In this covenant there is no provision against alterations, but rather a permission to make them under the words,

"all fixtures and things which at any time during the said term shall be erected and made," (by the lessee as I understand it to mean; for no power is reserved by the lease to the lessor to enter upon the demised premises for the purpose of erecting and making them.)

This action is not determinable upon the consideration whether the acts done by the defendant would have amounted to waste at common law, for here there is an express covenant, and it is by the terms of the covenant that the parties are to be bound, and the action is brought upon the covenant.

Greene v. *Cole*, 2 Wms. Saunders, 228 and 252, was an action of waste.

In construing a covenant such as this regard must always be had to the subject matter of the covenant (per Rolfe, B., in *Payne* v. *Haine*, 16 M. & W. 541); and in this case regard must be had to the fact that the demised premises were built to be used as a shop, and to be leased as such to such tenants as might from time to time offer to take them, and that the internal arrangements, and the arrangement of windows and doors that would suit one tenant's business might not suit the business of another, and would have to be altered from time to time to suit the incoming tenant in order to obtain such tenant.

The plaintiff did not hesitate to fit up or permit to be fitted up the demised premises to suit the incoming tenant when the defendant was the incoming tenant, and I have no doubt that he would have done or permitted to be done the very acts of which he complains to suit another incoming tenant.

The form of the covenant is not set out in the report of the case of *Doe Vickery* v. *Jackson*, 2 Stark. N. P. 294, and the doorway was put through the outside wall of the house, which I would infer was a dwelling house, and there was, so far as appears by the report, no implied permission as in this case to erect and make fixtures and things upon the demised premises.

In *Doe Wetherell* v. *Bird*, 6 C. & P. 195, a covenant to uphold a wall was held to be broken by taking it away altogether.

In *Gange* v. *Lockwood*, 2 F. & F. 115, on a demise of certain rooms in a house, the tenant covenanted to keep the rooms in good and tenantable repair, and to surrender them free from all dilapidations at the expiration of the term; the defendants took the adjoining house and opened two doors in the walls between the houses. Willes, J., told the jury that a covenant to repair, uphold, and maintain, or keep in good repair, raised a duty not to destroy the demised premises, and the pulling them down wholly or in part was a breach of such covenant.

It does not appear from the report what was the precise form of this covenant, but the breach complained of was similar to that in *Doe Vickery* v. *Jackson*.

I have not been referred to any case upon a covenant in form such as the one in question, nor have I been able to find any, the nearest approach to it being that in *Doe Dalton* v. *Jones*, 4 B. & Ad. 126. The covenant there was to repair and keep repaired the messuage, garden, and premises, by the indenture of lease demised, together with such buildings, improvements, and additions whatsoever as at any time during the said term should be erected, set up, or made by the lessee; but it contained no exception, as in this case, of reasonable wear and tear, &c. The demise was in 1819, and until 1832 the house was private and occupied as a lodging house. The lessee then took down part of the house front next the street, and converted the lower portion of the premises on that side into a shop and exhibition room for pictures. The windows, which were 4½ feet wide, by 5 feet high, he took away, and replaced them by windows 8 feet wide and 6 feet high, and on the inside he broke a door through a partition and stopped up an old one.

At the trial Alderson, J., was of opinion that no breach of the covenant was proved, and non-suited the plaintiff, with leave to move to enter a verdict for the plaintiff.

Counsel moved accordingly, and cited *Doe d. Vickery* v. *Jackson*. Patteson, J.: "In that case the door was made not in an internal partition, but in a wall between two houses." Parke, J.: "The covenant relied upon here contemplates the making of improvements." Counsel: "It cannot have been the meaning of the parties that a private house should be turned into a shop." Parke, J.: "If the defendant had sold goods on the premises, that would not have been a breach of any covenant; the only question, therefore, is, whether a forfeiture be incurred under this lease by merely enlarging these windows and opening a new door in the house. Counsel; "In *Vin.* Abr. Waste, D. pl. 19, it is said that if a lessee flings down a wall between a parlor and a chamber, by which he makes the parlor more large, it is waste, because it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house." Parke, J.: "That does not apply to a lease like this, which contemplates improvements and additions, and only provides against non-repair, which is *permissive* waste. Under such a lease can it be said that a valuable house was to be kept in precisely the same condition for forty years? I think the nonsuit was right." Taunton, J.: "I am of the same opinion. This case is the same as if there had been an express contract for the liberty to make improvements, which at common law would have been waste; here the contract is implied. There is no stipulation against waste except by the covenant to repair, and I am clearly of opinion that enlarging the windows and opening a door as here proved did not amount to a breach of that covenant, the effect of which was merely that the tenant should supply the ordinary wear and tear of the premises." Patteson, J.: "This was nothing more than the ordinary covenant to repair. I think no forfeiture was incurred under the lease."

The covenant in question implies a liberty to erect and make fixtures and things upon the demised premises, and in that respect is like the covenant in *Doe Dalton* v. *Jones*, and I am inclined to think that what was done by the defendant was not a breach of his covenant.

The cutting of the door through the brick wall was done two years before this action was commenced, and if a breach of the covenant to repair was not a continuing breach, and any forfeiture by reason thereof was in my opinion waived by the continued recognition during that period of the relationship of landlord and tenant continuing to exist between the plaintiff and the defendant.

But whether this is so or not, and whether or not all that was done by the defendant was a breach of the covenant, the question in my opinion really is, was the plaintiff's reversion injured by what was done by the defendant; for if it was not, the plaintiff was not damnified, and if he was not damnified there can be no forfeiture?

The measure of damage for a breach of a covenant to repair, such as that in question, is the extent to which the actual value of the reversion is injured: *Williams* v. *Williams*, L. R. 9 C. P. 659; *Mills* v. *East London Union*, L. R. 8 C. P. 79; *Doe Darlington* v. *Bond*, 5 B. & C. 855; *Atkinson* v. *Beard*, 11 C. P. 245.

I am unable to find in this case that there has been any damage caused to the plaintiff's reversion by the acts of the defendant, and I find expressly that the plaintiff has sustained no damage by reason thereof.

The result of this my finding, therefore, is, that there has been no forfeiture: *Doe Grubb* v. *Burlington*, 2 N. & M. 534.

I think, therefore, that the action must be dismissed, with costs.

I refer to *Leighton* v. *Medley*, 1 O. R. 207; *Buckley* v. *Beigle*, 8 O. R. 85; *Easton* v. *Pratt*, 2 H. & C. 676.

November 24, 1885, *James Maclennan*, Q. C., *Ritchie* with him, moved to set aside the judgment for the defendant and to enter it for the plaintiff, because the finding for the defendant was contrary to law and evidence, and because also of the improper reception of evidence for the defendant.

What the defendant covenanted to do by his lease was *to repair* the premises. The lease being under the statute

the full effect of the covenant is, that the defendant will "well and sufficiently repair, maintain, amend, and keep the demised premises, with the appurtenances, in good and substantial repair, and all fixtures and things thereto belonging, or what at any time, during the said term, shall be erected and made, when, where, and so often as need shall be."

These latter words do not say by whom the fixtures during the term are to be erected and made, whether by the landlord or by the tenant.

Whether damage has or has not been done to the reversion is not a test in an action brought for non-repair in breach of the covenant: *Mayne* on Damages, 2nd. ed. 191.

The case of *Doe d. Dalton* v. *Jones*, 4 B. & Ad. 126, does not apply here, for the tenant had there covenanted to keep in repair all such buildings, improvements and additions which he should make during the term.

In this case the lessor had no right to alter the state and arrangement of the premises as they were demised to him: it amounted to waste, and waste is a breach of the covenant to repair: *Kerr* on Injunctions, 2nd ed., 72, 73, 74, 85, 86, 396, 397; *Cole* on Ejectment, 424; *Roscoe's* N. P. Forfeiture for non-repair; *Woodfall's* L. & T. 12th ed., 563, 578, 580, 581, 584, 585; *Doe d. Vickery* v. *Jackson* 2 Starkie's N. P. 293. There was no waiver of any claim of forfeiture the landlord had by merely seeing the breaking of the wall through, and the other acts complained of: he did no act of any kind affirming the tenancy after these acts were done: *Doe d. Sheppard* v. *Allen*, 3 Taunt. 78; *Perry* v. *Davis*, 3 C. B. N. S. 769.

McLaren, contra. The building was let to sell groceries and liquors, and when the law required these businesses to be carried on in distinct buildings, or parts of buildings, the defendant was warranted in altering his building to meet the new requirements of the law, and all he did was to put up a partition in the shop to separate the one part of the business from the other and to give the necessary street entrance to the new part. The covenant

applies to fixtures put on the premises by the lessor, and the decision of *Doe d. Dalton* v. *Jones*, 4 B. & Ad. 126, applies. See also *Doe Palk* v. *Marchetti*, 1 B. & Ad. 715. In *Leighton* v. *Medley*, 1 O. R. 207, it was held the removal of a frame fence from one place to another was not of itself an act which would be equivalent to not keeping the fence in repair; it would be a question for the jury. See *Doe Worcester* v. *Rowlands*, 9 C. & P. 734; *Doe d. Grubb* v. *Earl of Burlington*, 5 B. & Ad. 507.

Maclennan, in reply. It is simply a question whether the plaintiff is entitled to recover or not, and that depends upon the rule of law which applies to the facts of the case.

March 8, 1886. WILSON, C. J.—It will be convenient to consider the opening the door in the brick wall, which was made in April, 1883, by itself, because there was an alleged waiver by the landlord of the forfeiture claimed in respect of it, and the fact and effect of waiver apply to it which do not apply to the other acts complained of; and to consider the removal of the partition by itself, because there was no part of the substantial structure of the building altered by its removal, but a mere wooden internal arrangement of a somewhat temporary character shifted to a different part of the shop; and lastly, to consider the removal of part of one of the large outer front windows, and replacing it by a door to form a new entrance from the main street to the liquor part of the premises, which was separated from the other part of the shop; for as to it, there was an alteration of the outer part of the building, and it certainly, as well as the change of partition, was not only done without leave, but against the will of the landlord, and it was complained of at once.

As to the breaking of the brick wall, assuming for the present that it was a ground of forfeiture, could it be waived, and if so, was it waived?

In *Doe d. Sheppard* v. *Allen*, 3 Taunt. 78, it appeared that Sheppard in December, 1802, let the premises to one Dore, who in July, 1803, assigned to the defendant, who there-

upon partitioned off the shop into two apartments, in one of which he carried on the business of a fishmonger, and the other he let on lease to a butcher, who carried on his trade in it. The plaintiff during all that time, up to the time of the trial in 1810, lived next door to the premises, and knew of the use to which the premises were put. The defendant paid his rent to Dore, but there was no evidence that Dore paid any rent to Sheppard during all that time. It was argued that Sheppard's knowledge of the breach of covenant by the user of the premises to such trades as were carried on in them, contrary to the express words of the lease, was evidence of a waiver of the forfeiture, but the judge at the trial ruled there must be evidence of some positive act of waiver, and that mere silence was not sufficient. The jury found for the plaintiff.

It was said by the Chief Justice, on the argument, that, as the landlord had seen a large sum of money expended in making the alterations and improvements, it was not merely a circumstance for the consideration of a court of equity, it was a strong circumstance for a jury to find consent to the alteration; but it was held the mere knowledge and acquiescence in the act constituting a forfeiture does not amount to a waiver; there must be some act by the landlord after the alleged forfeiture affirming the tenancy. *Perry* v. *Davis* 3 C. B. N. S. 769, affirms that case.

The breaking of a doorway through the wall of the demised premises into the adjoining house, and keeping it open for a long space of time, is a breach of covenant to repair, and will constitute a forfeiture, and it is not waived by the subsequent acceptance of rent, for it is a continuing breach. *Doe Vickery* v. *Jackson*, 2 Stark 293.

In *Walrond* v. *Hawkins*, L. R. 10 C. P. 343, the covenant of the tenant was not to "assign, or demise, or permit any other person to occupy the premises, or any part thereof without the consent in writing of the lessor," and there was a proviso for re-entry by the lessor for any breach. The lessee underlet a portion of the premises to another, and the lessor, with a knowledge of the underletting, distrained for and received his rent.

Held, the lessor by distraining had waived the breach of covenant, and that the permitting the undertenant to occupy for the remainder of his underlease was not a continuing breach.

In giving judgment Lord Coleridge, C. J., referred to *Doe d. Ambler* v. *Woodbridge*, 9 B. & C. 376, in which the covenant by the tenant was that he "should not alter, convert, or use the rooms then used as bed rooms, or either of them, into or for any other purpose than bed or sitting rooms for the occupation of himself or family, without the license of the lessor in writing," and it was held that a breach of that covenant was a continuing breach, and the acceptance of rent by the landlord, with a knowledge of that breach, was not a waiver of the breach.

The covenant not to alter the rooms, &c., was a breach complete at once by the act, and the breach of it was waived by the after acceptance of rent; but the covenant was also not to use the rooms for any other than certain purposes and that covenant was broken every day the rooms were used for any of such other purposes, and was therefore a continuing breach. The mere underletting contrary to a covenant without license is waived by the after acceptance of rent with a knowledge of the covenant being broken, because it is a complete breach at once.

The breaking of the doorway in the brick wall of this small room, giving access from the shop into it, was a breach of the covenant to repair and keep in repair on the part of the tenant. The act of breaking through the wall was a breach of the covenant complete in itself, when it was done it was finished, the doing of it could not be continued or continuing, it was done once for all, just as an assignment is concluded complete by the mere act of assignment. The breaking of the wall was, therefore, a breach of the covenant which could be waived, and if waived it was waived once and forever.

There was no acceptance of rent by the landlord with a knowledge of that breach for a period after the committing of the breach, because the rent was merely nominal, $1

a year, if it was demanded, and it was neither demanded nor paid.

The landlord had, however, substantially got all his rent payable five years in advance, as the free occupation of the premises by the defendant during these five years was paid for by him, as it was part of the consideration allowed by him to his landlord, when the landlord bought the other property from the tenant at a certain sum in money, and the free occupation of the premises in question was part of the consideration for that purchase.

The defendant has therefore, in effect, paid all his rent in advance, and it would be unjust to hold the breaking through of the brick wall complained of was an act which could not be waived in such a case, as it would be to hold it could not be waived in like manner as if he were paying his rent at periodical times during the term. The result will be more prejudicial in the present case to the tenant than if he had been paying his rent in the ordinary way, for he will forfeit not only the ordinary benefit of his lease but all of his payments which he had made in advance for the residue of the unexpired period of five years. But acceptance of rent by the landlord is not the only way by which a forfeiture may be waived.

If an owner of land, who stands by and sees another building upon his, the owner's, land, under the honest belief that he, the one who is building, is building upon his own land, and does not stop him and inform him of his mistake, is afterwards precluded from recovering the land so built upon by such other person, I think the like rule may well be applied to a landlord who stands by and sees his tenant doing an act which is a forfeiture of his term, and who, by his landlord's conduct, is led to believe that the landlord is an assenting party to such act; and that he should equally be estopped from setting up such act afterwards as a ground of forfeiture.

I am of opinion the breaking through of the brick wall in April, 1883, was in fact assented to by the landlord, although he may have at first objected to it.

Then as to the removal of the wooden partition a few feet more into the shop than it was when it was first put up. The materials for the original partition were supplied by the defendant, and they were put in place by the landlord. It was a mere temporary erection. It divided the office from the shop. It was put up for the defendant. He might or might not require to continue it. His shop business might require greater accommodation, and its removal would be necessary. There can be no doubt but the landlord and the tenant considered it to be only a temporary arrangement for the tenant's own personal convenience. It was no kind of injury to the property, and when it is considered that the change of partition was necessitated by the late statute which compelled the liquor business to be carried on in a different shop or place from that in which the general grocery business is conducted, there is still more excuse for the defendant in adapting his grocery shop to the new requirements of the law. There is a principle in the law of waste which applies to the removal of the partition; it is the smallness of the value or extent of the damage done.

I refer to the case of *Doe d. Grubb* v. *The Earl of Burlington*, 5 B. & Ad. 507, at pp. 516, 517.

Lord Denman, C. J., said: "There is another principle applicable to waste; that is, the smallness of the value, and there are a great number of old authorities to say that if the value be very small the consequences of waste do not attach." He refers to those cases, and after observing shortly upon them, he said: "They are illustrations of the principle that where there are no damages there can be no waste, and to this effect is the case of *Barrett* v. *Barrett*, Hetley 35, where C. J. Richardson, said: 'The law will not allow that to be waste which is not in anyways prejudicial to the inheritance. Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, first, by diminishing the value, or secondly, by increasing the burthen upon it, or thirdly, by impairing the evidence of title.'"

It is quite certain the change of the place of the partition is no damage, and in fact, if it can be said to be so, the damage is scarcely appreciable, and it is quite certain also the non-repair complained of is because of the fact of waste charged against the defendant by the removal of the partition.

The plaintiff, in my opinion, is not entitled to succeed in respect of that alleged act of forfeiture; firstly, because I am not satisfied it was an act of waste; and secondly, because the act was of no appreciable damage.

Then, lastly, as to the removal of a part of the large shop window fronts and putting a door in its place. Is that waste or is it not?

The plaintiff said that the change made in the window was the same as "turning the window from one that would not lift into one that would hang on hinges," and again he said "I do not know what harm turning the window into a door does * * it spoilt the look of the building altogether."

The tenant has covenanted to repair "the demised premises with the appurtenances and old fixtures and things thereto belonging, or which may at any time during the term be erected and made."

Under this covenant the defendant has engaged not only to repair the *demised premises*, but also all fixtures and things which may at any time *during the term* be erected and made, which he would not but for that special provision have been liable to do. *Cornish* v. *Cleife*, 3 H. & C. 446; *Doe* v. *Rowlands*, 9 C. & P. 734.

The repairs, also, as to fixtures and things put up after the making of the demise, must be such as the tenant puts up, for the landlord would not, under such a lease as this, have the right to enter to put up any fixtures, and to increase, without express authority for that purpose, the burdens of the tenant. The landlord would be a trespasser if he were to enter for such a purpose, as he is not under an obligation to repair, nor has he reserved any right so to enter: *Colley* v. *Streeter*, 2 B. & C. 273.

I am of opinion that under the full text of the statutory covenant to repair the defendant has the right to put up fixtures and things upon the demised premises during the term, and if he do he is bound to keep them in repair equally with the whole of the demised premises as he received them.

To what extent then has the defendant the right to make and erect such fixtures and things?

I do not know to what extent the defendant would be restrained otherwise than by the limits stated in 5 B. & Ad. at p. 517, before mentioned, that is, that the fixtures and things made or erected should not be such as to diminish the value of the demised premises, nor to increase the burthen upon them as against the landlord, nor to impair the evidence of title.

Converting a flat window into a bow window, or to put glass into a panel of the door, or a door where there was a window, or to make a door to open at the right hand in place of the left hand, or to divide a door into two parts, in place of being all in one, or to shift a staircase from one part to another, or the like, would not be wrongful acts under such a lease as the present, if these were acts of improvement and beneficial to the estate.

In a shop more particularly, where it is an object for the shop-keeper to have as attractive and convenient a place as possible, some latitude must be allowed to him under such a covenant as the present one is. I do not say he would be at liberty to cut away a brick or stone front support and to put iron pillars as a support, and to put in large plate glass windows, nor to remove the plate glass windows and iron pillars and build up the front with brick or stone; for that would be a serious structural alteration. But the tenant might put up an additional building, subject to the limits before defined. The acts which are plainly waste are such as the following: pulling down the house and building it less than before; or building it larger; or building a house where there was none before; or altering the house to the lessor's prejudice, as by con-

verting a parlour into a stable; or a corn mill to a fulling mill, or to a horse mill, although it be to the lessor's advantage: Com. Dig. *Waste*, D. 2.

And in Vin. Abr. *Waste*, D. pl. 19, it is said to be waste if a lessee fling down a wall between a parlor and a chamber, by which he makes the chamber more large, because it cannot be intended for the lessor's benefit, nor is it in the power of the lessor to tranpose the house.

I have not seen the judgment which my brother Armour gave after reserving the case for that purpose, but it was said he referred to *Doe d. Dalton* v. *Jones*, 4 B. & Ad. 126, as an authority upon which he relied in finding for the defendant.

In that case the lessee covenanted to repair and keep in repair the premises and all such buildings, improvements and additions as should be made thereupon by the lessee during the term, with a proviso for re-entry in case of breach of covenant.

The lessee changed the lower windows into shop windows and stopped up a doorway, making a new one in a different place in the internal partition of the house.

Held, no forfeiture was incurred, the lessee's covenant being only against non-repair, and it being implied by the the lease that additions and improvements were to be made. There a private house was by these changes converted into a shop.

I am inclined to think the lease before us is substantially like the lease just referred to. In that case there was an implied leave to make improvements and additions. In the lease in question there is an implied leave given to the defendant "to make and erect fixtures and things" upon the demised premises.

Upon that ground I think the defendant is entitled to succeed.

I am also of opinion the plaintiff must fail, because there was no evidence of damage in fact, [assuming there was damage], which would by law constitute damage and entitle the plaintiff to a judgment as for waste against the defendant.

The conclusion I come to is that in law the plaintiff is not entitled to recover the premises as for a forfeiture, nor damages for the acts complained of in this action, and that the motion must be dismissed, with costs.

ARMOUR, J., not having been present during the argument, took no part in the judgment.

O'CONNOR, J., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

MOORE V. MITCHELL.

Libel—Pleading in mitigation of damages.

In libel a plea in mitigation of damages must in its nature be an admission that the plaintiff is entitled to recover some compensation; but it amounts to a contention that the amount of the plaintiff's recovery shall be limited to the value of the plaintiff's character, which value is affected by the facts pleaded.

Such a plea, based upon the plaintiff's bad character, must either shew that the plaintiff is a man of bad *general reputation or character*, or that the plaintiff has a bad character with regard to *some specific act which relates to the charge in the libel complained of.*

It is not permissible to a defendant to plead justification to a libel, and under that defence to offer evidence of the plaintiff's bad character in mitigation of damages: *Wilson* v. *Wood*, 9 O. R. 687, disapproved of.

LIBEL.

The words complained of were stated to have been published in the Ottawa *Free Press* on the 21st of July, 1885:

"Caution.—One John Moore has been representing himself as connected with the *Free Press*, and on the strength of such connection applying for railroad passes. This is to give notice that no such person has any connection with the *Free Press*, and all persons are hereby cautioned against any one of that name representing himself as belonging to the *Free Press*, and asking for favors in such connection.

C. W. MITCHELL"—

Meaning thereby that the plaintiff had been falsely representing himself as being connected with the *Free Press*, and had been fraudulently attempting upon the strength of such false representations to obtain railway passes.

The 6th, 7th, and 10th paragraphs of the statement of defence were as follow:

6. On or about the 1st of June, 1883, the defendant dismissed the plaintiff from his employment on account of gross misconduct and dishonesty, inasmuch as the plaintiff, while engaged in the collection of accounts due the defendant and in the defendant's employ in connection with the said newspaper, collected large sums of money for the defendant, amounting to upwards of $370, which monies the plaintiff appropriated to his own use without the knowledge of the defendant, and in breach of trust.

7. The defendant, having discovered such defalcation and embezzlement of the plaintiff, questioned the plaintiff concerning the same, when the plaintiff admitted being guilty thereof.

10. If the alleged publication referred to the plaintiff (which the defendant did not admit), that the defendant, knowing the plaintiff's antecedents, bad character and dishonesty, as set forth in the 6th and 7th paragraphs, and believing he might make similar applications, unless prevented, to other railway companies on account of the Ottawa *Free Press*, and for the protection of the defendant's interest, and the character of his paper, defendant published the said caution *bonâ fide* and without malice, and the said publication was necessary to protect the defendant's interest, and that of railway companies, and to prevent frauds on said railway companies, and was the only way of effecting defendant's object, and was made by the defendant believing it to be his duty so to do.

The Master in Chambers refused to strike out the above paragraphs of the statement of defence. On appeal to Galt, J., he ordered the paragraphs to be struck out.

Notice of motion was served on behalf of the defendants to set aside the order of Galt, J.

November 23, 1885, *A. H. Marsh* supported the motion. The pleas go to damages, which are objected to; and such a defence is now pleadable: *Scott* v. *Sampson*, 8 Q. B. D. 491, 502-3; *Livingston* v. *Trout*, 9 O. R. 488; *Judicature Act*, Rule 128; *Wilson* v. *Woods*, 9 O. R. 687; *Jones* v. *Evans*, 11 Price 235, and cases there cited; *Moyer* v. *Moyer*, 1 U. C. L. J. N. S. 248, a decision in the Supreme Court of Pennsylvania. [ARMOUR, J., referred to *Edgar* v. *Newell*, 24 U. C. R. 215, which case, however, does not appear to be now good law].

Millar, contra, referred to *Daniell's* Chancery Practice, 5th ed., 290; *Odger* on Slander 305. The cases merely shew that the damages may be pleaded to when the facts pleaded would before the said Act have been admissible in evidence.

March 8, 1886. WILSON, C. J.—The article is libellous. It charges the plaintiff with making false representations for the purpose of getting free passes on the railways, and notice is given cautioning the public against the person putting forward such representations. The innuendo is quite maintained by mere inference from the charge made.

In answer to that charge the defendant, in the 6th paragraph, says that in June, 1883, two years before the publication complained of, the defendant dismissed the plaintiff for the dishonesty set out in that paragraph, and the plaintiff, as the 7th paragraph stated, admitted the acts of dishonesty to the defendant.

So far these matters have nothing whatever to do with the libel charged. They are not a denial, nor an admission and justification of them as true, nor that the publication was privileged; they are, and can only be made pertinent to the defence by being set up in mitigation of damages.

Then, as to the 10th paragraph. The defence is (1) that the defendant knowing the plaintiff's bad character and dishonesty as before stated; and (2) believing he might make similar applications (that is for free railway passes), "unless prevented; and (3) for the protection of the defen-

dant's interest and the character of his paper, he published the said caution." And the defendant says further (4) that "the publication was necessary to protect the defendant's interest, and that of the railway companies, and to prevent frauds on these companies; and (5) that it was the only way of effecting the defendant's object; and (6) it was made by the defendant, believing it to be his duty so to do."

The meaning of all that is, that because the defendant two years before the publication had acted dishonestly towards the defendant in the collection of the defendant's accounts, and because he believed the plaintiff *might* make similar applications to the railway companies for free passes, as if he were still connected with the defendant's paper, he published the caution, &c.; that is, because the plaintiff had at a particular time acted, as the defendant says, dishonestly, the defendant had the right to libel the plaintiff, because the defendant believed the plaintiff *might* again act in like manner; or, in other words, because a person has unfortunately fallen under the sentence of the law he is ever afterwards to be libelled in case he *might* break out again.

That, it is quite plain, is not a defence, and it does not even apply to the damages. It does not pretend to be in reduction of damages. It is an assertion of a right to libel the plaintiff as much as the defendant pleases, because he says the plaintiff has at a former time acted dishonestly. The defendant has no such right. A plea to the damages must in its nature be an admission that plaintiff is entitled to recover some amount of compensation, but only to the extent his character is worth. The 10th paragraph is not of that character in any respect. I am of opinion it must be struck out.

Then as to the 6th and 7th paragraphs, which should properly have been in the one paragraph, it will not be disputed that a plea in reduction of damages may since the Judicature Act be pleaded in an action of this kind after the convincing and conclusive judgment in *Scott* v. *Sampson*, 8 Q. B. D. 491, which has been followed by my

brother Rose in the two cases which he decided in 9 O. R. 488 and 687,

The question is, do these paragraphs shew that the plaintiff is a man of *general bad character*? If they do they should be allowed to stand, because "on principle general evidence of reputation shall be admitted." If they do not shew that he is a man of *general bad reputation* the paragraph should be struck out. These paragraphs shew the defendant is impeaching the plaintiff's character and reputation in respect of a charge of dishonesty in matters which lie wholly between the plaintiff and the defendant and which may never have gone beyond themselves.

I do not agree with the particular decision of *Wilson* v. *Woods*, 9 O. R. 487, that a defendant, in slander, may plead in justification the truth of the slander, and then be admitted to prove, under such a defence, the bad character of the plaintiff, because the defendant says he will use the facts printed in justification or reduction of damages. That appears to me to be objectionable. The justification applies to the *truth* of the charge, this particular charge If it be proved it is an absolute defence, and it is unnecessary to say anything as to the measure of damages. If it is not proved, it cannot be used to reduce the damages. It is in such a case a reason for enhancing the damages, by persisting in the charge.

And in any case it is not a plea of *general bad reputation*, and it is not admissible in reduction of the damages, because it does not give the plaintiff the least notice that he is to be called upon to defend his *general* reputation; but, on the contrary, his attention is expressly diverted from his *general* reputation to the particular subject of the defamation, the truth or falsity of it, and of it alone: *Jones* v. *Stevens*, 11 Price at p. 275.

I am of opinion the 6th and 7th paragraphs are objectionable because they are not directed in any respect to the general reputation of the plaintiff, but to the particular acts of dishonesty asserted by the plaintiff on the one

side and denied by the plaintiff on the other side, and not in any way relating to the charge in the libel complained of. The 6th and 7th paragraphs must also be struck out.

The motion will therefore be dismissed, with the costs of the motion in Chambers and the motion before Mr. Justice Galt, and of the present motion before us.

ARMOUR, J., concurred.

O'CONNOR, J., not being present during the argument, took no part in the judgment.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

GOLDSMITH v. THE CITY OF LONDON.

Municipal corporations—Defective sidewalk—Negligence—Misdirection.

The plaintiff, while crossing a street in the city of L., stumbled against the end of a sidewalk, which was constructed of asphalt boxed in with boards, and was some four inches higher than the crossing, and falling was severely injured: *Held*, WILSON, C. J., dissenting, that there was evidence of negligence on the defendants' part that must have been submitted to the jury; and that they having found in favour of the plaintiff, their verdict could not properly be interfered with.

Held also, no misdirection to tell the jury that they might or might not, as they thought proper, infer from the evidence, though there was no evidence of it, that if the roadway was at that level when the accident occurred, it had been filled up between then and the examination of it by the defendants' witnesses, who stated that they found the depression much less than was stated to have been when the accident took place.

THE plaintiff by her statement alleged (1) that she was a widow residing in the city of London: (2) that on or about the 12th of May, 1885, she was walking northward, along the east side of Richmond street, in that city, towards her home on that street, and was obliged to cross Sydenham street, a street running into Richmond street at right angles thereto: that while so walking along said Richmond street, and crossing said Sydenham street, and

approaching the northerly side thereof, the plaintiff's foot came in contact with the end of the defendants' public asphalt pavement, or sidewalk, which had at this point been so improperly constructed or left out of repair as to be raised above the level of the road crossing, thus constituting an obstruction to any one travelling along the said road crossing, or highway, and thus endangering the safety of those travelling or passing along the same, and the plaintiff was thereby thrown violently to the ground, and the plaintiff's nose was broken, and she sustained thereby divers other severe injuries, suffering great sickness and pain of body, being for a long time confined to bed, and unable to attend to her affairs and business, and was permanently injured and disfigured for life, and was put to great expense in procuring medicine and medical attendance and nursing, and was otherwise injured and damnified: (3) that the defendants, as such municipality as aforesaid, were obliged, and it became and was their duty, to properly construct, and maintain, and keep in proper repair their public sidewalks, highways, and road crossings in the said city, and the approaches thereto, so as not to endanger the safety of those travelling along the same, yet they failed to so properly construct and maintain, and keep in repair the portion of sidewalk on Richmond street as hereinbefore set forth, and failed, and neglected to build up the approaches or street crossing leading to the said sidewalk, whereby the plaintiff sustained the injuries and damages as hereinbefore set forth.

The defendants denied all the allegations contained in the plaintiff's statement of claim: (2) that the alleged accident, if any, was caused by the negligence of the plaintiff: (3) that the alleged damages were not sustained within three months before the commencement of the action; and they pleaded and claimed the benefit of the statute known as "The Consolidated Municipal Act, 1883."

Issue.

The cause was tried by O'Connor, J., and a jury, at the last Winter sittings of this Court at London. The plaintiff

stated that she was residing on Richmond street: that she was returning home from Mill street: that she proceeded northwards along the west side of Richmond street: that she then crossed along the south side of Sydenham street to the east side of Richmond street, and then crossing Sydenham street she stumbled against the end of the sidewalk which was formed of asphalt, and was contained and surrounded by boards or scantling, and was higher than the crossing, and fell, receiving severe injuries: that she had never been over this crossing before: that there was no lamp at the crossing: that there was one on the opposite side, but she could not say if it was lighted: that it was not a pretty moonlight night, nor was it a very dark night; that she did not see the place again till she went there with some of the council on the 24th or 25th of July: that the level of the sidewalk was then about four inches above the crossing: that she did not see it measured that day: that it was the same then as when she stumbled upon it.

Dr. Jones gave evidence for the plaintiff. He said he examined the place where the accident happened, the next morning: that the sidewalk was made of asphalt and was boarded up on each side and then at the end a board was put across: that there was an abrupt ending to the asphalt sidewalk: that he did not know how long the sidewalk had been made, but that there was a fall of three, four, and five inches from the edge of the sidewalk to the ground crossing: that it was dangerous: that he had tripped over there several times: that it had been in that condition from the time the sidewalk was built: that he did not measure it, but judged it with his eye and the highest part would be about five inches: that it varied in height, being higher at the edges than at the centre of the crossing: that it was three or four inches in the centre: that he had tripped over other similar places in the city, but would not undertake to say that he had ever tripped on this.

George Bryce, a wholesale merchant, who lived on Richmond street near the plaintiff, also gave evidence on her

behalf, stating that he examined the place the morning after the accident: that there never had been any crossing put there after the asphalt had been put down just as the street was gravelled; never any block pavement crossing, just gravel and sand ordinary to the street up there: that the distance from the asphalt to the crossing was about four inches; it varied from three and a-half to four or five inches: that there was a considerable washout from the heavy rains: that he had noticed it for some time and really thought it was dangerous: that he had noticed it all that spring from the time the snow left: that he knew it was dangerous, but not for him; but it would be for an old lady: that the lamp on the opposite side was not lighted at midnight the night of the accident: that this road was very much travelled: that it was thickly populated: that it was the main thoroughfare in that part of the city: that the sidewalk remained in the condition it was in that night for two or three months: that the asphalt walk had been made on both sides of Sydenham street boxed in the usual way and no crossing made; but on the street itself it was just left the natural grade.

Alice Goldsmith, the daughter of the plaintiff, said that she went to see the place where the accident occurred the next day: that the the top of the curbing was about six inches above the roadway: that she did not consider it in a safe condition: that it was not: that it stayed that way for about three weeks: that she actually thought there was a space of six inches between the road and the top of the curbing; as much as that, perhaps a little more; it was, moreover, in the centre, she judged, about three inches, and about six inches at the ends, and the board was visible all the way up.

For the defence, Charles Taylor, a member of the defendants' council, was called, and said that he and Aldermen O'Meara and Christie went to the place of the accident on the 24th or 25th of July, and sent the commissioner to bring the plaintiff: that before the plaintiff arrived each of them measured the height of the curbing from the cross-

ing, and at the deepest point found it not two inches: that that was in the corner, and at the centre it was not quite an inch and a half: that there was nothing unsafe or dangerous to persons passing along the highway.

John Christie gave evidence to the same effect.

Stephen O'Meara also gave evidence to the same effect.

John M. Moore was acting engineer for the defendants; examined the place about the end of June; did not measure it, but judged that the curbing would be about an inch and a half above the level; he did not consider it dangerous; that three or four feet from the end of the sidewalk there was a depression of about three or four inches, and it sloped up to the sidewalk.

Wade Owen, the defendants' street commissioner, stated that he went to the place with the Aldermen on the 24th or 25th of July, and also a couple of weeks before: that there was no difference in the height of the curbing on both occasions: that he measured it, and agreed with them as to the measurement: that he did not consider it dangerous.

Benjamin Slade was at the place when the Aldermen were there, and agreed with them in the measurement; did not consider it dangerous.

The jury found for the plaintiff and $500 damages.

On the 3rd of February, 1886, *W. R. Meredith*, Q.C., obtained an order *nisi* to set aside the verdict and judgment, on the ground that there was no evidence that the injuries complained of by the plaintiff were caused by the negligence or breach of duty by the defendants; or for a new trial on the law and evidence; and for misdirection in directing the jury that they might, although there was no evidence of it, assume that the depression in the roadway, which was alleged to have been the cause of the plaintiff's accident, had been filled up between the time of the accident and the examination of it by the defendants' witnesses.

On the 11th of February, 1886, *R. M. Meredith* (*Love* with him) shewed cause, and *W. R. Meredith*, Q.C., supported the order *nisi*.

March 8, 1886. ARMOUR, J.—According to the evidence of Mr. Bryce the defendants had constructed their sidewalk of asphalt, boxed in with boards, and had left it standing some four inches above the crossing without grading the crossing up to the level of it. This I think was evidence of negligence that had to be submitted to the jury.

I do not see how we can upon any proper principle interfere with the finding of the jury in a case like the present, which is one so peculiarly within their province.

They had to determine upon the condition of the sidewalk at the time the accident happened, at the place where it happened, and to say, having regard to all the circumstances and the requirements of the public, whether it was then in a reasonably proper state of repair. They had to decide whether it was in the condition described by the plaintiff's witnesses at the time of the accident, or whether they ought to infer from the measurements which were had by the defendant's witnesses between two and three months after the accident happened, that it was not in that condition, but that it was then in the condition described by the defendant's witnesses when they made the measurements.

They had to guage the good faith of these measurements, and whether they truly indicated the actual condition of the place of accident.

I should have had more faith in them if they had been made in the presence of and with the knowledge of the plaintiff, or of some one on her behalf.

The evidence of Mr. Moore would seem to my mind to indicate that the measurements were made in the way most favourable to the defendants, and did not shew the whole truth with respect to the condition of this sidewalk as to its height above the general level of the crossing.

To put the case most favourably for the defendants, the most that can be said is, that the evidence was conflicting, and upon this conflicting evidence the jury have pronounced, and having done so we ought not to interfere.

Then we have to say whether there was any misdirection as complained of, and whether if so, any substantial wrong or miscarriage was thereby occasioned; and in a case like the present we cannot pick out a sentence from the Judge's charge and subject it to criticism as if it stood alone, but we must consider it in reference to its context and to the whole charge, and see whether there is any substantial misdirection having regard to the charge as a whole.

This is what is complained of: "Then it is suggested on behalf of the plaintiff that if it was at that level at that time" (the time of the accident), "that it had been interfered with in the meantime"; (that is, between the time of the accident and of the measurement). "That is only an inference: there is no evidence of it; but it is one of those inferences that you may or may not draw from the evidence as you think proper when you consider it."

I do not consider there was any misdirection in this. If the witnesses for the plaintiff spoke the truth and the sidewalk was four inches above the level of the crossing at the time of the accident; and the witnesses for the defendant spoke the truth, and it was only an inch and a-half above the level of the crossing when they made their measurements, surely there was an inference which the jury might or might not draw from this? The learned Judge did not say that any inference was to be drawn, but that it was one they might or might not draw from the evidence, as they thought proper, when they considered it. Besides, the learned Judge told the jury, at the very end of his charge, that they were bound by their oaths to consider the facts themselves, and to be guided by nothing else but the evidence as to the result of those facts upon their minds.

In my opinion the order *nisi* must be discharged, with costs.

WILSON, C. J.—The statement of claim charges the defendants with negligence in not keeping in proper repair the portion of the sidewalk in question, and in not building up the approaches or street crossing leading to the sidewalk, whereby the plaintiff sustained injury.

The plaintiff was walking along Richmond street and had to cross that street where it is intersected by Sydenham street, and just as she approached the sidewalk, at the northeasterly point where the sidewalks on these two streets meet, her foot came in contact with the edge of the sidewalk, which was raised above the level of the highway crossing, which thus, it is said, caused an obstruction to persons travelling along the crossing, and endangered the safety of those travelling along the same, and the plaintiff was thereby thrown violently to the ground and seriously injured.

The evidence shewed that the streets in that part were macadamized, and were raised in the centre, and from there sloped towards each side, not quite to the sidewalk, and from that lowest part of the roadway that it had sloped up to the top edge of the sidewalk.

The form of the road as it joined the sidewalk, as I understand it, shaped somewhat like an expanded V, the lowest part of it being the water way or gutter.

There had been a wash-out at the crossing where the plaintiff was injured, so that from the lower part of the water way to the top of the sidewalk, in place of a slope there was, at the most, for the witnesses differ, an abrupt rise of four inches, and it was against that elevation the plaintiff struck her foot—*stubbed her toe* will express it better—and fell upon her face and was badly injured.

In *Ray* v. *Corporation of Petrolia*, 24 C. P. 73, the plaintiff's counsel admitted that a hinge which projected about two inches above the level of a trap-door in the sidewalk was not an act of negligence; and it was stated in *Ringland* v. *The Corporation of Toronto*, 23 C. P. 93, following *Merrill* v. *Inhabitants of Hampden*, 26 Maine 234, that the road being in such a state of repair as would

exempt the corporation from liability to an indictment, would also exempt it from liability in a civil action: *Boyle* v. *Town of Dundas*, 25 C. P. 420, is to the same effect. I do not say that the rule so stated is altogether a complete test: *Burns* v. *City of Toronto*, 42 U. C. R. 560, states it is not.

There are two cases in which the duties and responsibilities of municipalities arose, and were considered in the case of intersecting roads; but there one of the cross-roads was in a different municipality from that in which the other road was situate: *Regina* v. *The Woodstock, &c., Road Co.*, 18 U. C. R. 49; *Bradley* v. *Brown*, 32 U. C. R. 463.

In *Boyle* v. *The Town of Dundas*, 27 C. P. 129, the jury found the sidewalk was not in repair, and that the plaintiff by watching her steps might have avoided the hole in the sidewalk, yet that she exercised that due care and caution that a person would ordinarily use under the circumstances. Held, a finding in favor of the plaintiff.

The plaintiff in this case was not injured by any defect in or upon the sidewalk, but by the sidewalk, at its junction with the *via trita*, or roadway for horses and carriages at the crossing, being about four inches higher than the crossing, and by reason of that depression of the carriage way being caused by the original formation of the road at that part being washed out by the flow of water in the gutter. I have been anxious to satisfy myself, if possible, that a roadway constructed in the first instance with the crossing left four inches below the sidewalk is a wrongful or negligent construction of the street by the municipality. Apart from judicial decision I would say it was not. In many cases in cities the crossing is continued on the level from one sidewalk to the other, the water ways or gutters at the end of each crossing being covered by plank or by an iron plate. I do not think the universal mode of making the sidewalks is by crossings upon the level with the sidewalks. In this particular case it was not continued upon the level, but was at first formed from the lowest part of the water way in a slant to the top of the sidewalk.

Such a formation would leave those on foot, to some, but perhaps not to any great, extent, still liableto stub their toes against the incline as it rose higher to the level of the sidewalk.

I cannot say there is a legal obligation upon municipalities to make their street crossings at their junction with the sidewalks upon the level of the sidewalks. I do not say they should leave the sidewalk two or three feet higher on the perpendicular than the crossing, for that could be avoided in every case, however roughly the locality was there by nature; for a slope could be made more or less in length from the lower to the higher level to meet the natural lie of the ground. And perhaps an abrupt rise of one foot from the crossing to the sidewalk might be too great for ordinary convenience and safety. It becomes, therefore, a question of degree. It is not contended that one inch difference would at such a place be evidence of negligence, and it was not contended, in one of the cases cited, that two inches in height of a hinge on the sidewalk was of itself an act of negligence. And yet a person might strike his toe upon a projection one inch high, and injure himself. The difference, and it appears to me to be a great difference, between the obstruction, as it is called, in this case, and the obstruction in other cases is this: in the other cases the neglect complained of is in the sidewalk, where one does not expect to meet danger or obstructions of any kind, and there is no reason specially to look out for either the one or the other; in this case the obstruction complained of is just in the place and at the point where there is reason to believe the sidewalk and the carriage way do not meet on the level, and where persons are required to be, and ought to be careful of their steps. It is holding municipalities too strictly; it is binding them too rigidly to make them liable in such a case; for the obligations now bearing upon them already are quite hard enough without subjecting them to an action for negligence because the edge of a sidewalk happens to be four inches higher than the crossing at the point of contact.

In nearly every street in the city the sidewalks—I do not at present refer to the place of the crossings—are all along the carriage way several inches above the level of the gutter, and people do cross the streets at such points, and are entitled of right to do so as well as at crossings, which are the continuation of streets, or at other crossing specially made for convenience, and I am sure that no action would lie against the municipality for not making the entire length of the carriage way at the gutters on a level, by iron plates or otherwise, with the sidewalk. Then, are they more bound to do so at the crossings, which are the continuation of intersecting streets?

The case of *Kent* v. *Worthing Local Board of Health*, 10 Q. B. D. 118, shews that the defendants were held liable for not repairing the wearing away of their road, by reason of which the iron cover of a valve connected with a water main, and which had been properly fixed on the highway by the defendants at first, projected an inch above the highway, by reason whereof the plaintiff's horse stumbled over the valve and was hurt.

In that case it is important to notice that the mere difference of *one inch* above the level of the highway caused this accident and created the liability. So in *Blackmore* v. *Vestry of Mile End Old Town*, 9 Q. B. D. 451, the defendants were held to be liable, although there was no elevation in the road, but the iron flap of the water meter in the footway had become worn and slippery, and the plaintiff had slipped upon it, and was injured.

I may here point out that at the corner of King and Toronto streets, where thousands pass every day, the sidewalk is raised at least four inches above the crossing, and no accident has happened there for the many years the road has been in that condition. That cannot, then, I should say, be a dangerous construction of the crossing.

I am not prepared to say that municipal bodies are bound by law to make their street crossings meet the sidewalks upon the level; and I am not prepared to hold them liable because the sidewalk rises on the perpendicular

four inches above the crossing at the point of contact. The municipality is bound to maintain its roads in a reasonably fit condition to ensure the safety of all persons using them; and the fact that tens of thousands of persons have no doubt passed that spot at all hours of the day and night without harm, and without complaint, is a conclusive argument in favor of the view which I take of the construction of the road at this particular locality.

The case of *Walton* v. *York*, 32 C. P. 35, and *Shaw* v. *King*, 8 A. R. 248, and other cases of the like kind, are findings by the jury, and are so many premiums held out to unfortunate or careless people who have met with accidents on the highway to convert their misfortunes or carelessness into a charge of negligence against the municipality, and to make it pay most unjustly for results for which they are in no way responsible.

In one of the above cases the man got into a ditch on the highway, which it would have been a nuisance to have fenced off, and in the other an intoxicated man fell out of a waggon, and the municipality had to provide for his wife and children, because he was so intoxicated he could not keep his seat in the waggon.

In my opinion there should be a new trial, the costs to abide the event.

O'CONNOR, J., agreed with Armour, J.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

SMITH v. CITY OF LONDON INSURANCE COMPANY.

Insurance (fire)—Misdescription of premises—Waiver—Arbitration—Verdict—Variance—Statutory conditions—Variation.

The plaintiff, in his application for insurance, described the building insured by an illegible word that was intended by him for *board*, but was read by the defendants as *brick*, and they issued their policy upon a brick building and at a premium rate for that class of building, and were not aware until after the fire, that the building was a board one. Condition 17 of the statutory conditions on the policy provided: "The loss shall not be payable until thirty days after the completion of the proofs of loss, unless otherwise provided by statute or the agreement of the parties; and there was a condition printed upon the policy, in the manner required by the Fire Insurance Policy Act as a variation of conditions, that "The loss shall not be payable until sixty days after the completion of the claim." Action was commenced upon the policy more than thirty days but less than sixty days after the fire. After action the defendants demanded a magistrate's certificate under statutory condition 13 *e*, and had an arbitration under statutory condition 16, and by the award on the arbitration it was found that the value of the building insured was $2,500, and the amount of the loss was $1,700. The jury found that the value of the building was $3,500, and the amount of the loss was $3,500.

Held, per WILSON, C. J., (1) That by reason of a misunderstanding as to the nature of the building, the parties never contracted together, but the defendants waived their right to object to the mistake by demanding the magistrate's certificate and the arbitration, and by doing so precluded themselves from asserting that no contract was ever made. (2) That the finding of the jury as to the value of the building must prevail, notwithstanding the award. (3) That the condition that the loss should not be payable until sixty days after completion of the claim, being in the policy and not dissented from by the plaintiff, constituted an agreement between the parties, and that it was a reasonable condition; but that it was unreasonable for the company to insist upon it, as they never intended to pay the loss.

Per ARMOUR, J. Following *Parsons* v. *Queens Ins. Co.*, 2 Ont. 45, any variation of the statutory condition is *prima facie*, unjust and unreasonable.

ACTION on a fire policy, dated the 3rd of July, 1883.

The 3rd paragraph of the statement of claim alleged that the plaintiff, at the solicitation of the local agent of the defendants, who was well aware of all the facts, &c., connected with the plaintiff's building, applied to the defendants for an insurance upon a building, which risk was examined by the said local agent acting on behalf of the company, and reported upon and described to the defendants by said agent, and thereupon the defendants

issued a policy insuring him against loss by fire on the property therein described as a two-story brick building.

The 4th paragraph alleged that by the mistake of one of the defendants' clerks the word *board* in the plaintiff's application for insurance was read as *brick*, and the mistake was not discovered by either the plaintiff or the defendants until after the loss, and the defendants admitted it was a mistake and waived it; and the plaintiff claimed a rectification of the policy in that respect, and the sum of $2.500, the amount of the insurance.

Statement of defence:—

1. If the defendants entered into a contract with the plaintiff, which they denied, it was contained in the application by the plaintiff and the policy issued thereon.

2. The plaintiff applied for an insurance on a building constructed of bricks, and the defendants, without any mistake on their part, and at a premium rate greatly less than they would have insured the same building, if altogether constructed of wood, and without notice that the building was a wooden building, issued a policy embodying the contract actually made with him for the insurance of a brick building as described in his application; and the plaintiff accepted the policy and consented to its terms, with notice that the defendants intended to and did insure a brick building, and he retained the policy until after the loss by fire, when the defendants first became aware the building was constructed of wood and not of bricks; and if the plaintiff intended to insure a wooden building the defendants said that no contract was made by reason of the want of a mutual understanding by the parties as to the subject matter of the agreement.

The defendants then set out over valuation of the building, and omission to describe building within 100 feet of the building proposed to be insured; and that no incendiary danger was threatened or apprehended; and that the building was vacant for eight months after the policy issued: that there was a partial saving of the property; yet the plaintiff claimed the full value of the building: that in the state-

ment of loss the plaintiff falsely represented the value of the building at $3,500, whereas it was not worth more than $1,650; and that he also described the building in such statement as a brick building: that the defendants made a proper variation according to the statute, making loss payable in sixty days, and the action was begun before the sixty days expired: that the award made by the arbitrators appointed under the statutory conditions was conclusive between the parties: that the defendants never waived any of the terms of the policy.

Reply:

The agent of the defendants inspected the building for insurance, and knew it was not as described in the policy, and if a lower premium was received upon the building as a brick building it was the defendants' mistake, as their agent fixed the rate, and the plaintiff was willing to pay a higher rate on rectification of the policy; and that the sixty days for payment of the loss were unjust and unreasonable, as the statute fixed thirty days as the time for payment; and that the defendants had waived all defences they had pleaded; and that the award was not binding.

Issue.

The action was tried at the last Fall Assizes at Ottawa, before Rose, J., and a jury.

The learned Judge put the following questions to the jury, to which they gave the accompanying answers:

1. Q. "Was the statement in the application that the 'present cash value' of the property to be assured was $3,500, material to be made known to the company in order to enable it to judge of the risk, and did the plaintiff misrepresent the value?" A. "We believe $3,500 to be the cash value."

2. Q. "Was the statement in the proofs of claim, that the loss by fire amounted to $3,500, fraudulent or false?" A. "We believe the statement to be true."

3. Q. "If you think the loss by fire did not amount to $3,500, state what in your opinion was the amount of loss?" A. "We believe that $3,500 to be the loss."

4. Q. "In your opinion was the vacating of the premises by the Bromleys a change material to the risk?" A. "We believe the risk to be less after the Bromleys left."

5. Q. "At the time of the application for insurance was there any incendiary danger threatened or apprehended?" A. "No, there was not.

6. "Were the facts as to the Bromleys material to be known to the company at the time of the application in order to enable it to judge of the risk it was asked to undertake?" A. "Yes, and we believe that the facts were all known to the company.

7. Q. "Is the word in writing between the words "built of" and "covered," in the 13th line of the application, *board* or *brick*." A. "We believe this word was meant for *boards*."

A discussion then ensued for what amount the damages should be entered for the plaintiff, whether for the full amount of the sum insured, $2,500, or the amount the arbitrators appointed under the section had awarded as to the value, that is, the sum of $2,500; and whether the finding of the arbitrators was or was not conclusive as to the value. It was then argued by the plaintiff's counsel that the award was bad for two reasons: 1st, for not dealing with the property saved as the statute required; secondly, because the arbitrators had not found the value of the property insured *at the time of the insurance*, but only that it was worth $2,500; and the submission had relation to the time of the time of the insurance, because the award recited that differences had arisen * * respecting the value of certain property in the said village of Renfrew belonging to the said John Smith, *and insured by the said company* under a certain policy of insurance, dated the 3rd of July, 1883, issued by the said company.

The learned Judge did not assent to the second objection, for he said the words were not the value *at the time of the application*, and the reference in the submission to the value of the *property insured* under the policy was merely for *the purpose of identifying the property to be valued.*

The counsel for the defendants opposed the first objection to the award, saying the recital of the award that the property saved was a matter in dispute.

The learned Judge stated there were two matters submitted, the amount of the loss and the value of the property saved, and the loss could not be ascertained unless the two matters were found, and the property saved deducted from the loss.

The learned Judge then gave judgment for the plaintiff upon the finding of the jury, for $1,700, with costs.

At the Michaelmas Sittings *Robinson*, Q. C., obtained an order *nisi* to set aside the verdict and findings of the jury, and for a new trial; or to enter judgment for the defendants, upon the following, among other, grounds:—

1. The findings of the jury as to the present cash value of the property insured, as to the statement of the loss or the proofs of loss, and as to amount of loss, were and each of them was contrary to law and evidence, and the award as to such matters, or at all events as to the amount of such loss, was conclusive.

2. All the questions necessary for determination in the action were not submitted to the jury. It should have been submitted to them to find whether the defendants were misled by the description of the building in the plaintiff's application, and whether the defendants intended to insure a board building.

3. The learned Judge who presided at the trial improperly submitted the questions of the value of the property insured and the property saved, and the amount of the loss, when these questions had been conclusively adjudicated upon by an arbitration and award between the parties.

4. The learned Judge rejected evidence to shew that the defendants were misled by the description of the building in the application, and refused to submit questions to the jury upon that point, and whether the plaintiff took advantage of that mistake, whereby the defendants were materially prejudiced at the trial.

5. The judgment of the learned Judge was wrong upon the finding of the jury, and he should have held that the action was prematurely brought under the agreement between the parties, and that the variation of the statutory condition in that respect was just and reasonable.

6. The learned Judge should have told the jury, and held that the award was conclusive upon the plaintiff as a matter of evidence upon the questions submitted for arbitration as adjudicated upon by the arbitrators.

7. The learned Judge improperly received evidence to contradict the award.

8. The findings of the jury, in answer to questions five and six, as to incendiary danger, and the materiality of the facts as to the Bromleys, were contrary to law, evidence, and weight of evidence, and inconsistent with each other, the evidence and the weight of evidence being that there was incendiary danger, and there being no evidence that such facts were known to the defendants.

February 4, 1886. *Robinson*, Q. C. (*Millar* with him), supported the order *nisi*. The building was a board building, built of boards laid flat one upon the other, and the word *board* or *boards* was written by the company's agent, and was written in such a manner that it is difficult to say what word was written. The company read it for *brick* or *bricks*, and filled in the policy accordingly. It remains so yet, and the plaintiff is not entitled to sue upon it in its present state, describing the property insured as a brick building, and averring it was improperly so described, when it was in fact a board building, described as such in the application, but read by mistake as brick by the company. The plaintiff must get the policy before he can sue upon it in its present state: *Riley* v. *Spotswood*, 23 C. P. 318; *Smith* v. *Hughes*, L. R. 6 Q. B. 597; *Fowler* v. *The Scottish Equitable Life Ins. Co.*, 4 Jur. N. S. 1169; *Paget* v. *Marshall*, 28 Ch.D. 255; *Tamplin* v. *James*, 15 Ch.D. 215.

Statutory condition No. 2 provides that the policy sent to the assured is intended to be in accordance with the terms of the application unless the company points out in

writing the particulars wherein the policy differs from the application.

The plaintiff must have known when he got his policy that the building he had applied to be insured as a board building the company had insured as a brick building, yet he never gave notice to the company of their mistake, and in his claim for loss the plaintiff notifies the company, "You insured John Smith against loss by fire to the amount of $2,500 according to the terms and conditions printed in said policy, the written portion, together with correct copy of indorsements, being as follows viz.: On the building only of the two-story brick building, &c.," nothing being said then of the building not having been a brick building. Then the 17th statutory condition declares that the money shall not be payable until thirty days after the completion of the proofs of loss, unless otherwise provided by statute or the agreement of the parties. The company by a special variation made according to the statute declared the loss should not be payable until sixty days after completion of the claim. The fire was upon the 15th of April, 1884. The proofs of loss were received by the company on the 5th of May, and the action was begun upon the 4th of June. The action was begun after the lapse of the thirty days, but a month too soon, if the sixty days be allowed. The extension of the time for payment from 30 to 60 days is not unjust or unreasonable under the R. S. O. ch. 162, sec. 6.

The application and statement of loss state the cash value of the house to have been $3,500, which is untrue; and the proof of loss states the plaintiff's loss to have been $3,500, although part of the building, valued at $800, was saved.

The value of the building has been determined by arbitration between the parties, held under the 16th statutory condition, to have been $2,500 only, and that condition declares that "the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company." *Sly* v. *Ottawa Agricultural Ins. Co.*, 29 C. P. 557.

The fifth and sixth findings of the jury are not consistent. *McCarthy*, Q.C., contra. The application as to the kind of building was misread. The company's agent meant to describe a *board* building by what he wrote, for he knew all about the nature of the structure. *Liverpool, &c., Ins. Co.* v. *Wyld*, 1 S. C. 604; *Hastings Mutual Fire Ins. Co.* v. *Shannon*, 2 S. C. at p. 407; *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376. The change from the thirty to the sixty days cannot be said to have been by agreement, because the plaintiff never agreed to it. The putting the change in the policy does not shew the plaintiff ever agreed to it: *Ballagh* v. *Royal Mutual Fire Ins. Co.*, 5 A. R. 87; *Butler* v. *Standard Fire Ins. Co.*, 4 A. R. 391. There is evidence the building was worth at least $3,500. The arbitrators' finding as to value is not conclusive. The award is conclusive only as to the loss. The court will not stay proceedings in the action for a loss if the company desire an arbitration, unless the company will admit their liability. The arbitrators have nothing to do with the value of the property. An over valuation to be of any effect against the insured must be false and fraudulent: *Mason* v. *Agricultural Mutual Assurance Association Co.*, 18 C. P. 19, in Appeal. It was said there was a material change in the risk, caused by the house being vacant for some time. The jury found the risk was less with the Bromleys being out of it than in it. *Abrahams* v. *Agricultural Mutual Assurance Association*, 40 U. C. R. 175; *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121; *Campbell* v. *Victoria Mutual Fire Ins. Co.*, 45 U. C. R. 412. The finding of the jury was not against evidence.

W. Nesbitt, on the same side. There are many cases which shew the knowledge of the agent is the knowledge of the company: *Sinclair* v. *Canadian Mutual Fire In. Co.*, 40 U. C. R. 206; *O'Neil* v. *Ottawa Agricultural Ins. Co.*, 30 C. P. 151; *Gowinlock* v. *Manufacturers and Merchants Mutual Ins. Co.*, 43 U. C. R. 563. The extension of the time for payment from thirty days to sixty days was

unjust and unreasonable: *Williamsburg City Fire Ins. Co.* v. *Cary*, 83 Ill. 453.

Robinson, Q. C., in reply. As to knowledge of agent see *Benson* v. *Ottawa*, R. & J. Dig. 4530, and other cases; *Wilson* v. *Conway Fire Ins. Co.* 4 Rhode Is. R. 141; *Lowell* v. *Middlesex Mutual Fire Ins. Co.*, 8 Cush. 127, 133; *Rohrback* v. *Germania Fire Ins. Co.*, 62 N. Y. 47; *Alexander* v. *Germania Fire Ins. Co.*, 66 N. Y. 464; *Ward* on Ins., sec. 389. As to the insured not reading the policy, see *Watkins* v. *Rymill*, 10 Q. B. D. 178. There was plain evidence of a concealment by the plaintiff of the property having been threatened to be burned.

March 8, 1886. WILSON, C. J.—There does not seem to be any dispute of fact excepting with respect to the value of the property insured, to which I shall afterwards refer, if it be necessary to do so. The plaintiff, in his application and claim for loss, stated it to be of the value of $3,500, and the jury found it to be of that value, while the arbitrators found it to be of the value of $2,500.

The undisputed facts are, that the plaintiff, in his application for insurance, which was filled in by the defendants' agent, but for the purposes of the application he is by the terms of it made expressly the agent of the applicant—that in describing the building proposed for insurance the word which the agent meant to be *boards*, was written in such a manner that the defendants read the word as *bricks*.

The word, so far as anything can be made of it, looks as if it were made up of the letters *B-u-r-d-s* or *B-u-r-k*, and something which may be a part of the *k*, or perhaps an *s*.

No one says it reads *boards*, and no one says it reads *bricks*.

The plaintiff intended it for *boards*, which is the actual structure and composition of the house. The company believed it to be *bricks*.

The policy was drawn up for insurance "on the building only of the two-story *brick* building, &c.," and it was sent to the plaintiff in that form, and he had it in his custody some months before the fire took place.

He never informed the company of the mistake in the description of the building, and when the fire took place he sent in his claim for loss in this form: "By your policy of insurance No. 41,659, dated, &c., you insured John Smith against loss or damage by fire to the extent of $2,500 according to the terms and conditions printed in said policy, the written portion, together with correct copy of indorsements, transfers and assignments, being as follows, viz.: on the building only of the two-story brick building, &c.," to which he subscribed his name.

The company sent an inspector to examine and report upon the premises after the fire; and on the 18th of April, 1884—that is, three days after the fire—he telegraphed to the company: "Smith's building wood, not brick."

That is the first knowledge the defendants had of the building not being brick as they believed it to have been.

The difference of rate between the insurance of a brick building and a board building was one-half per cent.

The defendants' case is, that as the plaintiff intended to insure a *board* building, and as they, by reason of the way that word intended for *boards* was written, read it as *brick*, and issued the policy on a *brick* building, and delivered the policy so drawn to the plaintiff, who had it months before the fire, and as the plaintiff in his claim for loss recited the policy as on a *brick* building, and never at any time informed the defendants of the mistake, and the defendants did not discover the true state of things until three days after the fire, their own agent informing them of the fact, and as they have never waived the mistake, that they are not bound by the policy, because the plaintiff and themselves had never come to an agreement upon the subject of insurance, and so no contract in fact or in law for insurance was ever perfected between them.

That is the first question to be considered.

The next matter between the parties is, as to the value of the building.

The plaintiff, in his application and in his claim for loss, which he affirmed by a statutory declaration, alleged the property at the time of the insurance to be of the cash value of $3,500, while the defendants say the value found by the arbitrators, appointed and acting under the statutory conditions, was that "the value of the property insured was $2,500;" and the defendants say that such award is a conclusive determination of the value between the parties. And the defendants contend that as the difference between these two sums is so great, and as the value was a matter material to be known to the defendants, to enable them to judge of the character of the risk in insuring to the extent of $2,500, the policy is void for that reason.

The plaintiff alleges the award, whatever other operation it may have, is not binding as to the value, but that the award itself is invalid, because the value of the property saved from the fire was to have been found by the arbitrators, and it has not been found, nor has the amount of the loss been found, as it should have been.

The defendants reply the award is valid, but in any case it is not absolutely void, and as it has not been set aside it is binding between the parties.

These matters are the second subject for consideration.

It is quite clear, if the statement of value is not concluded by the award, that we cannot properly interfere with it, as a matter of fact, after the finding of the jury.

The next enquiry is, whether the vacancy of the portion of the building, which was at the time of the application for insurance occupied by the Bromley family, and which was the whole of the insured property, excepting the harness shop in the occupation of the plaintiff, and which vacancy the plaintiff in his claim for loss states had been "for the past eight months" before the loss by fire, that would be from about the 25th of August, 1883, and beginning at a time a little less than two months from the date of the policy, was a matter material to be known by the

company as affecting the risk. The question was not put to the jury with respect to a general vacancy, but in this form:

Q. "In your opinion was the vacancy of the Bromleys a change material to the risk?"

A. "We believe the risk to be less after the Bromleys left."

The 3rd statutory condition is the one applicable on this point.

I am not inclined to entertain the effect of vacancy generally, as the parties appear to have limited the enquiry to the effect of the Bromley family having left the premises. The evidence shews it was not from the Bromley family the fear of danger to the house was entertained, but because the Bromley family were in the house that danger was apprehended to be done to the house by the plaintiff's own son, in consequence of the objectionable relations which existed or were supposed to exist between the plaintiff and that family; and that accounts for the question and answer being restricted as to the vacancy of the house by reason of the Bromley family having left it.

That part of the case, we think, must remain as it was found.

The next part to be dealt with is the question and answer about incendiarism.

The heading No. 14 of the application contains the question: "Is there any incendiary danger threatened or apprehended?" and the answer of the plaintiff was "No;" and the declaration at the end of the application is, that the applicant agrees the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and he agrees that the same be held to form the basis of the liability of the company, and shall form a part and be a condition of the insurance contract.

The question put to the jury with respect to it was:

5. Q. "At the time of the application for the insurance was there any incendiary danger threatened or apprehended?" A. "No, there was not."

The evidence of the plaintiff upon that point of the case I shall refer to afterwards. It is very confusing, if not contradictory and unsatisfactory.

The questions, then, to be considered are:

1. As to the effect of the word *brick* in the policy, while *board* was in the application, as the jury have found, and was the word without any doubt which was intended to have been written.

2. As to the value of the building, which involves the enquiry whether the award in that respect is conclusively binding on the parties or not.

3. As to the matter relating to the incendiarism.

4. Was this action brought too soon? (This raises the question as to the 30 days and 60 days for the payment of the loss.)

Then, firstly, as to *brick* for *board*.

The plaintiff desired an insurance on a *board* building. The defendants reading *board*, which was badly written for *brick*, insured a *brick* building, and issued the policy as on a brick building.

The parties intended to insure the same building, but the plaintiff knew it was a board building. The defendants for the reason stated believed it to be a brick building.

The plaintiff was answerable for sending in an application so doubtfully written, for the word is neither board nor brick.

The defendants are to blame for treating the word so badly written and of so doubtful a reading as *brick* without applying for further information.

The fact is, however, the defendants did read it as *brick*, and they had, so far as the mere writing is concerned, as much reason to read it as brick as to read it as board.

It is quite certain they did read it as brick, and upon that reading they issued the policy as on a brick building,

and sent it to the plaintiff, who had it in his possession from about the latter part of July or the first of August until the time of the fire in April of the following year, and from that time until the commencement of this action in June, 1884.

There is a memorandum endorsed upon the policy: "Please to read your policy and conditions." The plaintiff said he never read his policy.

When he made the claim for loss on the 25th of April he copied into his claim papers the description of the building as it was given in the policy, that the insurance was on a brick building; yet even then, when he must have discovered the mistake, he did not inform the company of the mistake. The company did not know there was a mistake of the kind till after the fire, when they sent their appraiser to the building to estimate the loss upon the 18th of April. I do not see any evidence that the company, on finding the building was of board and not of brick, informed the plaintiff of what they had been told, and that they repudiated their liability.

The evidence shews that as late as the 21st of June, about two months after the claim of loss was sent in by the plaintiff, as on a brick building, and a few days longer than the two months after they knew the building was not a brick building, the company wrote to the plaintiff, by their solicitors, stating, "You have not yet completed your proof of loss under policy of insurance with the City of London Insurance Company, No. 41,659, and that you have been and are now required to comply with clause "*e*" of the 13th statutory condition on the policy."

That condition relates to the production of a certificate under the hand of a magistrate, &c., residing in the vicinity, stating he has examined the circumstances attending the fire, &c.

And on the 24th of June, the plaintiff's solicitor sent to the defendants' solicitors the certificate required.

The law is quite clear there can be no contract unless the two parties are agreed as to the subject in question.

In this case the plaintiff had the means of knowing by his policy the company did not agree to insure a board building. The company did not know the plaintiff wanted to insure such a building, and although the agent of the company fixed the rate at one and a half per cent. upon the board building, Mr. Magurn, the manager of the company, said the proper rate upon such a building was two per cent.

The rate upon a *brick* building was one and a half per cent., and the rate stated on the application, being one and a half per cent., corresponding with the rate on a *brick* building, may very likely have confirmed the company in the belief that the doubtful word was *brick*, and not board. Besides, a *board* building such as this was is an unusual kind of building, and one not knowing the special nature would rather understand that a house built of boards would be described as a *frame* building, as a *frame board* building is usually built, and would not suppose the house to be built of boards laid flatways, one upon the other, as this one was; and not supposing such a thing, he would be more likely to read this badly written doubtful word as *brick*, and not as board.

In *Smith* v. *Hughes*, L. R. 6 Q. B. at p. 607, Blackburn, J., stated the rule, which is not denied, "That if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract under the circumstances, and such as to preclude one of the parties from denying that he has agreed to the terms of the other."

There are no such circumstances in this case to prevent the company from denying that they had not insured a board building, because it is quite certain the company did not understand the building they were asked to insure was not a brick building. In the same case Hannen, J., said, at p. 609, "It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an

apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them;" and at p. 610, citing from Paley, which quotation is found in *Chitty* on Contracts, and in other works of this kind, "that a promise is to be performed in that sense in which the promiser apprehended at the time the promisee received it, and may be thus expressed, the promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it."

In the present case the policy informed the plaintiff the defendants did not promise to insure a building of the description the plaintiff desired them to insure.

In *Harris* v. *The Great Western R. W. Co.*, 1 Q. B. D. 515, it was held the defendants, who received a passenger's luggage to be stored in the cloak-room, were bound by the conditions printed on the back of the ticket, that the company would not be liable for any such property over the value of £5, unless the value of it was declared to the company at the time of deposit. The plaintiff knew there were conditions, but he never gave them a thought, and the front of the ticket referred to the conditions on the back. Blackburn, J., said: "It is clear the defendants meant the ticket should be the contract. What more could be required to justify their servants * * in believing that the person bringing the goods and paying the money * * receiving and carrying away the ticket, meant to assent to the terms on the ticket, and to induce them to receive the the goods on those terms?"

In *Parker* v. *The South Eastern R. W. Co.*, 2 C. P. D. 416, which was also an action on a ticket given by the defendants on luggage deposited in a cloak-room, it was held it should have been left to the jury whether the company did that which was reasonably sufficient to give the plaintiff to understand there were conditions printed on the back, although on the face of the ticket was printed "See the back."

Mellish, L. J., said: "In an ordinary case, where an action is brought on a written agreement, which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud it is wholly immaterial that he had not read the agreement, and does not know its contents."

But that does not apply here, for the plaintiff did not sign the policy.

But Mellish, L. J., proceeded: "The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove the defendant has assented to it. In that case, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement, and did not know its contents. Now if, in the course of making a contract, one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are."

The whole of that applies with direct force to the policy in this case, for it was delivered to the plaintiff in this action *on the contract* between himself and the defendants. The judgment of Bramwell, L. J., was more strongly against the plaintiff in that action; but he was the dissenting judge.

In *Tamplin* v. *James*, 15 Ch. D. 215, the defendant was resisting specific performance. The property was well described, and he was relying on his knowledge of the property, and he thought he was buying more than was offered for sale, but he did not read the particulars of sale nor look at the plans: *Held*, he could not be relieved be-

cause he afterwards found he was mistaken in his belief. And on appeal James, L. J., said the defendant "must be presumed to have looked at it" (his map) "and at the particulars of sale. * * * If a man will not take reasonable care to ascertain what he is buying, he must take the consequences."

In *Watkins* v. *Rymill*, 10 Q. B. D. 178, all the cases are reviewed on this point. I need merely give the head note:

"The condition was not unreasonable" [that a waggonette deposited with the defendant for sale would be subject to be sold if the expenses of keeping it were not paid for each month it was there]; "and having regard to the circumstances there was nothing to take the case out of the general rule that, if a document in a common form is delivered by one of two contracting parties to and accepted by the other without objection, it is binding upon him whether he informs himself of its contents or not, and that judgment ought to be entered for the defendant without a new trial, for there was evidence upon which the jury could have properly found for the plaintiff."

It is is said in *Paget* v. *Marshall*, 28 Ch. D. 255, when there is a mutual mistake in a deed or contract the remedy is to rectify by substituting the terms really agreed to. When the mistake is unilateral the remedy is not rectification but rescission.

The cases referable to mistakes in telegrams, are *Henkel* v. *Pape*, L. R. 6 Ex. 7; *Playford* v. *United Kingdom Electric Telegraph Co.*, L. R. 4, Q. B. 706; *Dickson* v. *Reuters' Telegraph Co.*, 2 C. P. D. 62, and in App. 3 C. P. D. 1.

In the second statutory condition it is declared that "after application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application." That applies to a case in which the company knowingly deviates from the application, and the applicant cannot know of it unless expressly

notified by the company of the deviation. It cannot be applicable to a case of the kind before us.

I come to the conclusion that the parties never contracted together: that they were never of the same mind, and that the plaintiff is answerable for the failure to agree, because he was notified by the company by means of the policy what kind of building they had insured, and the plaintiff must either be presumed to have read the policy and to have become aware of the insurance the company had professed to make, or he cannot be excused from not becoming aware of the fact because he did not read his policy.

The only question in connection with this part of the case is, whether the company, upon discovering the mistake after the fire, waived the mistake, and agreed by their conduct or dealing with the plaintiff to treat the policy as a valid insurance upon a *board* building. A simple contract before breach can be waived; that is, the party to do the act may be exonerated or discharged without any consideration from doing the act. After breach there must be a release, except as to bills and notes. A waiver is the passing by of a thing, or a refusal to accept it: *Jacob's* Law Dic., *Waiver*. One may waive a gift. A grant made to an infant may be waived by him on his majority.

The only acts which there are here of waiver are the letter of the defendants' solicitor after the fire, and after action was brought, requiring the plaintiff to furnish the company with the magistrate's certificate, according to the statutory condition 13*e*, and the plaintiff doing so.

That does seem like an affirmation of the policy, and these acts were done at a time not only with a full knowledge of all the facts, but with the knowledge of the action pending, and that the plaintiff was insisting on the assertion of his claims for his loss under the policy, treating the description as a mere matter of mistake. I more strongly rely upon the fact of the company's solicitor having upon the 30th of May served a notice upon the plaintiff that the company had appointed Mr. Blakely as the

arbitrator for the company, "to whom the differences which have arisen between you and us respecting *the value of* the property insured, the property saved, and the amount of loss, and the proportion thereof *to be paid by us*, are to be submitted pursuant to the said condition No. 16," and requiring the plaintiff to name an arbitrator on his behalf, and if he did not do so Mr. Blakely would be the sole arbitrator. This is not strictly a waiver of any condition of the policy under the 20th statutory condition. It is rather an admission by the defendants that the reading of *brick* for *board* was a mistake; so that both parties seem by these later proceedings to be *ad idem* as to that being a mistake, and so it is a matter for rectification, and not for rescission; and it precludes the defendants from now asserting that no contract was ever made. The cases of *Stickney* v. *Niagara District Mutual Ins. Co.*, 23 C. P. 373, and *Abrahams* v. *The Agricultural Mutual Assurance Association*, 40 U. C. 175, are very distinguishable from the case before us.

The second question is: Is the award binding between the parties as to the value of the building assured?

The 16th statutory condition provides that if any difference arises as to the value of the property insured, of the property saved, or amount of loss, shall, whether the right to recover on the policy be disputed or not, independently of all other questions, be submitted to arbitration; and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss to be paid by the company.

Mr. Blakely was appointed arbitrator by the defendants; Mr. Wright by the plaintiff, and Mr. McTavish was appointed the third arbitrator by the other two arbitrators.

The award was made on the 19th of July, 1884.

It recites that differences had arisen between the plaintiff and defendants respecting the value of certain property belonging to the plaintiff and insured by the defendants under a policy of 3rd July, 1883, issued by the company in favour of the plaintiff, and of the property saved, or amount of loss. The 16th statutory condition is then

recited, also that the parties could not agree and they appointed each an arbitrator, and that they had proceeded with the reference. Then they award, after considering all the allegations and evidence concerning the matters in difference and so referred, that the value of the property insured was $2,500, and the amount of the loss is $1,700, and that the company do pay the plaintiff $1,700.

There is no express finding as to the property *saved*, which was according to the evidence $800, just the difference, it seems, between the $2,500 and the $1,700.

As by the 16th statutory condition the reference is subject to the provisions of the Common Law Procedure Act, it becomes absolute if not appealed from, and if this be an appeal the Judge may amend the same, or refer it back, or confirm it. It cannot be impeached so long as it stands unless it is void on its face.

I read the award in this way:

The value of the building was $2,500 at the time of the fire. The loss by fire was, that is, the building was injured, to the extent of $1,700, and the uninjured part of it, or the part saved, is $800.

The value saved is not expressly stated, but it can plainly be ascertained, for it is just the difference between the two principal sums, and in my opinion is sufficiently certain.

The certainty required in an award is certainty to a common intent: *Hawkins* v. *Colclough*, 1 Bur. 277. Is then the award "conclusive as to the amount of the loss and proportion to be paid by the company?"

The 16th statutory condition expressly says so, but that does not necessarily make the value of the building conclusive.

If the value of the building determined by the arbitration is conclusive, it is not because the statute in express terms has made it so, but because it is one of the matters which has been referred by the parties to be ascertained by them as a matter in difference between them, and that it is conclusive upon all matters referred is the established

principle of law: Com. Dig., Accord. D. 1; *Cumming* v. *Heard*, L. R., 4 Q. B. 669.

The value of the building must then be taken to have been at the time of the fire $2,500. It must have relation to that time for that value, and the value saved, and the loss are all enumerated together as so many items of account to be taken into consideration to determine how much is to be paid by the company. The value of the building at the time of insurance would not be of any use in that respect, for between these two periods the property might have been damaged by another fire, or by high winds; but the company have only to make good the loss the insured has sustained by the particular fire, and therefore it is the value of the building at that time which has to be considered. The value at the time of insurance is therefore still an open question for the jury.

The defendants, however, in their 7th paragraph of defence, allege that the plaintiff under the 13th statutory condition furnished a statutory declaration that his loss was $3,500, whereas it was much less, and the award has fixed it at $2,500, and that it is declared by the 15th condition that any fraud or false statement in a statutory declaration in relation to any of the particulars in the 13th condition contained shall vitiate the claim.

It is only fraud and false statement which is a bar to the recovery. The defendants have charged a false and fraudulent statement to have been made in that respect, but the jury have negatived it.

His loss was not $3,500, but only $1,700, or less than one-half of the amount stated in his statutory declaration.

It appears to me this finding of the jury is wholly opposed to the evidence, as well as to the award, for by the award the parties are bound by the sum found by the arbitrators.

But the defendants cannot have a finding entered for them on the issue, because the jury have found the plaintiff's valuation to be true, and *not false or fraudulent*. There should have been a plea of the award made, alleging

the finding by the Statute to be conclusive, upon which the entry upon such an issue would be in their favour; but the effect of that would be merely to limit the plaintiff to the $2,500, being the value of the building, and not to defeat his recovery, because the recovery is not to be defeated unless his valuation is false and fraudulent, and that has been found against the defendants as a fact, and it is wholly a matter of fact.

Then, thirdly, as to the incendiarism.

The evidence shews the plaintiff's evidence was contradictory and equivocating. He pretended not to know whether the tar had been spread upon the door steps of the building on the night before the Queen's birthday, the 24th of May, or on the night before Dominion day, the 1st of July. He said it was done on a Sunday, and he asked if Monday was the first of July. Then, as I understand, he said it was done on a Saturday night, and that if we find out what day Dominion day was that would settle upon which day it was.

Now it appears the 1st of July in 1883 was a Sunday, and the 24th of May was a Thursday, so that the tarring the door step was the night before the 1st of July, and the application for insurance was made on the 3rd of July; and it appears he was not applied to by the insurance agent to insure, but that he sent for the insurance agent to come to him to have the insurance made, and that was after the 1st of July.

It seems almost conclusive, upon a perusal of the evidence of the plaintiff, that his application for insurance was made immediately after the tar was spread upon the door steps and in consequence of it, and threats had been made to him which he stated were made after the insurance. The Bromleys, man and wife, who were the tenants of the house, were tarred and feathered before the application for insurance, and there is every reason to believe the plaintiff was either threatened with or apprehended incendiarism at the time he answered in his application he was not. Yet the jury have found he was not threatened

with incendiarism, and that he did not apprehend it. It is a finding against the evidence; it is what might be called almost a perverse finding, but what can we do? It was for them to determine, and it would have to go to them again if a new trial were granted. We feel compelled to leave the finding alone. See *Campbell* v. *The Victoria Mutual Insurance Co.*, 45 U. C. R. 412.

The remaining question is, was the action commenced before the expiration of the sixty days?

The fire was on the 15th of April. The proofs of loss were completed on the 25th and were delivered to Mr. Magurn on the 26th or 27th, say the 26th, and the action was commenced on the 4th of June.

It was brought before the sixty days expired. But it is said the statutory conditions allow only thirty days, and the defendants' variation to sixty days was an unjust and unreasonable variation.

The 17th statutory condition is: "The loss shall not be payable until thirty days after completion of the proofs of loss, unless otherwise provided by statute or the agreement of the parties."

And the company have made a variation in the manner provided by the Act, that "the loss shall not be payable within sixty days after completion of the claim."

The provision as to the time of payment under the 17th condition is as much for the benefit of the company as of the assured. They cannot be sued for payment until the expiration of thirty days: that is their protection; and the insured cannot be delayed longer than the thirty days: that is for his protection.

The company have however provided they shall have sixty days; and the plaintiff says that additional time has not been given by statute, nor did he ever agree to that extension.

In my opinion he did agree. He did not stipulate for any particular time in his application. If he had, the company could not have changed that time without giving him express notice of having altered the application in

that respect by giving him notice in writing of having so altered the time for payment, under the second statutory condition.

It may be the mere *variation* in the policy would be a sufficient "pointing out in writing the particulars wherein the policy differs from the application." I doubt it, however.

There was no special writing required for the time of payment being changed, because it did not alter anything contained in the application.

I think, however, the change was by the agreement of parties, because the policy is the agreement and contract, and the plaintiff, from the authorities before referred to, was bound to read and inform himself of the contents of the policy, and he must be taken to have assented to all it contained, unless the terms are unjust and unreasonable; but the extension of that time for thirty days cannot be said to be unreasonable.

The Legislature has allowed Mutual Companies, R. S. O., c. 161, sec. 56, three months to pay losses: *Ballagh* v. *The Royal Mutual Fire Ins. Co.*, 44 U. C. R. 70, 5 A. R. 87; *Butler* v. *The Standard Fire Ins. Co.*, 4 A. R. 391; *O'Neil* v. *The Ottawa Agricultural Fire Ins. Co.*, 30 C. P. 151.

In my opinion the plaintiff did bring his action too soon, and upon that ground, and upon that alone, I think he is entitled to judgment, unless we can give the plaintiff the benefit of the verdict and judgment in his favour by allowing the judgment to stand upon the payment of the costs of the proceedings to the defendants.

I did not see the written judgment of the learned Judge who tried the cause until I had proceeded thus far. I see now the learned Judge's opinion is the extension of the time for payment was not just and reasonable. I cannot say my opinion is changed, for I cannot conceive how that short additional period of thirty days for payment can be unjust and unreasonable. Where are the *injustice* and *unreasonableness* in a company like the defendants, doing a very

large business, requiring thirty days additional time to meet a demand upon them for a loss. It must require some very strong reason to induce a charge not only of unreasonableness, but of injustice, in such a case?

I must say, speaking only for myself, with great respect for my brother Rose's judgment, that it seems somewhat unreasonable to hold the thirty days extension of time to be unjust and unreasonable.

It is, however, unreasonable of the defendants to set up the premature bringing of the action when they did not mean to pay the assurance money at all, and were disputing the plaintiffs right to receive it at the end of the sixty days, or at any other time, and to that extent it is an unreasonable use they are making of their variation of the condition.

The result is, the defendants motion must be discharged, and with costs.

ARMOUR, J.—The 17th statutory condition provides that the loss shall not be payable until thirty days after the completion of the proofs of loss, unless otherwise provided by statute, or the agreement of the parties.

I do not see what object could have been intended to be effected by this condition, if a variation of it is to be held to be the agreement of the parties. I do not think it can be so held, and the very provision of section 4 of the Act shews that it was not so intended; because the provision there is that the variation is to be in force only so far as by the Court or Judge, before whom a question is tried relating thereto, it shall be held to be just and reasonable to be *exacted* by the company. The use of the word exacted shews clearly that the agreement of the parties referred to in the condition was not to be evidenced by the variation of the condition. If we were to so hold, a variation of this condition could never be held to be unjust and unreasonable, because it would be the agreement of the parties, and thus covered by the exception in the condition.

I have nothing to add to the opinion I expressed in *Parsons* v. *The Queen's Insurance Co.*, 2 O. R. 56, and I am of opinion that the variation of this condition in this case by the defendant company was not just and reasonable to be exacted by them.

O'CONNOR, J., not having been present during the argument, took no part in the judgment.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

JENNINGS ET AL. v HYMAN ET AL.

Assignment for benefit of creditors—Release of debtor—R. S. O. ch. 118, sec. 2—Fraudulent preference.

An insolvent debtor informed his creditors of his difficulties, and on the 19th March, 1885, all but two of the creditors signed a memorandum to the effect that the best thing he could do was to sell out his stock and effects for a sum named and agreed to be paid by one of the creditors, and which would pay all his creditors 50 cents in the dollar on certain terms, and those who signed agreed to accept 50 cents in full of their claims.

The debtor afterwards accordingly by bill of sale, dated the 9th of April following, sold and conveyed his assets to one of the said creditors, who had signed the memorandum, for the sum and on the terms named therein, which were that the money was to be payable in four and eight months, and the purchaser was to endorse the vendor's notes, so that he could transfer them to the creditors.

The bill of sale referred to the previous agreement, and recited that "the creditors" had agreed to accept these notes "in full satisfaction and discharge of their respective claims" against the debtor, and also provided that the balance, if any, "after deducting the debt of the purchasers" (who were among those agreeing to accept the 50 cent composition), should be paid to the debtor.

Held, that this amounted in effect to a condition that any creditor receiving the 50 cents in the dollar of his claim, should release the debtor, and that the sale was therefore void as against the two non-assenting creditors under R. S. O. ch. 118, sec. 2.

Per O'CONNOR, J.—The reservation to the purchasers of "the amount of the debt" was ambiguous, and might mean their whole debt, in which case the sale was preferential, and so void.

INTERPLEADER to try whether the goods and chattels [other than household furniture] seized by the sheriff of the county of Bruce on 18th April, 1885, in the store of D. McLean & Co., in the village of Mildmay, under a *fieri facias*, dated 16th of April, 1885, upon a judgment in which the now defendants were plaintiffs, and the said D. McLean & Co. were defendants, or any of the said goods, were the property of the now plaintiffs as against the now defendants.

The action was tried at the last Fall Assizes held in Toronto before Galt, J., without a jury.

It was admitted that McLean & Co. assigned their assets to Jennings & Hamilton, who agreed to indorse the notes of McLean & Co. to the creditors who came into the

assignment for 50 cents in the dollar. The defendants refused to sign the agreement, and they could not get their share of the proceeds of the assets of the debtor's estate because they did not sign the agreement.

The evidence was, that all the creditors of McLean & Co., but the defendants and another firm, agreed to the assignment. The plaintiffs at the same time offered to these two creditors that they, the plaintiffs, were willing to take from them the 50 cents in the dollar, if they, the two creditors, or either of them, would assume the responsibility of paying that composition.

The further facts appear in the judgment.

The case was argued by counsel, and the learned Judge entered a judgment for the defendants.

At the Michaelmas sittings the case was argued on a notice of motion, given on behalf of the plaintiffs, to set aside the finding of the learned judge and to enter it for the plaintiffs, upon the ground that upon the law and evidence the assignment to the plaintiffs was not made with intent to defraud or delay creditors, nor to give one or more of them a preference over any of the others, but was made for the purpose of paying all of the creditors ratably, without preference or priority; and on the ground that the assignment was a sale made *bonâ fide*, in the ordinary course of trade, to an innocent purchaser.

James Maclennan, Q. C., supported the motion. He referred to *Nolan* v. *Donelly*, 4 O. R. 440; *Gottwalls* v. *Mulholland*, 15 C. P. 62, 3 Err. & App. Rs. 194; *Bank of Toronto* v. *Eccles*, 10 C. P. 282, 2 Err. & App. Rs. 53.

Gibbons contra.

March 8, 1886. WILSON, C. J.—The case turns upon the effect of the assignment, and of the agreement which the creditors were required to sign to entitle them to the composition.

The agreement is as follows: "We, the undersigned, creditors of D. McLean & Co., of Mildmay, Ontario, having

had submitted to us by them a statement of their affairs, from which it appears that their assets amount to $13,915.-18, and their liabillties to $18,737, and Jennings & Hamilton, who are the largest creditors, offer 67 cents in the dollar for the assets, which will at that figure pay 50 cents in the dollar of the liabilities—"we, the undersigned creditors, consider that their offer is the best that can be made under the circumstances, and hereby agree to accept 50 cents in the dollar for the amount of our respective claims specified hereunder, payable in four and eight months, without interest: the notes of the said D. McLean & Co., therefor to be endorsed by the said Jennings & Hamilton, and upon receiving the said notes so endorsed, we and each of us hereby agree to accept the same in full of our said claims respectively.

"Witness our hands and seals this 19th day of March, 1885.

"And the said D. McLean & Co., execute these presents as parties hereto and agree with their creditors as above mentioned.

D. McLean & Co."

Then follow the names of the creditors who assent to the arrangement nineteen in all.

The assignment is dated the 9th day of April, 1885, by McLean and Dolmage, trading under the name of D. McLean & Co., to Jennings and Hamilton, trading under the name of Jennings & Hamilton. The recital is as follows:

"Whereas the parties of the first part are carrying on a general store at ——, &c., and have in the course of the said business become and are indebted to the parties of the second part, and to various others, in sums amounting in the whole to $18,737, or thereabouts, and being unable to pay the said creditors in full applied to them for advice as to the best method of disposing of their assets for the benefit of their creditors, and thereupon an agreement was come to that the creditors should accept fifty cents in the dollar of their respective debts, payable in four and eight months from this date, without interest, by notes indorsed by the firm of Jennings & Hamilton, composed of the

parties of the second part, in full satisfaction and discharge of their respective claims against the parties of the first part; and in order to provide the means of paying the said composition the said parties of the first part should sell, and the parties of the second part should purchase, all the assets and property, goods, chattels and effects of the parties of the first part, including the store and dwelling-house, stock in trade, book debts, &c., for the sum of $9,346.62, to be paid by the parties of the second part, by taking up and retiring at maturity the notes to be indorsed by them as aforesaid; and the balance, if any, without interest, to be paid at the expiration of eight months from this date to the parties of the first part, after deducting the amount of the debt of the parties of the first part to the parties of the second part, but without interest."

The defendants' counsel contended the assignment was void, because it required of those creditors who became parties to it to accept fifty cents in the dollar of their respective claims, and to forego, of course, any recourse upon the assignors for the balance of their debt, and such a condition was not warranted by the statute; and it was contended, on the other hand, that, although the agreement made prior to the assignment did require that of the creditors who chose to subscribe to it, it did not affect the defendants, for they did not subscribe it; and that the assignment merely recited that agreement, but did not exclude any creditor from the benefit of it who did not assent to take fifty cents in the dollar in full of his debt.

If the assignment contains a release of the debtors from all claim above fifty cents in the dollar, it is, according to the authorities in our Courts, a condition which avoids the assignment made under the R. S. O., c. 118. I may refer to our decisions on the point, as collected in R. & J. Dig., *Bankruptcy and Insolvency*—1. *Assignment for the benefit of Creditors.* 5. *Release of Debts*, 376 to 378.

The object of that statute is to secure an equal and ratable division of the debtor's property among all of the creditors. A release to the debtor does not, it appears to

me, defeat that object. The mere requirement of a release by the debtor does not necessarily shew an intent to defeat or delay his creditors, and it certainly does not shew an intent to give any of them a preference over the others: the intent it manifestly shews is that the debtor claims to be released from all future liability to his creditors upon his giving up all his property to them, if they take the property which he voluntarily gives up to them. He cannot, of course, oblige them to take a part of their claims in place of the whole, but independently of that statute it is quite clear an assignment made upon such a condition is not void because it excludes those creditors who will not grant an absolute release. The case of *Bank of Toronto* v. *Eccles*, 3 Err. & App. Rs. 53, and the authorities referred to in it plainly prove that; and in *Hickman* v. *Cox*, 18 C. B. 617, and in the Ex. Ch. 3 C. B. N. S. 523, and in the House of Lords, 7 Jur. N. S. 105, such a release was contained, and in many other cases referred to by Sir John B. Robinson in *The Bank of Toronto* v. *Eccles*, the like clause was inserted and without objection.

In *Janes* v. *Whitehead*, 11 C. B. 406, there was also a release given to the debtor, and at p. 416 Maule, J., said: "All deeds of this sort are within the letter of the 13 El. c. 5, s. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed shall be void; that is, all deeds made to or for any of the intents mentioned in sec. 1, namely, to delay, hinder or defraud creditors and others of their just and lawful actions, suits and debts. And in *Pickstock* v. *Lyster*, 3 M. & S. 371, it was said that if a man assigns all his property to a trustee, simply with the purpose of having it fairly distributed amongst all his creditors, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within the spirit of the act, and therefore is not void, because it does not deprive any of the creditors of his fair share of the debtor's property if he chooses to become a party to the deed."

It appears, then, such an assignment as the one in question, if it do contain a release, is not invalid independently of the R. S. O. c. 118, and, from the English decisions, that it is not void under the statute of Elizabeth, which is substantially similar to our act in this respect. Yet our Court of Appeal having all these cases before it in 2 Err. and App. Rs. 53, held such and assignment to be void as against creditors.

We must therefore follow that decision. In *Pickstock* v. *Lyster*, 3 M. & S. 371, or in *Owen* v. *Body*, 5 A. & E. 28, nothing is said of the conveyance being opposed to the bankrupt act.

In *Hickman* v. *Cox*, 18 C. B. at p. 629, the deed was made under section 224 of the bankruptcy act.

We have no bankrupt act in force here at present against which it might be argued that the assignment itself would be an act of bankruptcy.

It is true the Dominion Parliament has exclusive legislative authority over bankruptcy and insolvency; but it may be that a provision in such an act, as in our R. S. O. ch. 118, declaring an assignment for creditors generally, whether with or without a clause of release to the debtor, although closely encroaching on bankruptcy, would be valid; but with that we have nothing to do at the present time: all we can say is that such an assignment as the one before us is invalid, according to the decisions of our own courts, if it do contain a release to the debtor of more than that part of his debt which he has agreed to pay.

The question then is, does it contain such a release or not?

The agreement, which was drawn up on the 19th March, 1885, does in express terms declare that all who subscribed to it should, upon receiving the notes of the defendants, "accept the same in full of our said claims respectively."

The assignment then recites that the debts in full of the assignors amount to $18,737, and that they are unable to pay their creditors in full. The recital is that the debtors

are indebted to the parties of the second part and to various other creditors, including, therefore, all their creditors.

Then the agreement of March is expressly referred to, stating that "an agreement was come to that the creditors"—that is, all the creditors—"should accept 50 cents in the dollar of their respective debts, payable, &c., in full satisfaction and discharge of their respective claims against the parties of the first part."

Then it declares that to provide the means for paying the said composition the defendants should pay the insolvent estate the sum of $9,346.62—that is, just about one-half of the debts—to the creditors, who were to take the defendants' notes for the 50 cents in the dollar; and any surplus there was after payment of the 50 cents in the dollar was to be paid to the debtors.

I think it is quite clear that all the creditors were to get was one-half of their debts, and the debtors were to get the surplus, which it seems to me would be a discharge in law, or a good accord and satisfaction founded on a sufficient consideration; but besides, it expressly appears the creditors were to take what they got in full satisfaction and discharge of their respective claims.

According to our decisions such an assignment is invalid as contrary to our statute.

The assignment either includes all creditors, or it does not. If it do not, it is void for that reason; if it do, it is void as to those who are unwilling to take the one-half of their debts in full.

If the defendants desire to contest the decisions of our courts as to the clause of release, they may of course do so.

There were some minor objections taken by Mr. Gibbons but we believe he does not rely upon them. There is nothing, however, in them.

The action will be dismissed, with costs.

O'CONNOR, J.—Regarding this transaction in the form in which it was done, it is not an assignment of a debtor's property for the benefit of creditors, but a sale of the

debtor's property to one of his creditors, the proceeds of the sale to be applied to the payment of 50c. in the dollar of all the debts of the debtor.

But when all the proceedings in the matter are examined and considered it is virtually a case of assignment for the benefit of creditors. The only difference I see is, that in case of assignment of property for the benefit of creditors, in the ordinary and usual form, the assignee is left to realize from a sale or disposal of the property assigned money to be applied, as far as it will go, towards payment of the debts equally. In this case a value is put on the property, a price at which the assignee, who is a large creditor, takes the property; and he is required to pay the creditors 50c. in the dollar of their respective debts.

Those who signed the preliminary agreement, which resulted from the meeting of the creditors, are bound to receive that compromise amount in full of their claims, and the receipt of the 50c. on the dollar by them operates *ipso facto* as a discharge of the whole claim. That agreement is recited in the premises of the assignment, as the reason for the assignment. But the recital does not state that some or any of the creditors had declined to sign, or at all events had not signed that agreement; on the contrary, I think it is rather to be inferred from the whole document that all had signed it; at least, this is left in a state of ambiguity. On the other hand, the operative part of the assignment seems well enough, except with reference to the premises, which it seems to me must be read in connection with that operative part, and as explanatory of it; and although it is true that the defendants did not sign the preliminary agreement, and are, therefore, not bound by it, yet having notice that it made part of the assignment in the manner mentioned, it is not improbable that the fact of receiving the notes under the provisions of the assignment, would be such an act of acquiescence in the terms and purpose of the assignment, would be such an act of acquiescence, as would bind them as firmly as those who signed the preliminary agreement. The defendants might

guard themselves against that effect by means of a special receipt, but they ought not to be driven to that artifice: nor could the assignee properly pay the money in that way, for the assignee is bound to pay to the assignor whatever balance there may be in his hands, after paying the creditors the 50 cents in the dollar under the provisions of the assignment, first, however deducting his own debt. Here, as regards these defendants, two objections arise. Why should any part of the estate of the assignors go back to them?

If all the creditors agreed to it, "well and good;" there would be no person to object.

The defendants have not agreed to it, and they may object; and I think the objection is a valid one. This point is to some extent discussed in *Ewart* v. *Stuart*, 12 A. R. 99, by Mr. Justice Burton p, 101, by Mr. Justice Patterson, p. 105.

Then, what means the provision that the balance, if any, &c., to be paid to the party of the first part, the assignors, "after deducting the amount of the debt of the parties of the first part to the parties of the second part," that is, the assignees, "without interest?"

Does this not mean that notwithstanding the fact that the assignees signed the preliminary agreement, they are allowed by the assignment to pay themselves in full, except interest? This is certainly the evident clear meaning of the language used.

This, too, is very well for the creditors who agreed to it, and are willing it should be so; but as regards the defendants it is a preference, makes the assignment a preferential one, and therefore objectionable and void. The benefit of the assignment being, as I think it is, confined to the creditors who signed or otherwise accepted the terms of the preliminary agreement, it is equivalent to a schedule containing the names of creditors who are to be benefited by the assignment, and falls within the principle of *McLean* v. *Garland*, 32 C. P. 524.

ARMOUR, J., not having been present during the argument, took no part in the judgment.

Motion dismissed, with costs (a).

[COMMON PLEAS DIVISION.]

IN RE FUNSTON AND THE CORPORATION OF THE TOWNSHIP OF TILBURY EAST.

Municipal corporations—Drainage by-law—Revision of assessments by court of Revision—Necessity for alterations in by-law—Locus standi—Motion to quash, whether to Divisional Court or single Court—O. J. A., Rules 480, 524.

In a drainage by-law the assessments as made by the engineer, and contained in the schedule to the by-law, were revised by the Court of Revision, and alterations made, but the by-law was not amended before being finally passed so as to correspond with such alterations as required by sec. 571, sub-sec. 2 of the Municipal Act of 1883, and it was impossible to discover from the alterations as made the amount of the "total special rate" against each lot or part of lot, and therefore the amount to be annually levied, to be ascertained by dividing such total special rate by the number of years the by-law has to run, which in this case was fifteen years.

Held, that the defect was fatal to the by-law.

The *locus standi* of the applicant herein was objected to, but on the evidence, the objection was overruled.

In moving to quash a by-law, the practice having been adopted of applying to a Judge sitting alone, an objection that the application should have been to the Divisional Court was not entertained; but such an application if required to be made to the Divisional Court, must be to the Common law Divisional Courts, and not to the Chancery Divisional Court.

On November 27, 1885, *Pegley*, of Chatham, obtained an order *nisi* to quash a by-law of the township of Tilbury East, intituled the "Forbes Drainage By-law," on various grounds, which are not now material.

(a) See *Burritt* v. *Robertson*, 18 U. C. R. 555; *Darling* v. *McIntyre*, 19 U. C. R. 154.—REP.

On December 14, 1885, *Pegley* supported the motion. *Moss*, Q.C., and *Wilson*, contra.

December 18, 1885. O'CONNOR, J.—As a preliminary matter before proceeding to the argument, Mr. Pegley asked leave to add to his order *nisi* as a further ground of objection with the objections therein contained, that the Court of Revision had reduced the value of the improvement set opposite each lot, or part of lot, as stated in the assessment roll transmitted to the court by the township clerk; for instance in the applicant's case on north half of lot No. 15, in the 8th concession, $25.50 to $16.20, but that the amount of interest previously calculated in the greater sum was not reduced.

This motion was opposed, and I reserved it for consideration.

Upon reading the by-laws, the proceedings having reference thereto, and the papers, I have allowed the amendment, and will treat that objection as part of the order *nisi* as if it had been originally stated therein as one of the grounds.

It appears that some time before the 18th of February, 1885, a petition signed by one Harry Forbes, and others, owners of low lands in the township of East Tilbury, was presented or offered to the council of that township asking for drainage under sub-sec. 8 of sec. 570, of the "Consolidated Municipal Act, 1883."

At the meeting of the council held on the 18th of February, the matter was mentioned, and the petitioners were requested to "attend the next meeting of the council with the view of effecting an amicable settlement of the whole question, and saving costs."

It appears the petitioners, or some of them, owners of the low lands, complained that the higher lands of a portion of the township, had, by a system of drainage, been drained upon and flooded their low lands, and had threatened actions at law for damages done them. The council had in consequence taken legal advice, and were informed that they were subject to such actions.

At a meeting held on the 2nd of March, Mr. Forbes accordingly attended, and again presented the petition to the council. The petition was received, and after some debate it was adopted by a majority of the council, and Mr. McDonell, a provincial land surveyor and civil engineer, was instructed to examine the locality in the petition mentioned, and prepare plans and estimates of the works necessary for the drainage of the locality, and an assessment of the lands to be benefited thereby, and to report to the council.

The petition prayed that the low lands in question should be drained (thereinafter described) by embanking and pumping at the cost of the lands and roads to be benefited, and which might use the said scheme of drainage in any of its parts as an outlet; and the territory to be drained was described by metes and bounds; and it suggests a scheme or system by which the drainage might be effected.

Mr. McDonell made the examination, reported a scheme of drainage and embanking corresponding, or for the most part corresponding, with that suggested by the petition, with a system of pumping, and made plans, estimates, and an assessment of the real property to be benefited by the work. And he stated the proportion of benefit, in his opinion, to be derived therefrom by every road and lot, or portion of lot, pursuant to section 570 of the act.

Thereupon the council, having apparently observed the preliminary forms, passed a by-law in form provided by section 571, "to provide for the proposed work being done."

The engineer assessed not only the lands described in the petition, which was signed by a majority of the owners thereof, but lands and roads outside of that area, according to his opinion of the benefit to be derived by them from the work. He reports five separate schedules of lands to be benefitted and assessed.

1. For the cost of improving the outlet of certain Government drains previously made, which he does under section 590 of the act.

2. Of Romney (and adjoining townships), for improving the outlet to certain drains in Tilbury East; and for the benefit of such outlet in removing waters overflowing from such lands on to lower lands and roads in Tilbury East, pursuant to the municipal drainage act.

3. For the cost of improving the outlet of the McDougall Creek drain, with its tributaries, and for the benefit of such outlet in removing waters caused to flow upon lower lands and roads, &c., under section 590, and section 586, as amended by section 19 of the amendment act of 1884.

4. Of lands assessed for the cost of embanking and constructing pumping machinery, and the expense of maintaining and running the pump.

5. For the cost of pumping the water caused to flow north from lands in the low lying plains in the second and third concessions of Tilbury East.

It is admitted that the petition was signed by two-thirds of the owners of the property to be benefited, as described in the petition, but not of those outside of that area whose lands are assessed as to be benefited by the work.

The assessment made by the engineer was complained of, and the complaint was tried before the Court of Revision pursuant to sub-section 10 of section 570. The court revised the roll and varied it materially; but, as it appears on the face of the by-law as finally passed, I am unable to say that they varied "*pro rata* the assessment of the said property as" as required by sub-sec. 15.

The form of by-law given by the Act, presents, following the third clause of the by-law, a schedule:

Concession.	Lot or part of Lot.	Acres.	Value of Improvements.	To cover interest for 10 years at 5 per cent.	Total special rate.	Annual Assessment during each year for 10 years.
10	5	200	$75 00			

The third clause of the by-law in question enacts: That for the purpose of paying the sum of $34,267.48, being the amount charged against the said lands in the said township of Tilbury East, so to be benefited as aforesaid, other than roads belonging to the said municipality of Tilbury East, and lands and roads in the township of Romney, and to cover interest thereon for fifteen years at the rate of five per cent. per annum, the following special rates, over and above all other rates, shall be assessed and levied (in the same manner and at the same time as taxes are levied upon the under mentioned lots and parts of lots, and the amount of the said special rate and interest assessed as aforesaid against each lot or part of lot respectively shall be divided into fifteen equal parts, and one such part shall be assessed and levied as aforesaid in each year for fifteen years after the final passing of this by-law during which the said debentures have to run.

Then follows a schedule in the statutory form given, filled up, as appears in the by-law as published, as follows:

Con.	Lot or part of Lot.	Acres.	Value of improvements.	To cover interest for 15 years at 5 per cent.	Total special rate.	Annual assessment during each year for 15 years.	As * amended by Court of Revision.
4	N.E.qr. 12.	50	$12 75	$5 70	$18 45	$1 23	$8 10

This schedule contains about 150 entries, of which the above stands first; and I give it as a mere sample of the whole.

Standing in that way I should say the requirements of the act were complied with, although the amount of interest stated is inaccurate. But the Court of Revision revised that schedule (which, I presume, was the roll transmitted to them by the township clerk) and returned it with an additional column (though not divided by a

* The column is the one below referred to as being in red ink.

line) at the right of the last column above, containing the entry, $1.23, in which they set down the figures 8.10 under the heading, "As amended by Court of Revision," and in the manner designated and shewn above in red ink; and so throughout the whole schedule figures are placed in the same position relatively, opposite every line of entry, figures which have about the same proportion to the figures in the column of value, and to those in the column of "total special rate;" and the by-law with the schedule so amended was passed by the council.

The question is, what do the figures placed there by the Court of Revision, mean? Do they mean that the value of improvements "is reduced from $12.75 to $8.10," or that the "total special rate" is reduced from $18.45 to $8.10; or do they mean dollars and cents, or something else?

The interest, as the schedule which is part of the by-law, stands, is calculated on $12.75; not on $8.10. As the schedule was before the revision, the $18.45 in the column "total special rate," were to be divided by 15 to find the amount of the annual assessment. But where and what is the sum now to be divided by 15? Sub-section 2 of section 571, requires that: "In the event of the assessment being altered by the Court of Revision or judge, the by-law shall, before being finally passed, be amended so as to correspond with such alteration by the Court of Revision."

This has not been done. Alterations were undoubtedly made by the Court of Revision, but the by-law was not amended as the law required "before being finally passed," so as to correspond with the alterations; nor does it appear that alterations were made which ought to follow those which were made by the Court of Revision, to shew the gross annual rate or the particular annual rate on each lot, or part of lot. As the by-law is, there is no column shewing the "total special rate" against each lot or part of lot respectively to be divided into fifteen equal parts, one of which parts is to be levied every year during fifteen years. This is imperatively required by the general law and the by-law; and I see no other provision for ascertaining or

determining the total special rate, or the rate to be placed on the assessment roll and levied every year during the period. This defect seems to me fatal to the by-law; and it is of a kind, I think, which, appearing as it does on the face of the by-law, roll and papers—the proceedings,—I should be bound to notice and consider even if the order *nisi* were not amended so as to embrace it; for, in my opinion, it makes the by-law a sheer nullity.

It is also argued on behalf of the corporation that the applicant's property, the north half of No. 15, in the 8th concession, is assessed only for improving the outlet to Government drains numbers 2 and 3 with their tributaries, and not for the cost of the works to improve the lands mentioned in the petition; and that, therefore, he has not such interest as qualifies him to apply to quash the by-law.

But the cost of all the works, no matter by what name they are called, is reduced to one lump sum for which debentures are to be issued; and the schedule on which his land is assessed could not be struck out without so materially affecting that sum as to require a revision of all the schedules—the whole assessment, and rendering an amendment of the third clause necessary; in short, a new by-law would be required. So far, then, as the applicant's interest is concerned the by-law must stand or fall as a whole.

I, therefore, am of opinion that the applicant has properly the *locus standi* which he claims.

I think it unnecessary to consider the other objections stated originally in the order *nisi* as grounds for quashing the by-law. I may state, however, that Mr. Moss, on behalf of the corporation, took a preliminary objection, that the applicant was late in moving; because the applicant's notice of his intention to make application to the High Court of Justice at Toronto, during the sittings next ensuing the final passing of the by-law, to have it quashed, should have been made during the sittings of the Chancery Division which commenced on the first Thursday of September last, that being the sittings of the High Court of Justice next ensuing the final passing of the by-law.

I think otherwise, and overrule the objection. Rule 480 of the Judicature Act, provides: 1. The sittings of the High Court of Justice shall be three in every year, viz., the Michaelmas Sittings, the Hilary Sittings, and the Easter Sittings.

(*a*) The Michaelmas Sittings shall begin on the third Monday in November, and end on the second week thereafter, &c.

(*c*) The preceding provisions of this order are not to apply to the Chancery Division, except, &c.

(1*a*) After the sittings in June next of the Chancery Divisional Court, the said Divisional Court will hold its sittings on the first Thursday in September, &c.

Notwithstanding this last provision, which is Rule 524, I think the Sittings of the High Court of Justice are those of Michaelmas, Hilary, and Easter, as they were before the passage of Rule 524.

It was also objected that the application should have been to the full Divisional Court, and not to a single judge sitting in term.

If I had to deal with this objection as a matter *res integra*, I am not certain at present how I should rule on it; but it appears to have been the constant practice hitherto, under the Judicature Act, to deal with matters of this kind in the single court; and I therefore follow the practice.

It was further objected that the applicant had no interest in the work to be done under the by-law; that he had no such interest as would give him a *locus standi* in court to move against the by-law. But he is owner of land in the township which it is said will be benefited by the proposed work, and the engineer assessed his land for the alleged benefit, and I think, therefore, he has such an interest as gives him the necessary *locus standi*.

I would feel inclined to sustain the by-law on grounds of public policy, if I could properly do so, but I do not see how it is possible. Indeed, I am inclined to think that if the by-law were not quashed, no assessment or taxes could be levied under it, on account of the defects mentioned,

but it is better to quash it than let it stand and lead to futile litigation.

I see no alternative but to quash the by-law, with costs to the applicant to the obtaining of his order or rule *nisi*, and the service thereof. No costs of the subsequent proceedings to either party.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

GORING v. THE LONDON MUTUAL FIRE INSURANCE COMPANY.

Insurance—Variation of statutory conditions—Fire Ins. Policy Act—Dominion Act—Mutual Ins. Co.—Attorney General—Minister of Justice—Constitutional law.

The defendant, a mutual insurance company, was incorporated by an Act of the Dominion Parliament, 41 Vic. ch. 40, by sec. 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto shall render the policy void."

Held, on demurrer, that the matters provided for by the above section were subject matters of the "Fire Insurance Policy Act" of Ontario, over which the province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the dominion act *per se*, but only by being used as required or modified by said Ontario act, namely in the manner provided for variations to the conditions therein contained.

Citizens Ins. Co. v. *Parsons* and *Queens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, commented upon.

The 28th section of the Mutual Fire Insurance Companies' Act, 1881, makes the Fire Insurance Policy Act applicable thereto, "except where the provisions of the act respecting Mutual Fire Insurance Companies are expressly inconsistent with, or supplementary and in addition to the provisions of the said Fire Insurance Policy Act."

Held, this includes all mutual insurance companies doing business in the Province; and it was not alleged in the pleadings herein, that there was anything in the defendants' act "expressly inconsistent with" the

Fire Insurance Policy Act, but merely that the matters were variations of the statutory conditions.

Held also that the questions, so far as raised, were not of a constitutional character so as to require notice to the Attorney General of the province and the Minister of Justice of the dominion.

THIS was a demurrer to the replication herein.

The statement of claim was on a fire policy on buildings and contents.

The only paragraphs of the statement of defence necessary to be set out are the following:

12. The plaintiff's application for insurance, incorporated with and made part of the policy of insurance granted thereon, contained a warranty of the truth of the allegations therein contained; but the allegations that there were no incumbrances in said applications contained, were false, whereby the said policies of insurance became void, and no longer binding upon the defendants.

13. Under and by virtue of the defendant's act of incorporation, being 41 Vic. ch. 40, sec. 28, (D.), it is provided as follows: "All policies of insurance issued by the board of directors sealed with the seal of the company, signed by the president or vice-president, and countersigned by the managing director or the secretary or acting secretary shall be binding on the company: provided that any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant, or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void." By his application, dated 31st January, 1882, upon which issued the policy of insurance, No. 207,279, under which the plaintiff claims herein, the plaintiff declared that the property insured was not encumbered, whereas it was encumbered by certain charges contained in two certain indentures, bearing date the 8th January, 1881, between the plaintiff and one Harmon H. Goring, which was a false statement respecting the title

or ownership of the plaintiff, or his circumstances, and a concealment of an incumbrance on the insured property, within the meaning of said section 28, whereby the said policy became void and no longer binding upon the defendants.

14. Subsequent to the issuing of said policy No. 207,279, the plaintiff by an indenture, bearing date the 28th April, 1882, between himself and one Mary Jane Goring, charged the said property in favor of the said Mary Jane Goring, and failed to notify the defendants thereof, or obtain their written consent thereto, whereby the said policy became void and no longer binding upon the defendants.

15. By his application, dated the 19th February, 1883, upon which was issued the policy No. 123,105, under which the plaintiff claims herein, the plaintiff declared that the property insured was not encumbered, whereas it was encumbered by certain charges contained in the indentures set out in the preceding paragraphs hereof, which was a false statement respecting the title or ownership of the plaintiff, or his circumstances, and a concealment of an encumbrance on the insured property, within the meaning of said section 28, whereby the said policy became void and no longer binding upon the defendants.

Replication to the twelfth, thirteenth, fourteenth, and fifteenth paragraphs of the statement of defence: that by the fourth section of the statute of the legislature of the province of Ontario, known as "The Fire Insurance Policy Act," it is provided that if any company desires to vary the statutory conditions of insurance set forth in the schedule to the said Act, or to add new conditions of insurance to any policy of insurance, such variations or new conditions should be printed upon the policy in conspicuous type, and ink of a different colour to that of the statutory conditions, with the heading and form of notice provided for by the said section; and by the fifth section of the said statute, it is further provided that no such variation or addition should be legal and binding upon the insured

unless the provisions of the said fourth section were complied with, and that the policy should be subject to the statutory conditions of insurance only; and the plaintiff, denying all charges of fraud in the said paragraphs alleged against him, says that the conditions of insurance set forth and pleaded as a defence herein by the defendants in the said paragraphs, are not legal and binding upon the plaintiff, being *variations of and additions* to the statutory conditions as set forth in the said act, and not being added to the conditions printed upon the policies sued upon herein respectively in the manner provided for by the fourth section of the said act.

To this replication the defendants demurred, on the grounds:

1. That the said further replication is, in law, no answer to the said twelfth, thirteenth, fourteenth, and fifteenth paragraphs of the said statement of defence.

2. That the "Fire Insurance Policy Act" has no application to the defendant company or the policies issued by it.

3. That under the defendants' act of incorporation the provisions set forth in the said thirteenth paragraph of the statement of defence, form part of the policy, and are not required to be set forth as conditions; and on other grounds sufficient in law to sustain this demurrer.

On December 22nd, 1885, the demurrer was argued.

Moss, Q. C., in support of the demurrer.

Osler, Q. C., contra.

December 30, 1885. O'CONNOR, J.—The grounds of demurrer assigned, are exceedingly vague and indeterminate; and were it not that counsel on the argument were explicit in directing attention to the questions which they desired to argue for decision, I am not quite certain what I should have done with the demurrer.

One of the points argued was, that the defendant company was incorporated by and that it operates under an

Act of the Dominion, 41 Vic. ch. 40; and that the matters provided by the 28th section thereof, are not controlled by the provisions of the "Fire Insurance Policy Act" of Ontario.

The company is doing business in Ontario, where the transactions in question in this suit have occurred; and it appears to me the question just mentioned, is the very one which was decided by the Privy Council in the cases of *Citizens Ins. Co.* v. *Parsons* and *Queen's Ins. Co.* v. *Parsons*, on appeal from the Supreme Court of Canada, and reported in 7 App. Cas. 96, and in 1 *Cartwright's* Cases, 265.

The question is not whether the provisions of the Ontario act over-ride or control the provisions of the dominion act or not; but whether the legislature of the province has or has not *exclusive* jurisdiction over the subject matter.

If it has such *exclusive* jurisdiction any provisions affecting the same subject matter contained in the dominion act, would be simply nugatory, because the Parliament of Canada is excluded from any jurisdiction over the matter. And I think this is unequivocally the effect of the decision of the Privy Council in the cases above cited.

The matters contained in the 28th section of the dominion act in question, might be, and I dare say they are, proper subjects of legal contract, if they are not inconsistent with the provisions of the Ontario act, or to be used as required or modified by the latter act, but they can have no force or validity in the Province, from the dominion act *per se*.

It was also urged by counsel for the company-defendant, that mutual fire insurance companies were, to a certain extent, exempted from the operation of the "Fire Insurance Policy Act."

The 28th section of "The Mutual Fire Insurance Companies Act, 1881," makes "The Fire Insurance Policy Act," applicable, "*except* where the provisions of the Act respecting mutual fire insurance companies are expressly incon-

sistent with, or are supplementary and in addition to the provisions of the said Fire Insurance Policy Act;" and I think that means all mutual fire insurance companies doing business in the Province.

I do not, however, observe that the replication demurred to asserts anything "expressly inconsistent with" the act last mentioned, nor is any such ground of demurrer stated. Neither does it allege any matter supplementary and in addition to, but that the matters alleged are "*variations of, and additions* to the statutory conditions as set forth in that act.

As to the case of *Mutual Fire Ins. Co. of Wellington*, v. *Frey*, 5 S. C. R. 82, which was cited on the argument, it is only necessary to say, that "The Mutual Fire Insurance Companies Act, 1881," was passed afterwards, and probably on account of that decision; at all events I think it overrules the decision.

With reference to the replication itself in question, it alleges that the matters in the statement of defence to which it is a replication are within the statutory conditions which are required by the 4th section of the act, which it invokes, to be endorsed on the policy, but which are not so endorsed. This is an allegation of fact, and the replication is good or bad as it is true or false. It does not in that respect raise a question of law independently of fact, but one of mixed law and fact.

If the replication be in that respect true in fact, as the demurrer admits, it is good in law, because the facts alleged bring it within the statute.

I do not think the questions as they arise, are so far of a constitutional character as to require notice to the Attorney-General of the province, or to the Minister of Justice of the dominion.

Judgment will be for the plaintiff, with costs.

Judgment for plaintiff.

[CHANCERY DIVISION.]

FERGUSON v. WINSOR.

Vendor and purchaser—Mistake—Sale by plan—Representation—Notice.

The judgment of O'Connor, J., reported *ante* p. 13, reversed.

Per BOYD, C. The evidence in this case does not come up to the standard laid down in *Dominion Loan Society* v. *Darling*, 5 A. R. 577, by Moss, C. J., that "It must be demonstrated what the true terms of the bargain were, and that by mutual mistake they were not incorporated in the writing. The proof must be clear, satisfactory, and conclusive."

The defendant bought lot 7, as contained in S's. mortgage, and obtained a deed from the executors according to a registered plan which is to be treated as incorporated therewith and he is, even as against his representation to the plaintiff that the piece in dispute was a portion of the property she was in treaty for and subsequently purchased, entitled to claim the benefit of G.'s position as purchaser and registered owner for value.

Per PROUDFOOT, J.—Even if the representation were proved the plaintiff owned no property at the time it was made to be affected by it, and such an expression of opinion should not estop him from purchasing Lot 7 eighteen months afterwards. The purchasers at the auction sale got a better bargain than they thought they had made, but they had no knowledge of any right to be interfered with had they chosen to assert their title to the whole lot. This raises no equity against them in the plaintiff's favour.

Even if the defendant had notice of the plaintiff's equity he is entitled to claim the benefit of the want of notice to the purchasers at the auction sale.

THIS action, reported *ante* p. 13, came on by way of appeal to the Divisional Court, from the judgment of O'Connor, J., and was argued on September 7th and 8th, 1885, before Boyd, C., and Proudfoot, J.

Lash, Q. C., for the defendant, who appealed.—The learned judge who tried this action was wrong in holding that the plaintiff was entitled to any part of lot 7. The defendant is a purchaser for value without notice. There may be some evidence of a mistake in the deed from Amabel Foubert, sen., to Stevenson, but there is none whatever as to the subsequent deeds upon which they could be altered. The land was advertised for sale by public auction, with the full description as lot 7. The executors of Foubert, who made the sale and deed, and Gordon and Shirkey, the

purchasers, were called, and their evidence shews that the executors intended to sell lot 7, and that Gordon and Shirkey bought lot 7; they bought by the advertisement but as the neighbours told them there was only 66 feet in it, that is all they took possession of at the time. Even if a purchaser buys with notice from a purchaser without notice, he can shelter himself under his vendor's title: *Snell's* Equity, last ed. 32. The evidence here is insufficient to rectify the deed from Gordon to the defendant. Even if it is true that, in the year 1882, the defendant told the plaintiff "to buy all Michael Foubert owned of the township lot 14, which had been devised to him by his father, as it contained the part of lot 7 in question and it would be a bargain," he still had a perfect right, two years after, in 1884, to purchase lot 7, and he has done so. There must be a mutual mistake without fraud in order to get a rectification. My client has a title under the registry law. The deeds to the defendant are on the plan: R. S. O., c. 111, s. 82. The deed to the plaintiff is on the original township lot 14. The evidence also shews that there was acquiescence. Michael Foubert was present at the sale and actually received part of the purchase money.

Moss, Q. C., contra.—The judgment of the learned judge deals with the facts fully. Stevenson, the first purchaser from Foubert, sen., bought up to the creek only, and not to the other side of it. There was a road on the other side of the creek. There was a mistake in the deed Foubert to Stevenson; and the evidence shews that Stevenson fenced and occupied the smaller part, and Gordon and Shirkey only intended to purchase what Stevenson had. There was no mistake in what was sold; the only mistake made was in describing it. There was no acquiescence, as acquiescence involves knowledge, and there was no knowledge in this case that lot 7 extended to the other side of the creek. This case comes within *Wigle* v. *Setterington*, 19 Gr. 512.

December 3, 1884. BOYD, C.—In *Dominion Loan Society* v. *Darling*, 5 A: R. 577, Moss, C. J., speaking of the degree of proof required for the rectification of a written instrument, says, "It must be demonstrated what the true terms of the bargain were, and that by mutual mistake these are not incorporated in the writing. The proof must be clear, satisfactory, and conclusive." A careful perusal of the evidence in this case does not satisfy me that it comes up to this standard of certainty, though I should be reluctant to interfere with conclusions of fact alone. I find it difficult to believe that old Mr. Foubert was not perfectly well aware of the limits of lot 7 on the ground. He had a copy of the plan, which was registered, in his own house or within easy reach. He made a conveyance in August, 1870, to the defendant Winsor of part of lot 6, which refers to a post as the boundary between lots 6 and 7, which the defendant identifies as being there at the date of that deed. He made a conveyance to his son of another part of lot 7 on 13th January 1877, which shews that the whole of lot 7, according to the deeds executed by him, was at least two chains in width, and his son-in-law Greason proves that the old man and Mrs. Foubert were living on lot 6, that Major was living on lot 8, and that this lot 7 intervened between these two (Evid. p. 63).

But apart from this there is another ground upon which I prefer to place my judgment. Whatever may be said as to the right to reform the deeds while yet the old man Foubert lived and Stevenson was the owner, a very important change takes place afterwards. After the death of Foubert, in 1878, Stevenson made default in payment; and under the power of sale in his mortgage Foubert's executors proceeded to advertise and sell by public auction on the 18th April, 1881, and at such sale Gordon and Shirkey became the purchasers. No mistake is proved to have occurred at that sale, nor in regard to the conveyance by which it was completed. What was exposed for sale was the double lot 7 (embracing the part now in question herein) as contained in Stevenson's mortgage. That mort-

gage described the lots as being on the south side of Queen Street and on the north side of Market Street in the village of Foubertville, according to a plan of said village registered in the registry office of the County of Russell. The lots thus described were conveyed by the same description to the purchasers by deed duly executed and registered on the same day. Of the three executors one is not examined at all: another is examined and says that he thought in his own mind that they were only selling that part of lot 7 which was on the east side of the creek, but that what was actually sold at the sale was lot 7, what was in the mortgage and that no boundaries were mentioned. The third and chief acting executor (who is also a solicitor) says that he followed the mortgage and sold lot 7; that he saw lot 7 on the plan, and that he did not know what its metes and bounds were.

Of the purchasers, who were partners, Gordon was chief actor, who says that he came to the sale a perfect stranger; that he did not know the size of the lots; that he did not know anything about the lots but that he bought by the advertisement. He says further, "I did not intend to buy anything else than lot 7 as offered for sale. Whatever lot 7 contained, that is what I supposed I bought."

Shirkey was not at the sale, but corroborates Gordon by saying "We did not know before the sale what lot 7 contained; we bought intending to claim all that lot 7 contained" (p. 69). They may have been in error subsequently in supposing that the limits of lot 7 to the east were defined by the creek, but that would not shew mistake when the contract was made and consummated by the conveyance. They bought lot 7 as contained in Stevenson's mortgage and according to the plan registered, and this they obtained by the deed from the executors. The plan was referred to in the conveyances and is to be treated as incorporated therewith; *Grasett* v. *Carter*, 10 S. C. R. 114. So far as possession of the part now in dispute is a material element in the case the evidence is too vague to lead to the conclusion that there was any adverse possession as against

Winsor and those under whom he claims. A piece 66 x 99 feet was taken out of the middle of the lot by the conveyance of January, 1877, which was afterwards rightfully occupied and apparently fenced by Byrnes. But there was no fence put up to the rear of Byrnes's lot between the portion that Gordon occupied with buildings and the land now in dispute. Between Byrnes's part and lot 6 there was, along Queen Street an old fence which was down in winter and up in summer; but there was no fence to the rear along Market Street between 6 and 8. The whole of the disputed piece was, according to the evidence of Gordon, lying in commons.

Bloomer v. *Spittle*, L. R. 13 Eq. 427, shews that the utmost relief which could be granted in a case like this would be not to force reformation of the deed upon the defendant without giving him the option of rescinding the whole transaction. And it is to be observed that the defendant has sworn to his willingness to turn over the whole property to the plaintiff or her husband on being paid what he gave for it.

But a case which more nearly applies to the circumstances now in hand is *O'Kill* v. *Whittaker*, 1 De G. & Sm. 83. There, by mutual mistake as to the duration of a leasehold, it was sold for three-fifths of its value; but after conveyance was executed and the purchaser in possession the Court declined to relieve after some years. The lease had been dealt with as of eight years duration, whereas it was really for twenty years. Knight Bruce, V.C., said "The question is, What was that thing which the vendors intended to sell, and the purchaser intended to buy? Was it a term of eight or nine years, or was it a specific lease, erroneously supposed not to have more than eight or nine years to run? That is the material question. Now the property had been exposed to sale by auction * * *. The just and inevitable conclusion, I think, is, that the thing which the vendors intended to sell and the purchaser intended to buy, was not a term of eight or nine years, but was the lease of 1755, as it affected this property, erro-

neously supposed to have a shorter time to run than in fact it had to run. That being so, it is impossible to give the plaintiff relief * * upon any other footing than that of rescinding the contract wholly—from the outset rescinding the contract." The Vice Chancellor proceeds to say in language very pertinent to this case: "How the vendors could make such a mistake, it is difficult to understand. For the present purpose it is not too much to say, that it was their duty to know what was the state, what was the condition of the property which they had to sell."

Upon appeal to Lord Cottenham, this decision was affirmed, 2 Ph. 338 and upon the same grounds. He says, "Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres,' and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm on payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial. * * The misfortune of this case is, that here the plaintiffs did intend to sell all the remaining interest in the lease, but by their own mistake they misdescribed what that interest was."

I consider the plaintiff here to be as against Gordon and Shirkey in a less meritorious position than the executors themselves, for her title is acquired as a matter of speculation from the devisee of old Mr. Foubert by buying up *en bloc* various fragments of land comprising thirty acres more or less of what remained of the township lot after deducting what had been sold during the testator's lifetime. It is true that she gives in evidence a personal equity against this defendant, because he represented to her two years before his purchase from Gordon, and at the time she was about buying from the devisee, that the land now in dispute was a valuable part of what she was in treaty for, but he is entitled to claim the benefit of Gordon's position as purchaser and registered owner for value,

irrespective of his own personal demerit, which the Judge has found to be established.

The result at which I have arrived is, that the action should not have been entertained but have been dismissed, though without costs on account of the misleading conduct of the defendant. He should get, however, the costs of the proceedings in this Divisional Court.

PROUDFOOT, J.—I have read the evidence in this case and the elaborate judgment of O'Connor, J., who heard the case. I am much impressed with the conviction that the defendant is getting more than he thought he was buying, and I am strongly inclined to affirm the judgment, if it can properly be done; but after repeated consideration it seems to me that the judgment cannot be affirmed.

A good deal of reliance was placed by the learned judge on what he considered the fraudulent misrepresentation made by the defendant to the plaintiff about the time of her purchase in July, 1882, that she would get the whole of the lot to the creek, thus including that part of lot 7 now claimed by her. But this representation is distinctly denied by the defendant, who says that the conversation he had with the plaintiff referred to other lots and not to lot 7. Besides the plaintiff owned no property at that time to be affected by such representation, and such an expression of opinion ought not to estop him from purchasing, eighteen months afterwards, lot 7. Disposing thus of the sort of personal equity, it has then to be determined whether the defendant is a purchaser for value without notice, or if he can claim through any one who could maintain that character.

It was conceded that had the property remained with Stevenson the deed might have been rectified, as he only intended to buy to the creek, though the deed covered the whole of lot 7. Stevenson gave back a mortgage to his vendor Foubert with a similar description. And default having been made in making payment, the executors of Foubert sold the property by auction, describing it as in

the mortgage as lot 7. Gordon and Shirkey purchased it as lot 7. They did not know the boundaries, and appear to have supposed that lot 7 consisted only of 66 feet in front on Queen Street by 99 feet in depth. They measured it off that size and built upon it. There is no evidence, however, to shew that they were aware of any mistake in the mortgage under which they bought or in the deed from Foubert to Stevenson. The deed to them covers the whole lot 7 and operates on the whole lot except a piece conveyed to Byrnes by a deed registered prior to the deed to Stevenson. They got a better bargain than they thought they had made; but they had no knowledge of any right to be interfered with, had they chosen to assert their title to the whole lot. I do not think that this raises any equity against them in the plaintiff's favor.

Having such a title Shirkey conveys his interest to Gordon, who sells to the defendant. Assuming that the defendant had notice of the plaintiff's equity, he is entitled to claim the benefit of the want of notice of Gordon and Shirkey, and is therefore entitled to judgment.

But, I think, the action should be dismissed, without costs of hearing, but with costs of appeal.

G. A. B.

[CHANCERY DIVISION.]

STIMSON v. BLOCK.

Conversion—Measure of damages—Condoning conversion—Judicature Act.

B. having possession of certain goods of S., S. demanded them of him on December 23rd. B. refused to allow the bulkier of them to be re-removed until after Christmas, on the ground that it would interfere with his own trade. On December 24th, S. commenced this action for damages, on the ground of wrongful conversion and detention of the goods by B. On December 26th, B. notified S. that he could remove the remainder of the goods. S. thereupon sent for them, but finding some of them had been seized under process of attachment out of the Division Court, removed the rest, and afterwards contested in the Division Court the ownership of those seized.

eld, affirming the judgment of the Master in Ordinary, that S. was entitled to damages for the detention of the goods on December 23rd, but the measure of that damage was nominal and not the value of the goods detained. S. acted on the letter of December 26th, and there did not appear to have been any disposal of the goods in the sense of their destruction or removal adverse to the plaintiff's property, but the plaintiff was ultimately prevented from getting the goods, not because of the defendant's misconduct, but because the claim of attaching creditors intervened.

The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent has he sustained damage.

THIS was an action brought by E. R. Stimson against Hugo Block, claiming amongst other things damages for the wrongful detention of certain goods.

The writ of summons was issued on December 24th, 1884. By his statement of claim the plaintiff alleged that in April, 1884, he brought to Toronto for exhibition and sale a large collection of oriental and Indian goods, and obtained advances in cash from the defendant wherewith to pay freight and other expenses, and on June 17th, 1884, desiring further advances, agreed in writing with the defendant that the latter should have possession and hold the goods as security for moneys advanced and to be advanced: that in the September following a considerable portion of the plaintiff's indebtedness becoming due, the

plaintiff proposed to sell off the goods and pay the defendant's claim out of the proceeds, and a new agreement was come to, by which the plaintiff agreed to concur in any sales the defendant should make, and pay the defendant five per cent. on sums in arrear from the plaintiff to the defendant: that he and the defendant then proceeded to sell the goods, from which large sums were realized, and in December the plaintiff arranged to pay off his indebtedness and adjust his accounts, but the defendant refused to give up the goods except on payment of a sum largely in excess of what was really due: that the defendant was paid this sum, but when the plaintiff sent to have the goods removed, refused to allow them to be removed, and had prevented possession being taken; by which the plaintiff had lost large profits and incurred large expenses: and that the defendant had refused to give a proper account of his dealings with the goods: and the plaintiff claimed payment of the amount overpaid to the defendant; a return of the goods unsold or unaccounted for or their value; damages for the unlawful detention of the goods after the plaintiff's claim had been paid, and costs of suit.

The defendant in his statement of defence denied the allegations in the statement of claim, and alleged that all matters and accounts between the plaintiff and himself were finally and completely settled and adjusted long before the commencement of this action, and that he never made any claim whatever to the said goods or the possession thereof after payment to him of the amount due to him, but he was always ready and willing that the plaintiff should at all seasonable times, and in all reasonable ways remove the said goods from his premises: that the plaintiff had long since taken the goods; and that the plaintiff had not sustained any damages or loss whatever by reason of the alleged grievances complained of.

The action came on for trial on May 16th, 1885, at Toronto, before Boyd, C., when it was referred to the Master-

in-Ordinary to take an account of the dealings of the plaintiff and the defendant in respect of the matters in the pleadings mentioned, and to enquire and state what if any damage the plaintiff had sustained, and further directions and costs were reserved, except the extra costs occasioned by the trial which the defendant was ordered to pay to the plaintiff in any event of the cause.

The facts as shewn by the evidence sufficiently appear from the written judgment of the master.

September 19th, 1885. THE MASTER-IN-ORDINARY.—There is a direct conflict of evidence between the plaintiff and the defendant as to a parol agreement to pay to the defendant a certain rate of interest per month in addition to a percentage agreed to in a letter written by the plaintiff to the defendant of the 4th of September, 1884.

The rule laid down in *Grant* v. *Brown*, 13 Gr. 256, therefore applies, that when the evidence of a parol contract is contradictory, no effect can be given to it. I must therefore find on the evidence that the only contract between these parties is that contained in the letter referred to.

The plaintiff complains that the defendant wrongfully detained and converted certain goods of his by refusing to allow the same to be removed pursuant to the plaintiff's demand on the 23rd of December last.

To entitle a party to claim damages in such a case there must be a detention, or an exercise of dominion over the goods inconsistent with the rights of the true owner. Such detention may be temporary; but if it brings additional expense or charge on the owner it is evidence of a detention and conversion: *Seyds* v. *Hay*, 4 T. R. 260.

In this case the plaintiff had employed men and carts to convey the goods to another place, and the action of the defendant in preferring the interest of his own business to his duty to the plaintiff by refusing to allow the removal of the plaintiff's goods except at the times and in the manner chosen by himself, was an unlawful detention

of the goods, and caused expense, delay, and possibly loss of sales to the plaintiff, for which the defendant is liable in damages (*a*).

Thus when a plaintiff brought a threshing machine on borrowed wheels to the defendant's place, and the defendant removed the wheels, but told the plaintiff that he could remove the machine, it was held that the defendant was liable: *Bowen* v. *Fenner*, 40 Barb. N. Y. 383. Allen, J., in that case said, at p. 389: "The plaintiff could only possess himself of his machine, and remove it from the defendant's premises and possession by incurring an expense, and after a delay and loss of time to which the defendant could not by his wrongful act subject him. The defendant cannot ask the plaintiff, in order to release him from his wrongful act, to step aside or incur a shilling of expense"

The plaintiff's right of action was complete when he issued his writ against the defendant on the 24th of December, and had nothing intervened to qualify his right, his measure of damages would have been the value of the goods, *plus* the expenses which he had incurred in endeavouring to remove them.

But after service of the writ, the defendant's solicitors wrote to the plaintiff's solicitors offering him the goods, and shortly afterwards the plaintiff sent for some of the goods, but found the bailiffs in possession under process issued by certain creditors against himself. The plaintiff contends

(*a*) The evidence shewed that on December 23rd the plaintiff sent an order for the delivery of the goods. Block allowed them to be removed up to 12 o'clock, but then finding the removing of them interfered with his own business he would not allow the plaintiff to remove any except such as one man could carry, until after Christmas. Some of the goods however, were bulky and could not be moved by one man, and the plaintiff was obliged to leave these. On December 24th this action was commenced. On December 26th the defendant's solicitors wrote to the plaintiff's solicitors as mentioned in the judgment. About December 29th the goods were seized by a Division Court bailiff under process issued by attaching creditors. On December 30th the plaintiff sent to bring them away, when he found the bailiff in possession. Afterwards the good seized were sold under the above process, and as the plaintiff alleged realized only about a third of their value.

that but for the original refusal of the defendant the bailiffs' seizure would not have taken place. But the original refusal was condoned by the act of the plaintiff in sending for the goods in response to the defendant's offer. The defendant though willing to return the goods had then no power to deliver them to the plaintiff, and their non-delivery then was not the defendant's act, nor is it any evidence of a conversion by the defendant: *Verrall* v. *Robinson*, 2 C. M. & R. 495.

The plaintiff contends that I cannot consider what occurred after the commencement of the action in mitigation of damages. If so, then in an ordinary action of debt a defendant would not be at liberty to prove payments after action brought, which should relieve him *pro tanto* of the plaintiff's claim.

The rule is the other way. In *Moon* v. *Raphael*, 5 L. J. C. P., N. S. 46, Tindal, C. J., remarked during the argument: "Is it not the common practice at *Nisi Prius* to take 1s. damages and have the goods re-delivered?" And it has been a well established rule in the courts in England that in actions of trover the court will, under certain circumstances, permit the defendant after suit brought to bring the property claimed into court for the defendant with the costs up to that time, and will then order a stay of proceedings or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him, unless he is able to shew that he has been specifically damaged by the conversion of the property by the defendant in addition to its value at the time of its return. Or the courts will in a proper case, after verdict, upon a tender of the property reduce the verdict to nominal damages. See *Churchill* v. *Welsh*, 47 Wis. 39.

What occurred after the commencement of the action could, therefore, be given in evidence on a trial before a jury, and as the measure of damages in such cases is usually a matter of law to be decided by the judge, a jury would be directed on such evidence to give only nominal damages. I must therefore rule that the plaintiff is only

entitled to nominal damages in this case, *plus* the expenses actually incurred by him in consequence of the detention of his goods by the defendant.

On October 6th, 1885, the master accordingly reported a sum of $97.08 due to the plaintiff on the accounts between him and the defendant, and that the plaintiff had sustained damages which he assessed at the sum of $104.25, which two sums were due from the defendant to the plaintiff.

The plaintiff appealed from this report because the master had not allowed him substantial damages for the detention of the goods complained of, but only nominal damages, whereas he should have allowed him damages in the value of the goods detained; and on the ground that in taking the account the commission which he allowed the defendant was not that agreed on between the parties, according to the evidence.

The defendant cross-appealed, on the ground, amongst others, that the master erred in finding that the defendant had wrongfully detained the plaintiff's goods, whereas he did not convert or wrongfully detain the said goods, and never asserted any right or claim to the possession or property of or in the same.

The appeal was argued on November 5th and 6th, 1885, before Boyd, C.

D. B. Read, Q.C., and *W. Read*, for the plaintiff. This action was brought for conversion, and one of the questions in the action is the value of the goods on the day the action was commenced, viz., 24th of December. After action was brought, and on the 26th of December the solicitor for the defendant wrote to the plaintiff's solicitor that if the plaintiff chose to send another gang of men he might come and take away his goods. About that time or a few days afterwards these goods were seized by execution creditors of the plaintiff, and sold and realized $837. The question is therefore whether the plaintiff is entitled to the whole

value of the goods at the date of conversion, or whether there should be deducted therefrom the $837, which was realized under execution? The master has only allowed as damages the cost of the attempted removal of the goods on the 23rd of December. We contend that as soon as demand is made and there is a refusal the defendant is liable for the value of the goods at the time of the conversion. After action brought nothing but a return of the goods to the plaintiff can relieve the defendant from liability for damages. On doing this he might apply to the court to stay the action on payment of costs. The letter of December 26th was no return of the goods, it was a mere offer to let the plaintiff have the goods if he went to the expense of hiring another gang of men and vehicles, but nothing but an actual return of the goods by the defendant himself could relieve him: *Edmondson* v. *Nuttall*, 17 C. B. N. S. 280; *Wilson* v. *Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632. In *Hiort* v. *London &c., R. W. Co.*, 4 Ex. D. 188, there was what amounted to a re-delivery of the goods, and therefore nominal damages only were given, but that is not the case here. As to damages, see *France* v. *Gaudet*, L. R. 6 Q. B. 199.

G. H. Watson for the defendant. The master found that the defendant was technically guilty of conversion by detaining the goods on December 23rd. I controvert this. Moreover, the subsequent acts of the plaintiff in exercising ownership of the goods was a re-taking of them. The defendant never claimed any right to possession or property in the goods, and there was no conversion of them by him. See *Robinson's* Prac., vol. 3, p. 460; *Moon* v. *Raphael*, 2 Bing. N. C. 210; *Sutherland* on Damages, vol. 3, pp. 525-36; *Bates* v. *Courtwright*, 36 Ill. 518; *Curtis* v. *Ward*, 20 Conn. 204; *Delano* v. *Curtis*, 7 Allen 471; *Smalley* v. *Gallagher*, 26 C. P. 531; *Johnson* v. *Lancashire and Yorkshire R. W. Co.*, 3 C. P. D. 499; *Pickering* v. *Truste*, 7 T. R. 53. If only nominal damages are given for detention, costs should not be given: *Hiort* v. *London and North Western R. W. Co.*, 4 Ex. D. 188.

D. B. Read in reply referred to *Burroughes* v. *Bayne*, 29 L. J. Exch. 185: *Pillott* v. *Wilkinson*, 3 Exch. N. S. 345; *Addison* on Torts, 5th ed., p. 470-480; *Underhill* on Torts, 4th ed., pp. 83, 241; *Macklem* v. *Durrant*, 32 U. C. R. 98.

At the close of the argument the learned chancellor said that he would further consider the matter of damages, but that otherwise he did not substantially differ from the results found by the master, and judgment would be to pay what was found due to the plaintiff with the costs of action, less the costs of the plaintiff's surcharge as to the commission as to which he failed, and the costs of each were to be deducted.

November 11th, 1885. BOYD, C.—The defendant's action in stopping the delivery of the plaintiff's goods was a wrongful act, which may be technically called a conversion if the meaning of that term is understood to be a wrongful detention for the time being, but there was no conversion in the sense of a denial of the plaintiff's title and an exercise of dominion over the property in substantial derogation of his rights. The old learning on the subject of "conversion" need not be imported into the system introduced by the judicature act, which provides for redress in case the plaintiff's goods are wrongfully detained or in case he is wrongfully deprived of them. In all such cases the real question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent has he sustained damage.

The weight of judicial authority as applied to the circumstances of this case appears to me to be in favor of the views enunciated by Bramwell and Channell, B. B., in *Burroughes* v. *Bayne*, 5 H. & N. 296.

In *Fowler* v. *Hollins*, L. R. 7 Q. B. at p. 630, Brett, J., says: "The true proposition as to possession and detention and asportation seems to me to be that a possession or detention, which is a mere custody or mere asportation

made without reference to the question of the property in goods or chattels, is not a conversion." He proceeds to refer with commendation to the review of the law on the subject in *Robinson's* Practice, vol. 3, pp. 452-462, and quotes with approval his language that the "idea of property is of the essence of a conversion." With his view agree Kelly, C. B., and Byles, J. In the case as found in appeal to the Lords, L. R. 7 H. L. 757, Brett, J., further elucidates his views at p. 782, and lays it down that a mere simple detention is not of itself conversion, but only when done in a manner or with an intention inconsistent with the proprietory title as owner of the true owner The decision of the courts upon the particular case before them was not a refutation of that view, but proceeded upon the special proposition stated by Lord Chelmsford at p. 795, "that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion."

In the present case there was no disposal of the goods in the sense of their destruction or removal adverse to the property of the defendant therein. When the plaintiff sent for the goods on December 23rd he was allowed to remove a considerable portion of them up to 12 o'clock. Mr. Block found it interfered with his trade below, and he refused to allow the plaintiff to remove any of the bulkier goods till after Christmas, but he was told on that day that all goods portable by one man could be carried out and removed, which would have included nearly all the goods available at Christmas. Of this the plaintiff did not avail himself.

Then on December 26th the solicitor of the defendant wrote to the plaintiff that he might take all the remaining goods, and urged him to remove them forthwith. There was an acting upon that letter, and otherwise afterwards by the plaintiff in sending for the goods, in forbidding the Division Court bailiff from interfering with them, in contesting the

matter as to the ownership of the goods in the Division Court, and in gathering up and removing all that the bailiffs had not seized, which is quite inconsistent with the claim that the defendant had converted these goods to his own use. The plaintiff was prevented ultimately in getting the goods, not because of the defendant's misconduct, but because the claim of attaching creditors intervened. There was a right of action for the illegal detention of the goods in the first instance which occasioned damage to the plaintiff, but the measure of that damage is not the value of the goods, nor do I think it should be more than the master has already awarded as consequential upon the detention in question: *England* v. *Cowley*, L. R. 8 Ex. 126.

The report will therefore stand, and judgment will go on further directions as I stated at the close of the argument.

A.H.F.L.

[CHANCERY DIVISION.]

HICKEY ET AL. V. STOVER ET AL.

Will—Ambiguity—Devise of land not owned by the testator—Error in description—Extrinsic evidence—Guardianship—Express trust—Title by possession—Constructive trust—Statute of limitations—R. S. O. c. 108, s. 13, c. 132, c. 198, s. 30—Pleadings—New trial.

A testatrix devised the S. ½ of lot 20, con. 9, township of R., to T. L., and the E. ½ of said lot to her two daughters.

It was sought to show that she had at the time of her death no other land than the S. ½ of lot 20, con. 8, of R., and to make the will operate to pass this to T. L.

Held, that, the devise being in its terms free from ambiguity, the Judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shown that lot 20, in con. 8, was the only land which the testatrix owned, the will could not operate to pass it.

Held, also, that J. L. having been appointed by the Surrogate Court, guardian of her son, T. L., she thereby became an express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet that the guardianship ended and the trust ceased with T. L.'s minority, and as after that J. L. dealt with the land in question as her own for some 22 years, she had acquired a good title to it by possession as against T. L.

Held, also, that T. L., having in his pleadings set up that J. L. had been in possession for the said 22 years as his tenant, could not obtain a new trial on the ground that he could show by evidence that she had been in as caretaker for him.

Semble, per PROUDFOOT, J., that if J. L. had, after the minority of T. L., continued to manage the property for his benefit, she would then have been a constructive trustee for him, not an express one.

THIS was an action brought amongst other things, to ascertain the rights and interests of the parties thereto in certain lands, being the south east half of lot 20, in the 8th concession of the township of Raleigh.

The plaintiffs set up in their statement of claim that one Jane Barnes, widow, who died on July 7th, 1884, purported to have made her will on June 23rd, 1884, whereby she appointed James Stover, one of the defendants, her sole executor, and devised unto Thomas Larke, Martha Beaury, and Violetta Barnes, who were also defendants, in certain proportions, as therein described, half of lot 20, in concession 9 of the said township, subject to certain payments to be made to the plaintiffs; that Jane Barnes died seized and in possession of the south east half of lot 20,

concession 8, of the said township, which was the only property owned by her at the time of her death: that Jane Barnes was the widow of one Richard Larke, who died seized and possessed of the last mentioned property about 1852, leaving him surviving Jane Barnes, formerly Jane Larke, his widow, and the plaintiffs and the defendants Thomas Larke and Martha Beaury, his only children and heirs and heiresses-at-law: that Jane Larke afterwards married John Barnes, who also died leaving her again a widow, and the defendant Violetta Barnes, their only child and heiress-at-law: that Jane Barnes then remained a widow till she died: that the said will was obtained by undue influence, and Jane Barnes should be declared to have died intestate: that the said will did not convey any interest or title to the south east half of lot 20 in the 8th concession: and the plaintiffs submitted that as to this Jane Barnes died intestate: that Thomas Larke pretended to claim the last mentioned property as sole heir-at-law of Richard Larke, but that the fact was that Jane Barnes had been in continued and undisturbed possession of the same ever since the death of the said Richard Larke, and they, the plaintiffs, through her claimed the benefit of the statute of limitations; that in case it should be found that the said last mentioned land did pass under the will, the plaintiffs submitted they were entitled to the bequests made to them: and the plaintiffs claimed that the will might be set aside, and Jane Barnes declared to have died intestate as to the said last mentioned land; that the rights and interests of all parties might be declared; that the last mentioned land and premises might be sold or partitioned; that the legacies given under the will might be paid, and for other relief.

The will in question was produced at the trial and was so far as material, as follows:

"I, Jane Barnes, of the township of Raleigh, and county of Kent, * * bequeath to my son Thomas Larke, the south quarter of lot 20, concession 9, township of Raleigh, being 50 acres, and to my daughters Violetta Barnes and

Martha Beaury, the east quarter of said lot, being 50 acres, to be equally divided between them. I will to my daughter Isabella Higgins $200, to be paid to her by my said daughters Violetta Barnes and Martha Beaury. * * I appoint my brother James Stover my trustee and executor to this my will. In witness, whereof," &c.

By his statement of defence, Thomas Larke claimed to be sole heir-at-law of his father, and as such entitled to the said south half of lot 20, in concession 8, in fee simple, subject to the dower of Jane Barnes, who, as he alleged, subsequently to the death of Richard Larke, and until her death continued to reside upon and occupy the whole of the said lands, by and with his consent and concurrence as his tenant, and subject to his right and title therein; and who always admitted his title to the said lands, and never acquired title to the said lots by possession or otherwise, or had any power to devise the same.

The other defendants by their pleadings denied that the will in question was executed under undue influence, and set up other defences not necessary to be mentioned here.

The action was tried at Chatham, June 13th, 1885, before Ferguson, J.

Wilson and *Rankin*, for the plaintiffs.
Pegley, for the defendants.

It appeared that, by letters of guardianship issued out of the Surrogate Office of the County of Kent, Jane Larke was appointed guardian of her five infant children, Martha, Mary, Thomas, Jane, and Isabella.

In the course of the trial evidence was offered of certain extrinsic facts to explain the mistake in the number of the concession in the will, and evidence was also offered that Mrs. Barnes never claimed the lot as her own, but spoke of herself, on different occasions, as keeping it for her son, but this evidence was ruled out by the learned judge, who, on September 11th, 1885, gave judgment as follows:—

FERGUSON, J.—As to the will I am of the opinion that it did not pass the lots in question. I think there is not any sufficient ground for saying that the case is distinguishable from *Summers* v. *Summers*, 5 O. R. 110, and I think it has been made to appear that the late Jane Barnes died intestate as to this land. I am of opinion that the late Jane Barnes acquired a title to the land in question by length of possession of the same. I cannot think that she was caretaker only for the period of twenty-two years, nor do I think that it can be considered that she continued trustee or agent for that long period; and I think the evidence shews that she had possession in the ordinary way as for herself. There is not, I think, what can be called a written acknowledgment of title signed by her within the meaning of the statute. I think the late Jane Barnes died seized of the lands, and that the plaintiffs are entitled to the partition that they ask. As to the costs of the litigation it appears to me that the property was left by the intestate in such a position of doubt that litigation respecting it would reasonably be expected, and I think I shall not be going wrong in saying that the case falls under the class of cases in which it has been considered proper that the estate should bear the costs of the litigation respecting it. Costs of all parties out of the estate. Reference to the master here.

The defendants served notice of appeal to the Divisional Court against the above judgment, and asking for a new trial on the following grounds:

1st. That the decision and judgment given by the learned judge upon the hearing of the case, was against law, evidence, and the weight of evidence.

2nd. On the ground of the refusal of the learned judge to receive evidence tendered to explain the mistake in the number of the concession in said will.

3rd. On the ground that there was no evidence of possession sufficient to give Jane Barnes title as against the defendant Thomas Larke, and that there was sufficient

evidence to take the case out of operation of the statute of limitations, and to show acknowledgment of title in said Thomas Larke, and to show that said Jane Larke (or Barnes) was in possession as the agent and caretaker of said Thomas Larke.

4th. And on the ground of the rejection of parol statements made by said Jane Barnes during her life to shew that she was the agent and caretaker of the said Thomas Larke, and that she held possession of the said lands as such agent and caretaker only, and not in her own right.

The matter came up for argument on December 12th, 1885.

James Maclennan, Q. C., and *C. E. Pegley*, for the defendants. The mother was in the position of an express trustee under the letters of guardianship. She obtained possession as express trustee, and must have continued to occupy in that character: *Thomas* v. *Thomas*, 2 K. & J. 79; *Re Taylor*, 28 Gr. 640; *Petre* v. *Petre*, 1 Dr. 371; *Cook* v. *Grant*, 32 C. P. 511; *Johnston* v. *Oliver*, 3 O. R. 26; O. J. A. 1881, sec. 17, sub-sec. 2. Whether, however, a trustee or not, the mother was in as a bailiff for her son. If she did any act inconsistent with that character, it was a wrongful act; *Kennedy* v. *Lyell*, 15 Q. B. D. 491; *Ryan* v. *Ryan*, 5 S. C. R. 387 As to the will, and the admissibility of extrinsic evidence, we refer to: *Re Shaver*, 6 O. R. 312; *Doe Lowry* v. *Grant*, 7 U. C. R. 125; *Summers* v. *Summers*, 5 O. R. 110; *Campbell* v. *Campbell*, 14 U. C. R. 17; *Nicholson* v. *Burkholder*, 21 U. C. R. 108; *Re Callaghan*, 8 P. R. 474: *Lindgren* v. *Lindgren*, 9 Beav. 358.

Wilson, for the plaintiffs. Thomas Larke does not defend on the ground that his mother was in as caretaker; he sets up that she was in possession as a tenant of her son, and evidence was sought to be given of admissions by her admitting his title. Evidence was not put in on the ground that she was a caretaker, but even if it had been it was not admissible. The trusteeship ceased when the son

attained 21 years of age: 38 Vic. ch. 16, sec. 16, (O.); 42 Vic. ch. 16, (O.); *McDonald* v. *McIntosh*, 8 U. C. R. 388; *Laidlaw* v. *Jackes*, 25 Gr. 293, 27 Gr. 101; R. S. O. ch. 108, secs. 4, 12, 14, 29-33; *Doe Quinsey* v. *Canniffe*, 5 U. C. R. 602; *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486; *Davidson* v. *Boomer*, 15 Gr. 218.

Maclennan, in reply, This action is for possession of land, and we say simply that we are in possession, and all defences are open: O. J. A. 1881. Marg. r. 144. Evidence should have been accepted of admissions on the part of Mrs. Barnes, that she was in as caretaker. On the question of express trust, I refer to *Lewin* on Trusts, 8th ed., 877; *Salter* v. *Cavanagh*, 1 Drew. 310; *Mutlow* v. *Bigg*, L. R. 18 Eq. 246; S. C. 1 Ch. D. 385; Macl. Jud. Act, 2nd ed., p. 24.

December 23rd, 1885. BOYD, C.—Contrary to the impression I had at the close of the argument I am now of opinion that the judgment below should be affirmed, and that a new trial should not be ordered. There was in strictness no tender of evidence which might aid in the construction of the will; but assuming that it could be proved that the testatrix had no other land than lot 20 in the 8th concession of Raleigh, this would not affect the result. The admonition addressed by Lord Wensleydale to the Irish courts in *West* v. *Lawday*, 11 H. L. C. 375, is of prime importance. He says (at p. 388): "The duty of the courts in the construction of all wills is not to speculate upon the meaning of the words used by the testator which lets in the consideration what he intended to have done; but to recollect strictly that their duty is to look at the words of the will and see what the words of the will mean. * * The duty of the judges is to ascertain the meaning of the words of the will."

Following up that cardinal rule Lord Hatherley, in *Gordon* v. *Gordon*, L. R., 5 H. L. 254, advises (at p. 271), that in construing a will, if the words are themselves of doubtful meaning, the circumstances of the case may be referred

to for the purpose of assisting in the explanation, but must not be employed to shew the construction to be doubtful in order to enable the court to make what appears to be a more reasonable will for the testator. So again in *Martineau* v. *Briggs*, 23 W. R. 889, the House of Lords laid it down clearly that the argument *ab inconvenienti* cannot legitimately be resorted to unless there is ambiguity on the face of the will: see per Fry, J., in *Homer* v. *Homer*, L. R., 8 Ch. D., at p. 762.

The devise here is of the South ½ of lot 20, concession 9, township of Raleigh, to her son Thomas, and the East ½ of said lot to her two daughters. I do not perceive anything else in the will which can be brought in to aid in the interpretation of this clause. That being so, the devise is in its terms free from all ambiguity; it is not inherently absurd or insensible; it is not inconsistent with any context. The maxim pertinent to such a case is "*quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verbis expressa fienda est*," *Co. Litt*, 147 a. There is one single specific description of a particular lot of land; whether owned by the testatrix or not now appears to me to be a fact immaterial.

It is difficult, perhaps impossible to reconcile all the cases decided upon the admission of parol evidence to aid in the interpretation of wills. That is especially so in the particular instance we are now called upon to consider, where the property described in the will is not the property of the testator, and it is sought nevertheless to make the will operative upon what the testator owned. In our own courts, *Summers* v. *Summers*, 5 O. R. 110, more nearly approaches this case than does *Re Shaver*, 6 O. R. 312. In the latter case the description of a lot as the "S. W. ¼" was read so as to apply to the "S. E. ¼," and I thought that was justified by the holding of the full Court upon a similar error in *Re Callahan*, 8 P. R. 474. In *Summers* v. *Summers* the lot really owned by the testator was "lot 21 in concession 10," what he devised was "lot 14 in concession 10," and my brother Ferguson held that the former lot did not pass by the will and could not be made to do so by any oral evidence.

One of the earliest English cases, *Pacey* v. *Knollis*, Brownl. 131, 8 Vin. Abr. 277, pl. 7, appears to go a long way in favor of the appellant in this case. The meagreness of the report, however, lessens its value as an authority. It is thus noted in Viner: "The testator devised all the profits of his houses and lands lying in the parish of Billing, and in a street then called Brook's Street, to his wife for life, when in truth there was no such parish as Billing; but the land supposed to be devised laid in Billingstreet. The will was held by all the court to be good." The latest English case which I have found, decided by Hall, V. C., in 1876, *Barber* v. *Wood*, 4 Ch. D. 885, is opposed to the success of the present defendants. This is the head note: "Testator devised his freehold property in M. in trust for his children equally. He had no freehold property at M.; but he had two undivided fourth shares at R. which M. adjoined and in which parish M. was situate. *Held*, that the property in R. descended to the heir-at-law."

The decision in *Doe Lowry* v. *Grant*, 7 U. C. R. 125, is in the same line with that in *Brownlow*, though the early case is not there cited. The testator declared by his will that he intended to devise all his lands in Huntley. It appeared that he had four parcels there, and he devises four parcels in Huntley to his two sons to be equally divided. By mistake he misnamed one of the parcels as being lot 26, in the 6th concession, whereas it was really lot 22, in the 6th concession. Upon evidence of the surrounding circumstances as to the state of his title and situation of the land, the court held that lot 22 passed by the devise. It was a case in which the maxim *falsa demonstratio non nocet*, was strictly applicable. By extrinsic evidence the error in description was ascertained, and being rejected there was a sufficient description left to identify the land for the purposes of the will. That case falls within the rule subsequently condensed from the authorities and enunciated by Page Wood, V. C., in *Stanley* v. *Stanley*, 2 J. & H., at p. 573, that if you can, from all the expressions used throughout the will, together with

the surrounding circumstances, arrive at a clear conclusion, then and then only are you entitled to strike out or alter qualifying words.

In *Hardwick* v. *Hardwick*, L. R. 16 Eq., at p. 175, Lord Selborne is thus reported: "It is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence so as to exclude [qu. include] anything which any part of those terms does not accurately fit. On the other hand, I apprehend that if the words of description when examined, do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded."

Neither of these rules as stated by the Vice-Chancellor or the Lord Chancellor, can aid in the will now before us. There is no conflict upon different parts of the description of what is devised: the description is single and relates to a defined lot without any modifying or qualifying or assisting words to ascertain what is meant. Assume that oral testimony would disclose that the lot described in the will was not owned by the testatrix, but that a lot the same number in an adjoining concession was owned by her, what result properly follows? If you may delete the erroneous concession, and if you have a sufficient description left, the will may pass the land. The description left (after rejecting the concession) would be a devise of the south quarter of lot 20 in the township of Raleigh to the son and of the east quarter of the same lot to the daughters. Is that a sufficiently precise description of the lot? Is there any right to reject the concession stated in the will? My difficulties begin with the first step. What right is there to reject the concession stated in the will? It is not enough to say that she owned no land in that place. Such variance be-

tween the lot she owns and the lot she names in the will is not an instance of latent ambiguity or equivocation. She owns one thing; she devises another thing: evidence is not admissible to shew that these are identical, or that the one means the other for the purposes of the will. The only such case in which extrinsic evidence is to be received is where the description *in all its parts* is equally applicable to two things: Cairns, L. C., in *Charter* v. *Charter*, L. R. 7 H. L., at p. 377.

Difficulties appear to multiply with the next step. If by the effect of extrinsic evidence we render uncertain that which on the face of the will is certain, then we create an unnecessary ambiguity, and to remedy this we need further evidence to clear up the uncertainty. Having eliminated the concession as erroneous, we have to determine which lot is the one devised.

There are I suppose a dozen or more lots numbered twenty in the township of Raleigh; which is it to be? From the language in the will, if that is to be alone regarded, you cannot determine. If going outside of the will you introduce the assumption or the presumption that the testatrix meant to devise her own land, then you can arrive at certainty on the principle *id certum est, &c.* It is clear that no evidence of the testator's *intention*, or of circumstances to indicate intention, can be given to explain the will when it embodies no latent ambiguity. If not, I do not see how any assumption can be legitimately made that this testatrix intended to devise the land she lived on or owned. She may have thought that she had an interest in the lot actually named in the will, or she may have intended to procure that lot, and devised it in anticipation of such acquisition. All evidence on these heads is shut out, so that as a general rule it would be unsafe to conjecture what she meant. The rule must be *non quod voluit sed quod dixit.* It does not necessarily or infallibly follow that having but one lot she intended to devise that one. The conjecture that she so intended may be so strong as to fall little short of certainty; but that little involves a doubt

which cannot be solved by judicial inference. If the testatrix had said, "I devise my lot, being No. 20 in the 9th concession of Raleigh," then there would be something in the will itself to correct by. There would be then, practically, two descriptions, *i. e.*, her lot No. 20 in Raleigh and her lot in the 9th concession. You could then prove *ab extra* that the 9th concession was an erroneous designation and one that did not square with the rest of the description: *Welby* v. *Welby*, 2 V. & B. 191. This would be a case of *falsa demonstratio*, for enough would be left to render the will operative as to the particular land intended and defined.

I am inclined to think that I went too far in *Re Shaver*, but sitting here in Divisional Court I am not bound by it. It was not a contested case and was indeed disposed of *ex parte*. So was *Re Callaghan*, which of course we cannot overrule and might be bound to follow in a similar case. *Re Callaghan*, however, does necessarily involve the same question as is now under consideration.

Upon the rest of the matters argued by Mr. Maclennan, I had and have no doubt that we ought not to interfere. The mother ceased to be guardian when her son attained his majority, and thereafter was in possession of the land as a stranger. She dealt with it as her own—rented it in her own name, received the rents and never accounted to him or pretended to be holding it for him: *Thomas* v. *Thomas*, 2 K. & J. 79, which was much relied upon, does not appear to decide more than is set forth in the head note—namely, that when a father enters upon the land of his infant children, the Statute of Limitations does not begin to run against the children until they attain twenty-one years, and from that time at least a child has twenty years within which he may recover possession. Here the widow was in sole possession for some twenty-two years after her son attained twenty-one, and I think her title by the statute was perfect as against him. Her continuance in possession after the expiry of the letters of guardianship, would not be in the character of express trustee within

the meaning of the Statute of Limitations. See *Sands* v. *Thompson*, 22 Ch. D. 614.

The alleged answer to the Statute of Limitations by an averment that evidence can be given on a new trial that the mother was in possession as caretaker for the son, is evidently an after-thought. The son's pleading is, that she was in as his tenant; in the character he now seeks to clothe her with, she would be in law his servant and not tenant: *Yates* v. *Charlton-upon-Medlock Union*, 48 L. T. N. S. 872.

The result is, that the application should be refused and the judgment affirmed with costs.

PROUDFOOT, J.—The plaintiff claims that the widow obtained a title to the land by possession, and that, having misnamed the lot in her will, she died intestate as to the land.

For the defendant, Thomas Larke, it is contended that the intestate having died before 1852 he became sole heir-at-law. That his mother, the widow, was appointed his guardian by the Surrogate Court, and that during his minority she could not claim title by possession, being trustee under an express trust; and that during the time that has elapsed since he attained majority, a period of more than ten years, she occupied and rented the land as tenant for him, and therefore could not acquire a title by possession.

There can be no doubt, I think, that the trust imposed upon the widow, by the operation of the appointment by the Surrogate Judge and the statute empowering him to make the appointment, was an express trust, and therefore during the minority of the heir she could acquire no title against him by possession: C. S. U. C., c. 74 (R. S. O., c. 132,) and C. S. U. C, c. 88, s. 32 (R. S. O., c. 198, s. 30.)

But the guardianship ended and the trust ceased upon the heir attaining his majority. It is true, indeed, that if the guardian had continued the management of the property for the benefit of the heir after that period she might be considered as a trustee for him. But in that

case I apprehend she would be a constructive trustee, not an express one. There is no allegation, and no pretence, that the guardian had to account for anything received by her during the guardianship. And after that she seems to have dealt with the property as her own. Making leases in her own name, &c.

Under the Limitation of Actions Statute (C. S. U. C., c. 88, s. 15) R. S. O., c. 108, s. 13, an acknowledgement of title must be in writing. But evidence for the purpose of showing that the occupant was in the position of caretaker, or agent for the owner, may be given by parol: *Doe Quinsey* v. *Caniffe*, 5 U. C. R. 602; *Doe Perry* v. *Henderson*, 3 U. C. R. 486, 500; *Ryan* v. *Ryan*, 5 S. C. R. 387; *Johnston* v. *Cliver*, 3 O. R. 26, and had that defence been raised upon the pleadings, the evidence, if tendered, should have been admitted. But unfortunately for the defendant he has not defended upon the ground that his mother was caretaker for him. He indeed claims to have been in possession through his mother, but through her as tenant, of which there is no evidence; so that he does not bring himself within the provision of the Judicature Act that enables any defence to be given by a defendant who is in possession: *O. J. A.*, 1881, Marg. r. 144.

The mother having become owner, it is necessary to inquire if evidence could have been given to shew that lot 20, in the 8th concession should pass, or was intended to pass, instead of lot 20 in the 9th concession, which was mentioned in the will. The parol evidence proposed to be given, did not raise a latent ambiguity. To shew that she did not own lot 20 in the 9th concession, is no evidence of an intention by her to devise lot 20 in the 8th. It is not like the case of *Doe Lowry* v. *Grant*, 7 U. C. R. 125, where the testator declared his intention to dispose of all his real property, and then proceeded to dispose of the lots of which it was composed, and erroneously named among them the north half of lot 26, in the 6th concession, instead of the north half of lot 22 in the 6th concession. The testator did not own the north half of lot 26, and he did

not expressly dispose of the north half of lot 22. He intended to devise all his real estate, but if lot 26 remained in the will, he had not disposed of it all. The evidence thus raised a latent ambiguity, and it might be removed by parol: *Miller* v *Travers*, 8 Bing. 244, 1 M. & Sc. 342.

The cases in the American courts are conflicting; but the great preponderance of authority is against the admission of such evidence: *Judy* v. *Gilbert*, 77 Ind. 96, 40 Am. R. 289.

It is material also to observe the operation of the recent Wills Act, which makes the will to speak from the death.

The fact of a testator not having a particular piece of land at the date of the will, forms a much less conclusive argument than formerly against an intention to dispose of it. For the testator may have contemplated the acquisition of the property devised to satisfy the terms of the devise in their strict acceptance: *Jarman* on Wills, Randolph's Am. ed., vol. 1, p. 739.

On the whole, I think that such evidence is not admissible, and that the judgment should be affirmed, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MILLER v. CONFEDERATION LIFE ASSURANCE COMPANY.

Life insurance—Suppression by insured—Right to begin at trial—Discovery of new evidence—Direction to jury—New trial.

At the end of questions in an application for insurance, made in December, 1883, and forming part of the application, was an agreement signed by insured stating that he warranted and guaranteed that the answers to the said questions were true to the best of his knowledge and belief, and he also agreed that the application should be the basis of his contract, and that any mis-statement or suppression of facts in the answers to said questions, or in his answers to the medical examiner, should render the policy null and void. The proposals and declaration were also made the basis of the contract.

Endorsed on said application were answers given to questions by a medical examiner, and at the end thereof a certificate, signed by insured, stating that he had made full, true, and complete answers to the questions propounded by said examiner, and agreed to accept the policy on the terms mentioned in the application.

In answer to a question whether he had had any serious illness, local disease, or personal injury, and if so of what nature, insured answered, "No, except a broken leg in childhood."

There was an answer to a question, giving one T.'s name as that of his usual medical attendant, and in answer to another question, whether he had consulted any other medical man, and if so for what and when, insured replied, "Dr. A., for a cold."

Insured had been thrown from a load of hay, and on his examination, in a suit for damages against the municipality, he swore he had been five weeks in bed suffering from his chest and was at that time unfit for work of any kind, and had been attended by three doctors. No mention was made of this accident or of the doctors.

In reply to a question whether his grand-parents &c., brothers &c., ever had pulmonary or other constitutional disease, he replied, "No;" and he also stated, in reply to questions as to what disease his brother had died from, that he had died from over-growth.

It was shewn that an elder brother had been treated by Dr. A., some years before, for pulmonary affection, and that insured had said that the brother who died had bled at the lungs and had been ill for some months before he died. Insured, also, in answer to a question whether any material fact bearing on his physical condition or family history had been omitted, replied "No."

Defendants admitted policy, proofs of death, probate, &c., and accepted burden of proof at the trial, and claimed the right to begin, which was refused.

On motion in Term, copies of letters and documents, signed by insured, sent to the government for leave to remain off a homestead in the North-West, and shewing that he had been suffering from congestion of the lungs and illness, from the spring of 1883 to the spring of 1884, were produced. It was shewn that the existence of some such documents had been suspected and that they had been searched for in all the government offices but could not be found, and that defendants received them the day after the trial.

Held, that the plaintiffs had the right to begin, notwithstanding such admissions.

WILSON, C. J. reserved the consideration of the admission of the new evidence.

Per ARMOUR, J. It could not be received, as it was merely corroborative, and its suspected existence would have been ground for asking to have the trial postponed.

Per WILSON, C. J. There should be a new trial. There was evidence to go to the jury as to the truth of answer given respecting the health of the deceased brother. The jury should have been asked to say whether the answer as to inquiries was a misrepresentation in fact: that the certificate meant the answers were given upon a knowledge of the facts and upon insured's belief in the truth of those facts; and a statement made without knowledge would not be protected by the formula, "best of knowledge and belief," if insured had no knowledge; nor would such statements be protected if made regardless of insured's belief in the truth of such knowledge as he had. The proposal was a warranty that the answers were true according to *the best* of his knowledge.

Per ARMOUR, J. The direction to the jury, whether insured had stated to the best of his knowledge and belief the truth in regard to deceased's brother, was sufficient.

As to the accident, it was one which ought to have been mentioned, but it was probably considered of too little importance by insured, or else had escaped his memory at the time of the application, and it was sufficient for the jury to have found insured did not wilfully withhold the fact, but answered to the best of his knowledge and belief; and the proposals were not warranties.

The court being equally divided the motion for a new trial was dismissed, with costs.

ACTION on a life policy.

Defence.

False answers to questions, contained in the proposals for an application, on the part of the insured.

The case was tried at the last Autumn Assizes, at Toronto, before Galt, J., and a jury.

The facts appear in the headnote to the case and in the judgment.

The jury found for the plaintiffs, and a verdict was entered in their favour for $10,000 and $228 interest.

December 11, 1885. *S. H. Blake*, Q. C., and *Allan Cassels*, moved to set aside the verdict and judgment and to enter a nonsuit or judgment for defendants on the law and evidence, and weight of evidence; or for a new trial, on the grounds: 1. Because the learned judge refused to defendants the right to begin at the trial. 2. Misdirection in charging that the jury were to consider (*a*) whether the misrepresentations made by the assured were material to the risk instead of merely the truth or falsity thereof; (*b*), whether the misrepresentations were true to the best of

his knowledge and belief, instead of merely whether true or false; (*c*), whether the omission to mention the names of Drs. Lapsley and Armstrong, in answer to questions 17 and 18 in the application, was a wilful misrepresentation and not reasonably fair and truthful, instead of the mere truth or falsity of such answer; (*d*), that it was impossible for any one to testify as to the general state of health with reference to pulmonary, scrofulous, or constitutional diseases of his grand-parents, uncles, and aunts; and that they must consider whether the assured wilfully made a false statement when he answered "No," to question No. 13 b., and made no reference to the fact of his brother John and his brother William having had pulmonary disease, but stated, in answer to No. 12, that William died from over-growth, whereas the jury should have been directed to consider only the truth or falsity of the answers. 3. There was no evidence that William died from pulmonary disease. 4. The jury should have been told that the certificate given by the assured upon the application was equally a warranty with that given on the medical examination; and they should have been told that that given by the assured was part of the contract made by him with the company, and by it he agreed, if there was any misrepresentation or suppression of facts, the policy should be void; and if the jury found any untrue statements or any suppression in his answers either to the application or to the doctor, the policy was void. 5. The evidence of the assured, in his action against the township of Scarborough, was conclusive as to the truth of the facts therein deposed to, and they were not to consider whether the assured had wilfully concealed the Scarborough accident from the company or forgotten it, but whether it happened and was in fact suppressed; whereas the jury were directed only to consider whether the assured wilfully concealed said accident from the company, or whether it had escaped his memory. 6. On the ground of the discovery of new evidence, &c.

S. H. Blake, Q.C., and *Allan Cassels*, in support of the motion, cited *Jacobs* v. *Equitable Ins. Co.*, 17 U. C. R. 35, S. C. 19 U. C. R. 250, 257; *Hickman* v. *Fernie*, 3 M. & W. 517; *Taylor* on Evidence, last ed., sec. 379; *Casinove* v. *British Equitable Ins. Co.*, 6 C. B. N. S. 437; *Fowkes* v. *Manchester and London Life and Loan Association*, 3 B. & S. 917, and per *Blackburn, J.*, at p. 928; *May* on Insurance, secs. 185, 201, 203, 204, 206; *Thomson* v. *Weems*, 9 App. Cas. 671; *Lazare* v. *Phœnix Ins. Co.*, 8 C. P. 136; *Bliss* on Insurance, 2nd ed., sec. 371; *Jeffries* v. *Life Ins. Co.*, 22 Wallace 47; *Ætna Life Ins. Co.* v. *France et al.*, 1 Otto 510; *Duckett* v. *Williams*, 2 Cr. & M. 348; *McDonald* v. *Law Union Fire and Life Ins. Co.*, L. R. 9 Q. B. 328; *Moore* v. *Connecticut Life Ins. Co.*, 3 A. R. 230.

McMichael, Q.C., and *McCarthy*, Q.C., contra, cited *Jones* v. *Provident Ins. Co.*, 3 C. B. N. S. 65.

March 8, 1886. WILSON, C. J.—The defendants complain they had the right to begin at the trial, and I do not feel surprised they claimed such right, because all the plaintiffs' counsel did in opening the case was to put in the policy, and the probate, and the proof papers, none of which were denied by the defendants, and there they stopped their case.

They did not meet the denials of their claim as set up in paragraphs 20, 23, 24, 25, and 26 of the statement of defence; and the defendants' counsel allowed that to be done, thereby undertaking a greater amount of proof which rested properly upon the plaintiffs. Upon the case, as it stood when the plaintiffs' counsel closed it, the plaintiffs might have been nonsuited unless they undertook to go further, for upon such a state of things the plaintiffs could not have had a verdict in their favour.

The plaintiffs were bound to prove the truth of the answers to the application upon which the policy was founded. The pleadings shewed to what extent they were bound to do so: merely putting in the policy and the proof of death did not shew the plaintiffs were entitled to recover.

If the defendants had not appeared by counsel at the trial the plaintiffs could not have claimed merely to assess their damages at the sum insured for; they must have had to prove their claim so far as the burden of proof lay upon them: Rule 268.

The case of *Geach* v. *Ingall*, 14 M. & W. 95, above referred to, shews the plaintiffs were bound to begin, and that they should have proved their case in full, without resting it, and being allowed to rest it, where they did. See also *Rawlins* v. *Desbrough*, 8 C. & P. 321; *Soward* v. *Leggatt*, 7 C. & P. 613.

That objection must now be over-ruled, although the burden of proof did rest upon the plaintiffs. The true objection is, the plaintiffs did not prove their case, but the defendants assented to that course being taken, and undertook the burden of proof themselves; that is, they undertook to repel proof of the plaintiffs' case, which should have been given, but was not given.

As to the charge of misdirection by the learned judge, it is true the learned judge said that no one could tell what the general state of health of his grandparents, or of his uncle and his aunts was, and he therefore drew the attention of the jury more especially to the question so far as it affected the brother of the applicant. The learned judge said the applicant was asked whether there had been any pulmonary, scrofulous, or other constitutional disease in the family, and he answered, no. The learned judge then said: "The company say, with regard to the elder brother, that he had an attack from which it may be supposed that he had pulmonary disease. Now ask yourselves, gentlemen—these parties—consider the state of life in which they are—they were ordinary respectable men living on their property, and it appears that twelve years before this, I think it was twelve years past, the elder brother had a cough, and they say he spat blood three times, but never did after—ask yourselves if it would be reasonable to say this man wilfully made a false statement when he answered 'No' to that question."

The evidence as to John Miller is that he stated in his examination before the master that he had consulted Dr. Aikins "for a weakness, or something, of a lung trouble, and that he spat blood three times; that was twelve years ago. His brother George very likely knew of it; he was a young fellow at the time."

The first question for the jury was, whether the applicant did *in fact* make a false statement respecting his elder brother. If he did, was it false to his knowledge or belief, or had he any knowledge or belief about it one way or the other?

The learned judge proceeded: "With regard to his younger brother, William, he answered that he, William, was overgrown. The company say that at the time George Miller answered these questions he knew all about the facts. We all know that young people have died very often from overgrowth. Is it necessary that they should die from consumption? He died when a lad of seventeen, and that is all we know about it. Would you say, as regards that brother, there was a wilfully false statement made to those parties to induce them to enter into this contract?"

The evidence as to William was, that the widow of the applicant, in her examination before the trial, said: "Her husband told her once William had bleeding of the lungs; don't know if he said so more than once; but once he said he had gone for the doctor in a great hurry for bleeding. He did not say at the lungs."

John Miller, in his examination, said: "He brought William, his brother, to Dr. Aikins about six months before William died. The doctor said William had a slight inflammation in the lower part of the right lung, and the doctor thought William could get rid of it without much trouble, and he put a sticking plaster on. William had bleeding before his death."

Upon that evidence there was a case for the jury as to the truth of the answer the applicant gave as to the state of health of his brother William. It is a pretty strong

way of putting it whether the jury thought the applicant had made a *wilfully wrong* statement as to William Miller's state of health; but in substance it may not be objectionable. There was more, however, to be considered with respect to William than that he was only an overgrown lad of 17 when he died: the state of health, which might have been caused by too rapid a growth, had to be answered as well as the immediate cause of his death.

Then, with regard to the applicant himself. He said he had a leg broken in childhood, and he had been confined two or three days from cold. He made no reference to being thrown from a load of hay in 1880, three years before his application; he passed that over, and he mentioned a broken leg he had in childhood, probably twenty years before the time of his application; and the learned judge said that in his examination for damages for the injury he had received by being so thrown he no doubt represented his injury to be pretty serious for the purposes of that action; but the question was, "did he wilfully conceal from the defendants he had sustained this personal injury, or was it, in fact, a matter that had really gone altogether from his mind, and to which he gave no attention?"

Mrs. Miller, in her examination before the trial, said she did not know her husband was longer in bed than two or three weeks after his fall from the load of hay. He had to walk with a cane for a while, as his back hurt him.

Dr. Lapsley, who attended the applicant immediately after that fall, said he did not consider it a serious injury.

The applicant, in his examination against the township of Scarborough for that injury, said: "I was much hurt; no bones broken; hurt in my back, hips and chest; could not move my legs to any extent or walk; was partially stunned by the fall; got up from bed the first time in five weeks after; I feel the accident still [June, 1880]; while on the journey from the hotel at Woburn, to which I was taken after the hurt to my house, I did not think I could reach home; I nearly fainted when they raised me off the

bed to put on my clothes before starting; to that time I had splendid health; have not been able to do anything in the shape of work since my back has been so weak; Dr. Armstrong attended me after I was taken home; he cupped me on 1st June, 1880, for the pain in my back." That was four and a half months after the fall.

That was a matter calling for more consideration than that the applicant at the time of that action was trying to make out a case to inflame his damages before the jury. The question was, whether he purposely concealed all about that accident from the company, and whether it was an intentional misrepresentation in fact.

Besides the question as to his brothers and as to the applicant himself, before referred to, 14*a*, there remain:

16*b*. "Are you now affected with any disease, disorder or ailment, or are you aware of any symptoms of any?" to which the answer was, "No, except a cold."

18. "Have you consulted any other medical man? If so, for what and when?" to which the answer was, "Dr. Aikins, of Toronto, examined me the time I was sick from cold." And

20*s*. "Has any material fact bearing upon your physical condition or family history been omitted in the foregoing questions and the answers thereto?" to which the answer was, "No."

These have to be considered.

The 1st relates to his health.

The 2nd to consulting medical men; and

The 3rd as to the omission to answer fully.

As to the general health of the applicant, Mrs. Miller, in her examination, said her husband, in October, 1883, was suffering from a cold and he sent for Dr. Tabor, who said her husband had inflammation or congestion; and she had said, at a former examination: "I think my husband had inflammation or congestion." Her husband, in August, 1883, went with his brother John to Toronto to consult Dr. Aikins; and it was said the doctor stated he would pass the applicant for an insurance for $50,000.

John Miller, in his examination, said he went with the applicant, in August, 1883, to consult Dr. Aikins, who said there was nothing the matter with him: that the applicant had been ill eight or ten months before he died [he died on the 11th of August, 1884, and the application was taken on the 5th of December, 1883]: that George had a bad cough in May, 1884, and for two or three months before it; and that George bled two or three times before he died.

Mrs. Miller said her husband caught a bad cold in February or March, 1884; he coughed pretty hard sometimes after that, and his cough bothered him till the time of his death; and he bled, when last time in Manitoba, twice.

The applicant died when about thirty years of age.

The evidence as to his state of health shows that in October, 1883, Dr. Tabor stated the applicant had inflammation or congestion. I understand that to be of his chest or lungs. That, he said, was only a cold. He took a cold also in February or March, 1884, from which he never recovered, and he died in August after, having had several attacks of bleeding, I understand, from the lungs. These are very important matters, and taken in connection with the evidence as to the bleeding and illness of the brothers John and William, seem to require more consideration than the case, I think, has yet had.

Then, secondly, as to the medical men the applicant had consulted, and for what and when. He omitted all mention of Drs. Lapsley and Armstrong, who had attended him for the injury he had suffered when he was thrown from the load of hay, as he omitted all mention of that accident and injury.

Then, thirdly, the matter mentioned with respect to the preceding may be referred to here also, as it was a material fact bearing upon his physical condition, which he declared had not been omitted in these answers.

As to the state, then, of the applicant's health. The learned Judge placed the point in question upon which the jury had to find upon the fact of the statements of the applicant being or not being *wilful* misrepresentations,

because the answers to the defendants' agent were, as he held, made only according to *the best of the applicant's knowledge and belief*, and he told the jury that if they thought there was *wilful misrepresentation* to find for the defendants, but if they thought "*the answers reasonably fair and truthful, and that they reasonably covered the actual state of the deceased at the time he made them*, to find for the plaintiff. Again: "If the applicant made misrepresentations in regard to any matter of interest to the defendants his representatives cannot recover. If, on the other hand, you think he answered to the best of his knowledge and belief, and did not wilfully refrain from making any representations which ought to have been known to the defendants, then under the particular wording of this covenant you should find for the defendants."

The clause at the end of the examination by the defendants' agent is as follows:—

"I, the said George Miller [the person whose life is to be insured] do hereby warrant and guarantee that the answers given to the above questions [all of which questions I hereby declare that I have read or heard read] are true to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association; and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for and forfeit all payments made thereon; * * * and that this proposal and declaration shall be the basis of the contract between me and the said association."

The clause at the end of the examination by or of the medical man is as follows:—

"Examined at Whitevale, this 6th day of December, 1883. * * * Examining physician.

"I hereby certify that I have made full and complete answers to the questions propounded to me by the examining physician, and I agree to accept the policy, when issued,

on the terms mentioned in the within application, and to pay the association the premium thereon.

"Witness: J. R. TABOR,
"*Examining Physician.*

"GEORGE MILLER,
"*Applicant.*"

The applicant bound himself absolutely that his answers to the questions of the defendants' agent were "true to the best of his knowledge and belief." That means that the answers are given upon a knowledge of the facts he speaks of, and upon his belief in the truth of these facts. A statement made without knowledge would not be protected by the formula that it was made "according to the best of his knowledge," if he had no knowledge of the matter one way or the other and was speaking at random, although he happened to be correct in what he said; nor, if made with knowledge, would it be within the rule, if made regardless of the party's belief in the truth of such knowledge as he had upon the subject.

A person may be convicted of perjury who swears on his *belief* of facts which he knew not to be true.

The answer to question 13*a*, about his brother's state of health, to which he answered "No," may or may not be true according to the best of his knowledge and belief; that is, according to the knowledge and to the belief he had in the truth of his answer. The *wilfulness* of his alleged mis-statements may, in the sense of *purposely* or *intentionally*, be a sufficiently correct interpretation, although it is a stronger term than should properly have been used.

The same may be said of 16*b* and 20.

Then as to 14*a* and 18.

These would seem to be suppressions, as they cover the injury from falling from a load of hay; and the clause at the end provides expressly that "any mis-statement or suppression of facts made in any of the answers shall render the policy void."

I need only refer, out of the many cases cited, to the one of *Thomson* v. *Weems*, 9 App. Cas. 671, which reviewed those which were cited as English decisions.

In that case the insured was asked: 1. "Are you temperate in your habits?" and, "Have you always been strictly so?" The answers were: 1. "Temperate." 2. "Yes."

The insured, in his declaration for insurance which he signed, stated that the declaration was to be the basis of the assurance, and was to be considered as incorporated in and forming a part of the policy, and one of the provisoes was that if anything averred in the declaration shall be untrue the policy shall be void, and all moneys received by the company in respect of the policy shall belong to the company.

There was no fraud set up; but the defence was, that the statement of the insured as to his habits being temperate was untrue.

Held, the declaration of the assured and the policy shewed there was an express warranty by the assured that his statements were true.

Lord Blackburn said, in referring to the party forfeiting the payments he had made, and at the same time getting no benefit from the policy: "That no doubt is a bad bargain for the assured, if he has innocently warranted what was not accurate; but if he has warranted it, *untruth*, without any moral guilt, avoids the insurance;" and he referred to the language of Lord Lyndhurst, C. B., in *Duckett* v. *Williams*, 2 Cr. & M. 348, *S. C.*, 4 Tyr. at p. 242, in which the declaration subscribed for a policy provided that "if any untrue averment" was contained in the declaration, or "if the facts" required to be set forth, "were not truly stated," the policy should be void.

Lord Lyndhurst said: "For the plaintiffs it was urged that the words must mean *truly* or *untruly* within the knowledge of the party making the statement, and that if the insurer makes ignorantly and innocently a mis-statement he is not to forfeit, &c.; but that appears to us not to be the real meaning of the words: a statement is not the less 'untrue' because the party making it is not apprised of its untruthfulness. If the statement were untrue within the knowledge of the party making it, the assurance would be

void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and must therefore be so as to the first, for we should violate all the rules of construction by holding it material as to one consequence and not as to the other."

In *Anderson* v. *Fitzgerald*, 4 H. L., at p. 503, Cranworth, L. C., said: "Nothing, therefore, can be more reasonable than that the parties entering into the contract should determine for themselves what they think to be material; and if they choose to do so, and to stipulate that unless the assured shall answer certain questions accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answers will then avoid the policy."

The case of *Cazenove* v. *The British Equitable Assurance Company*, 6 C. B., N. S. 437, is also directly in point, that the untruth of a warranty in the policy avoids it, although there was no fraud, and although the jury found that no *material* information had been withheld from the insurers.

The answers of the insured to the agent of the company are required to be "true according to the best of his knowlege and belief"—not absolutely, as in the cases I have just referred to; and his proposal for insurance is a warranty with that qualification; and the insured agreed that any misstatements or suppression of facts made in the answers should render the policy void and forfeit the premium.

The learned judge was quite right in construing and in telling the jury the warranty was not absolute in form, but was qualified according to the best of the knowledge and belief of the insured; and in order to draw their attention to the difference between a mere untruth or mis-statement or misrepresentation made by, or suppression of facts on the part of the assured, which would not avoid the policy, and one which was made contrary or not according to the best of his knowledge and belief, the learned judge might perhaps have said that the misrepresentation or suppression of facts in any such respects must have been *wilful*;

that is, purposely or intentionally made; that is, the assured knowing to the contrary of the matters he was speaking to. It was not, however, quite a correct expression.

But it is scarcely credible he could have answered 14*a* as he did.—"Have you had any serious illness, local disease, or personal injury, and if so, of what nature"? "Broken leg in childhood, confined to bed three days from cold":—after being injured so much as he was by the fall from the load of hay; having had two doctors at different times to attend him for it; having had medical attendance for five months in consequence of it, and having brought an action to recover damages from the township for the injury he had sustained. And what is stranger still, omitting all mention of that occurrence which had happened only three years before, and mentioning his broken leg which had happened about twenty years before—that appears to me a suppression of fact contrary to the best of his knowledge, and the materiality or immateriality of it is not at all in question.

There should in my opinion be a new trial, as there has been no specific finding upon the alleged suppression.

There are some other questions also of importance which it might be better to have more specifically determined, such as 13*b*, 16*b*, 18, and 20.

ARMOUR, J.—I do not think that we can, consistently with the authorities, grant a new trial on the ground of what is called in the order *nisi* the discovery of new evidence. The existence of this evidence was known, and efforts were made to procure it for the trial; but no application was made to postpone the trial in order to procure it, and the defendants deliberately went to trial without it, and having so acted I do not think we ought to aid them now.

Besides, if anything, it is merely new corroborative evidence, and a new trial is never granted on the ground of the discovery of such evidence. It is, moreover, evidence not bearing directly but only inferentially upon the questions in issue.

The plaintiffs were clearly entitled to begin at the trial, and there is nothing in the objection taken in this regard.

The misdirection complained of was rested mainly upon the construction that was put by the learned judge upon the declaration appended to the application of the insured, which was in these words:

"I, the said George Miller, do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read or heard read) are true to the best of my knowledge and belief, and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for and forfeit all payments made thereon."

It was contended that the learned judge should have told the jury that the agreement "that any misstatements or suppression of facts in the answers to the questions aforesaid shall render null and void this policy" was an absolute one and was not at all controlled or qualified by the knowledge and belief of the insured.

This contention was wholly erroneous in my opinion, and I think the learned judge was right in construing the agreement as he did, as being qualified and controlled by the knowledge and belief of the insured, because "the answers to the questions aforesaid" were agreed by the insured to be true only to the best of his knowledge and belief.

The construction contended for would involve the conclusion that the defendant company had so framed the declaration as to entrap those applying for insurance by leading them to believe, by the first part of it, that the statements made in their answers were to be true only according to the best of their knowledge and belief; and yet binding them to their absolute truth by the subsequent part of the declaration.

The principles upon which this declaration is to be construed, prepared as it was by the defendant company, are fully laid down in *Fowkes* v. *Manchester and London, &c., Co.*, 3 B. & S. 917, and in the judgment of Lord St. Leonards in *Anderson* v. *Fitzgerald*, 4 H. L. Cases, 484.

I do not think that the learned judge is chargeable with misdirection in what he said about William Miller's death. I see no evidence from which it could reasonably be inferred that William Miller died of pulmonary disease; but this was beside the question, which was, whether the insured had stated the truth in regard to William Miller according to the best of his knowledge and belief.

I think that the charge of the learned judge was substantially right in point of law, and that there was no misdirection, certainly none by which any wrong or miscarriage was occasioned.

The next question is, was the verdict contrary to law and evidence? The principal ground of attack upon it is, that the insured omitted to state in his answers the injury he had received by the upsetting of his wagon, and for which he had brought an action against the township of Scarborough, and that Drs. Armstrong and Lapsley attended him for it. The omission as to the medical attendants is involved in the omission of the injury, and I treat them both, therefore, as one.

The injury was at the time a severe one, but not a serious one, according to Dr. Lapsley. The insured had altogether recovered from it, and it had no influence in promoting or accelerating his death. Still it was one which ought to have been mentioned in the answers to the questions propounded in the application. Why was it omitted?

This application was filled up, not by the applicant, nor by the local agent, but by the general agent of the defendant company. Was this injury a subject of discussion between the insured and this agent? Was it talked about, and was it considered of too little importance by the agent to be mentioned in the answers? We have to deal with this matter without the evidence of the insured, and

we must deal with it therefore with the utmost care, lest we do a wrong to his widow and children. Our experience tells us how careless agents are in filling up applications, how frequently they tell applicants that things are not necessary to be stated that afterwards turn out to be of the most vital importance. This agent was called as a witness by the defendant company. They knew whether this injury had been told of to him by the insured. He was not asked whether it was or not. It strikes me as singular that he was not. Mr. Reesor, the local agent of the defendant company, who doubtless knew that the insured had received this injury and had brought an action for it, was present when the application was filled up by the general agent. Is it not likely that he would have mentioned it? He was not called as a witness. Did the omission to state this injury arise from forgetfulness of it by the insured? It may be said that it is incredible he should have forgotten it. I have known and heard of many extraordinary instances of forgetfulness of matters as likely to make a lasting impression as a fall from a waggon. I may mention one which I have heard since the argument of this case. A Toronto barrister, now a learned Judge, whose good faith in making an application for life insurance would not and could not be questioned, had his life insured, and when the litigation of Moore and Connecticut arose he became alarmed and wrote to his insurers for copies of his applications, and found that he had omitted to state, in answer to a special enquiry on the subject, the only serious illness with which he had ever been afflicted, and that one, too, so important to be stated, as scarlet fever. If the Toronto barrister, in making his application for insurance, forgot his scarlet fever, is it not to be credited that this Markham farmer forgot his fall? After all, it is idle to speculate: it must be a question for the jury whether or not the insured honestly answered the questions according to the best of his knowledge and belief; and an important factor in arriving at a conclusion is, was the insured intending, at the time he made his application, to commit a fraud upon

the company? If there was any evidence of this I would certainly question the good faith of the answers; but if, on the other hand, the evidence shewed that no fraud was intended, it would go far with me in support of the good faith of the answers. Before I speak of this, I would ask what motive could the insured have had for concealing this injury, if he did conceal it? If he had concealed the fact that he then had a cold there might have been a motive in doing so; but there does not seem to have been any motive for concealing what he had long since recovered from.

Three circumstances were proved in evidence which convince me that no fraud was intended by the insured. First, he was persuaded by the representatives of the defendant company to insure his life, and they went to him for that purpose. Second, he insured his life upon the endowment plan, and not upon the basis of an ordinary life policy; the former costing annually $429, the latter costing annually $196.40, or a good deal less than half. Third, his persistent efforts to induce the defendant company to release him from the insurance contract.

These circumstances afford very strong evidence to show that no fraud was intended, and strongly support the good faith of the answers to the questions.

There is no evidence whatever to show that the answers to be given by the insured to the medical examiner, and which were given by him, were in any respect otherwise than true, full and complete, as he agreed they should be.

I do not think that there is any ground for setting aside this verdict, for after giving this case the most serious consideration, the more because the learned Chief Justice, in whose judgment I have the greatest confidence, has arrived at a different conclusion, I am unable to say that the jury have found a wrong verdict.

In my opinion the order *nisi* must be discharged, with costs.

I refer to *Jenkins* v. *Morris*, L. R. 14, Chy. Div. 684; *Solomon* v. *Bitton*, 8 Q. B. D. 176; *Hayes* v. *Union Mutual Life Ass. Co.*, 44 U. C. R. 360.

O'CONNOR, J., took no part in the judgment, not having been present at the argument.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

IN RE KNIGHT v. THE UNITED TOWNSHIPS OF MEDORA AND WOOD.

Prohibition—43 Vic. ch. 8, sec. 14—48 Vic. ch. 14, sec. 1—Certiorari—Colonization road—Repairs to—Title to land—Negligence.

Held, that a prohibition would not lie to the Fourth Division Court of the District of Muskoka, no notice having been given as required 48 Vic. ch. 14, sec. 1, (O.,) amending sec. 14 of 43 Vic. ch. 8, (O.,) disputing the jurisdiction of said Court; and that in any case prohibition would not lie in this case, the title to the road, upon which the injury complained of arose, not being in question, the road being a colonization road built by the government before the organization of the townships of Medora and Wood as a municipality, and the question arising not being one of title but of liability to keep in repair a road so built.

Per WILSON, C. J.—The road in question was a colonization road vested in "the Crown or in a public department or board," and which had not been renounced by proclamation, and the municipality were not bound to repair it.

The case was tried before the Division Court Judge, who gave his decision in favor of the plaintiff, but formally reserved the giving of judgment to a subsequent day, to enable the defendants to move for prohibition or certiorari. In the meantime the defendants gave the required notice.

Held, that the defendants could not thus wait and take the chances of a decision in their favor, and finding it adverse, apply for a writ of certiorari and properly obtain it.

Black v. *Wesley*, 8 U. C. L. J. 277; *Gallagher* v. *Bathie*, 2 U. C. L. J. N. S. 73, and *Holmes* v. *Reeve*, 5 P. R. 58, followed.

THIS was an action brought in the Fourth Division Court of the District of Muskoka.

The plaintiff by his statement of claim set forth (1) that he was a clerk in holy orders and incumbent of the Episcopal Church at the village of Port Carling, in the township of Medora; (2) that the defendants were the corporation

above named; (3) that on Sunday, the 19th day of October, 1884, the plaintiff, in pursuance of his duty, was driving along the public road in the township of Medora aforesaid, leading from Port Sandfield to Port Carling, and known as the Gravenhurst Road, and when near Massey's farm the plaintiff's horse broke through a bridge on said road, over which the plaintiff was gently driving, and injured the legs of said horse and otherwise damaged it, and thereby rendered it for thirty days unfit for use, and necessitated the employment of medical and other attendance and medicines for said horse, for which loss of the use of said horse and expenses and for damages generally the plaintiff claimed the sum of $70 damages.

The action came on for trial in the said Division Court on the 21st day of August, 1885, and after the examination of the first witness for the plaintiff had been entered upon Mr. Pepler, for the defendant, objected that as his defence was that the road belonged to the government, title to land came in question, and that court, therefore, had no jurisdiction, citing in support of his contention secs. 486, 489 and 502 Municipal Act (R. S. O., ch. 174); *Gilchrist* v. *Carden*, 26 C. P. 4; *Glancy* v. *Mariposa*, 13 C. P. 560.

The learned judge overruled the objection, stating that in his opinion the title to the fee in all roads was vested by the 487th section of the Municipal Act in her Majesty: that the duty of municipalities to repair was clearly imposed by the act irrespective of ownership, except in case of roads vested as a "provincial work" in her Majesty, as mentioned in 502nd section; and that therefore the question was not who owned the road, but upon whom was by that Act the duty imposed to repair, and upon whom rested the liability for damages occasioned by non-repair.

The case then proceeded, and at the close of the evidence, by consent of both parties, the further hearing of the case was adjourned to the court room at Bracebridge, at 3 p.m. of the 18th September, 1885. Mr. Pepler contended that the evidence shewed the road to be a government

road, and that therefore, under section 502 of the Municipal Act, defendants were not bound to keep it in repair until the issuing of the proclamation under that section. The learned judge said the proclamation by the section named was to declare the road no longer under the control of the commissioner of public works: that these colonization roads were not and never had been under the control of the commissioner of public works, but were roads constructed with moneys voted annually by the legislature for "colonization roads" (without specifying any particular road or roads), and which the commissioner of Crown lands expended in assisting the municipalities or the residents in unorganized townships to open up their roads or to repair roads already in existence. "In my opinion," he continued, "these roads are not provincial roads in the sense these roads are used in the 502nd section of the municipal act; if they were, like other provincial works, they would be under the control of the commissioner of public works and not of the commissioner of Crown lands, as they are. The 491st section of the municipal act declares that every road shall be kept in repair by the corporation within which it is situate, and that such corporation shall be civilly responsible for all damages sustained by reason of default to keep in repair. I also am of opinion that under the authority of *Lewis* v. *Radford*, 22 C. P. 18, the performance of statute labour on this road, as shewn by the evidence, is a sufficient assumption of the road by the municipality, even if it had been a government work, as to make them liable for damages resulting from non-repair. I, therefore, am of opinion plaintiff should recover, but as Mr. Pepler expresses the desire of applying for a writ of prohibition on grounds of want of jurisdiction, or for a writ of *certiorari* to remove cause to a superior court, I reserve rendering judgment herein to 18th October next to enable him to do so." On the 18th of October, 1885, on application of defendants' counsel, rendering of judgment was further postponed to 29th October, 1885.

From the evidence taken at the trial it appeared that the injury complained of was sustained on the road between Port Sandfield and Port Carling on a bridge in the township of Medora.

Richard G. Pearson swore: "Years ago, ten years at the least, I and others performed our statute labour on this road not far from the bridge; did this for ten years."

Robert Ennis swore: "My sons for me for three or four years have done my statute labour on this road; I have seen my sons working on the road."

William Foreman swore: "I am pathmaster of Medora; all statute labour required by law has been put on this road for past ten years; on both occasions when I was pathmaster a little statute labour was performed on this road."

Joseph S. Walton swore: "I have put statute labour on the road on which this bridge is."

George Massie swore: "I have resided in Medora for fifteen years, statute labour has been done on the road for ten years back."

T. Burgess, for defence, swore: "I was reeve of municipality at time of the accident and had been reeve from organization of the municipality: it was built by the government; so far as I know there never was proclamation issued placing the road under municipal council; any statute labour that was done on it was not authorized by the municipality; there are about fifty miles of government roads in the township; there are government inspectors of the government roads to open new roads and repair old ones; no township money was expended on this road."

On cross-examination: "Pathmasters are required to report to council when statute labor expended. I did not often travel the road, travelled it in winter only: whenever parties spoke to me about it I told them pathmasters had no power to order them to work on this road. I have received as reeve county money and expended it on these roads; have never put one cent of either county or township money on this road, but have on occasions expended

county money on government roads in the township; the government were petitioned by us to expend the money they did expend on these roads. I only repaired bridges in want of it out of money received by me from the government."

Enoch Cox swore: "I am only reeve for present year; I obtained from the county council this year $50, which we are now expending on this road within a quarter of a mile of where the accident happened."

The defendants moved before Wilson, C. J., in Chambers for a writ of prohibition to prohibit the said judge from further entertaining or adjudicating upon the claim in question, on the ground that the same was not within his jurisdiction; for a writ of *certiorari* to remove the said action from the said Division Court into this court, on the ground that the action involved important and difficult questions of law affecting not only the parties hurt, but many other municipal corporations in the district of Muskoka, and was a fit one to be tried in this court; or for such other order as to costs or otherwise as might appear just.

On the 11th of February, 1886, *Arnoldi*, for the plaintiff, moved by way of appeal from the order of Wilson, C. J., made on 17th October, 1885, directing that this action be removed from the said fourth Division Court into the Queen's Bench Division, and that a writ of *certiorari* do issue for that purpose, directed to the said judge; and by way of appeal from an order of the said Chief Justice, made on 24th November, refusing the plaintiff's application to rescind said order of 17th October, and refusing the plaintiff's application for an order that a writ of *supersedeas* do issue herein; or for a writ of *procedendo*; for an order reversing the said orders of 17th October, and 24th November, and for an order for a *supersedeas*, and for such further and other order as to the said Divisional Court might seem meet,

Pepler shewed cause. The following cases were referred to: *Town of St. Catharines* v. *Gardner*, 20 C. P. 108, 21 C. P. 190; *Regina* v. *Harden*, 2 E. & B. 188; *Regina* v. *Brown*, 13 C. P. 356; *Regina* v. *Perth*, 6 O. R. 195.

March 8th, 1886. ARMOUR, J.—No notice was shewn to have been given in this case disputing the jurisdiction of the Division Court under section 14 of the Division Courts' Act, 1880, 43 Vic Cap. 8, which section was made applicable to the Division Courts in Muskoka by 45 Vic. Cap. 7, sec. 1.

This court held in *Clarke* v. *Macdonald*, 4 O. R. 310, that section 14 of the Division Courts' Act, 1880, had not the effect of ousting this court of its jurisdiction to prohibit where no such notice had been given.

It might be a question how far this decision has been affected by the decision of *Chadwick* v. *Ball*, 14 Q. B. D. 855, overruling *Oram* v. *Breary*, 2 Ex. D, 346, one of the cases upon which the decision of this court was founded.

But the legislature has now put the matter beyond doubt by 48 Vic. Cap. 14, sec. 1, amending section 14 of the Division Courts' Act, 1880, by adding thereto the words following: "And every such notice shall be in writing, and prohibition to a Division Court shall not lie in any such suit from any court whatever where such notice disputing the jurisdiction has not been duly given as aforesaid.

I do not think, however, that the title to the road upon which the injury complained of was sustained was in question. Its origin and history were well known, and were not disputed at the trial. It was a road built by the government as a colonization road, and was so built before the organization of the townships of Medora and Wood as a municipality.

The question which arose was not in my opinion one of title, but one of liability, the liability of the defendants to keep in repair a road so built.

I think, therefore, that the defendants' motion for a prohibition fails.

I am of opinion, also, that the writ of *certiorari* was applied for too late and that the application for it ought to have been refused.

The defendants were sued by the plaintiff for the Division Court to be held at Port Carling on the 20th day of February' 1885; at the urgent request of the defendants counsel the plaintiff's counsel consented to the hearing being postponed till the next court to be held on the 22nd day of May, 1885, on which day the defendants' counsel appeared and objected that the road on which the injury complained of was sustained was a colonization road, and that the defendants were not liable, and that the learned judge had no jurisdiction to try the cause. The learned judge refused to give effect to these objections, and the plaintiff thereupon applied to postpone the hearing of the case to the next court, to be held on the 21st day of August, 1885, on the ground of the absence of his counsel, and the case was accordingly postponed on payment of the costs of the day by the plaintiff to the defendants. On the 21st day of August, 1885, the learned judge heard the cause and all the evidence on both sides, and by the consent of both parties adjourned the further hearing of the cause to the court room at Bracebridge, at 5 p.m., of the 18th September, 1885, and he then and there gave his decision in favour of the plaintiff; but, as the defendants' counsel expressed the desire of applying for a writ of prohibition, on ground of want of jurisdiction, or for a writ of *certiorari* to remove the cause to the superior court, he reserved rendering judgment to 18th October then next to enable him to do so, and on the 18th October, on the application of defendant's counsel, he further postponed rendering of judgment to 29th October then next.

The notice of application for the writ of *certiorari* was served on the 3rd of October for the 9th of October.

I do not think that the defendants could thus wait and take the chances of the decision of the learned judge being in their favour, and finding it adverse to them then apply for the writ of *certiorari* and properly obtain it

Such a proceeeding is against the spirit and intent of 43 Eliz. ch. 5, as applied to Division Courts, and it could not be upheld without our overruling the cases of *Black* v.

Wesley, 8 U. C. L. J. 277; *Gallagher* v. *Bathie*, 2 U. C. L. J., N. S. 73, and *Holmes* v. *Reeve*, 5 P. R. 58, which were, I think, rightly decided and ought to be followed.

In 1859, and in each subsequent year until confederation, there has always appeared in the supplies act a sum granted for colonization roads; how or under what authority the sums so granted were expended I am unable to say.

Ever since confederation, in each year, there has always appeared in the supplies act of Ontario a sum granted for colonization roads, not under the head of public roads, but as a distinct item; and the sums so granted have never been under the control of the public works department, nor expended by the authority of the commissioner of public works, but have always been under the control of the Crown lands department, and have been expended by the authority of the commissioner of Crown lands, and have been so expended in the making and repairing roads, and in aiding municipalities to make and repair roads for the encouragement of settlement upon the lands of the Crown in sparsely settled and remote and unsettled parts of the province.

The defendants were incorporated as a municipality by the Act 36 Vic., cap. 49, and were thereby made subject to the general municipal law; and since their incorporation it does not appear that the government have in any way exercised any control over this road or expended any money upon it, but it does appear that statute labour has been usually performed upon it for the last ten years.

This road was never a "public work" within the meaning of the public works act, R. S. O., cap. 30, nor was it ever under the control of the department of public works, or the commissioner of public works, and it is not, as was contended, within the R. S. O., c. 174, s. 502; but it is within R. S. O., cap. 174, s. 491, and as such the defendants are liable to keep it in repair, and I think the learned Judge was right in so deciding.

In my opinion this appeal should be allowed, with costs; the motion in chambers for the writ of prohibition and

of *certiorari* should have been and should be dismissed, with costs, and the motion to rescind the order of 17th October, 1885, should have been and should be allowed, with costs, and a *procedendo* should issue.

I refer to *Irwin* v. *Bradford*, 22 C. P. 421; *Harrold* v. *Simcoe*, 16 C. P. 43.

WILSON, C. J.—It appears that by an order of the Lieutenant-Governor in Council, dated the 27th of May, 1869, under "the free grants' and homestead act of 1868" and "the public lands' act of 1860," that certain orders and regulations in council were made, and No. 4 of such rules and regulations reads as follows:

"4. The right is reserved to the Crown to construct on any land located under the said act or sold as heretofore provided, any colonization road or any road in lieu of or partly deviating from any government allowance for road; also the right to take from such land any wood * * or other materials required for the construction or improvement of any such road, without making any compensation for the land or materials so taken, or for any injury occasioned by the construction of such road; and such rights may be exercised by the commissioner of Crown lands or any one authorized by him for that purpose."

It appears that every year the legislature of the province grants a large sum of money for the construction and repair of *colonization roads*.

A colonization road I understand to be a road constructed by the government to afford access to those who are about to settle in new townships when they are opened for settlement, to reach the lands on which they are to be located. Such a road is not only made in the township in which the settlers take up their lands, but it is a road to enable them to get to that township, and it may extend for many miles through or along several such townships from the last most convenient highway, to and upon which general travel can be had.

It is a road constructed to establish and encourage the settlement of the Crown wild lands in new districts, and it is cut through the woods and carried over rivers and creeks without regard to the government allowance for roads, merely for that purpose.

It is, therefore, as the name imports, a *colonization* road —a road to establish the settlement of the wild lands of the Crown.

These roads have been made in parts where there has been a municipal organization, but where the inhabitants have been too few in number and quite unable by their own means to do such works; but generally they have been made in unorganized localities.

By the municipal act, 46 Vic. c. 18, sec. 524, the definition of a highway is very extensive. It includes "any roads where the public money has been expended," and it may be said generally that the municipal council shall keep in repair all highways and bridges within the locality.

Section 542 of that act declares that no council shall interfere with any public road or bridge vested as a provincial work in her Majesty, or in any public department or board; and the Lieutenant Governor shall by order in council have the same power as to such roads and bridges as are by the act conferred on municipal councils with respect to other roads and bridges.

The act of 1860, c. 2, sec. 13, refers "to free grants to actual settlers upon or in the vicinity of any public roads opened through the said lands in any new settlement." From that enactment it appears the government for a long time past has "opened public roads through new settlements."

The order-in-council of the 27th of May, 1869, has provided not only for opening *public roads* through new settlements, but for constructing "*on any land*" located under the said act, or sold as therein provided, *a colonization road*, or "any road in lieu of or partly deviating from any government allowance for road."

If the road so to be constructed is not upon the original allowance for road, is it in substitution of the original allowance? The order in council says *in lieu* of it. Then to whom does the *original* allowance belong?

If the colonization road or bridge were made through or in a township could the municipal council stop the colonization road or bridge works, or prosecute the government employees for proceeding in the work without due authority, or undo their work? Or would the government employees be protected by the 542nd section of the municipal act before referred to, that "no council shall interfere with any public road or bridge vested in her Majesty, or in any public department or board, &c."?

It does seem to me that colonization roads, which are in fact made through or upon *Crown lands*, and which roads the Crown *reserves* the right to construct under the direction and authority of the commissioner of Crown lands, are roads vested in "her Majesty, or in a public department or board," and that the municipal council is not to interfere with them until they are renounced by proclamation of the Lieutenant-Governor, and then they become vested in the municipality: sec. 542.

And when it is considered that the commissioner of Crown Lands can take from any such lands any wood * or other materials for the construction or improvement of such road without making compensation for the same, or any injury occasioned thereby, it will be seen how different such provisions are from the ordinary reparation of roads by municipal councils: sec. 550, sub-sec. 8.

Then, what is to be done if the municipal council can not maintain the road or bridge which has been constructed by the commissioner of Crown lands?

I am not therefore satisfied the colonization roads constructed by the commissioner of Crown lands are roads which the municipal council of the locality is bound to maintain until they have been given up by proclamation.

The government may impose tolls upon roads or bridges made which are vested in the Crown or in any public

department or board; and if one of these colonization roads or bridges has a toll put upon it, is the municipality bound to repair such road or bridge while the government is receiving the tolls? I should say not: sec. 542.

What is there to prevent the government (as a matter of law) from putting a toll upon this colonization road? Nothing that I see. Nor is there anything to prevent the levy of the toll until the proclamation, after which no tolls shall thereafter be levied by the commissioner of public works.

The township has laid out statute labour upon the road. That will not, however, take the road out of the control of the government. If it had continued to be done for many years, and to a considerable extent, it might have been evidence against the township of its liability to repair; but because it does some work from necessity, because the authority that should have done it has not done it, so long as the municipality has not made it worse than it was, the municipality should not be held to be liable.

The case then is, the Crown has reserved the right to construct these colonization roads through Crown lands, and to take materials for their construction and improvement, such roads not necessarily being on the allowance for roads. Are these roads or bridges vested in the Crown or in any public department or board? It appears to me they are.

If so, the Crown has not renounced the care of them by proclamation. I am not, therefore, of opinion the township municipality is bound to repair these roads, even if constructed upon the original allowance for roads.

I am of opinion the *certiorari* should not have gone after the trial in the Division Court had begun; and here the trial was over and the judgment substantially given, but only formally withheld.

The motion must therefore be dismissed, with costs, and the judgment below will of course be or remain for the plaintiff.

O'CONNOR, J.—As I read sec. 542 of the municipal act, 46 Vic. ch. 18, two different matters are referred to, and it is accordingly divided into two parts. (1) It provides that "no council shall interfere with any public road or bridge vested as a provincial work in her Majesty, or in any public department or board, and the Lieutenant Governor shall by order in council have the same power as to such road and bridge as are by the act conferred on municipal councils with respect to other roads and bridges." (2) It then proceeds, "but the Lieutenant Governor may by proclamation declare any public road or bridge under the control of the commissioner of public works, to be no longer under his control, and in that case, after the day named in the proclamation, the road or bridge shall cease to be under the control of the commissioner, and no tolls shall be thereafter levied thereon by him, and the road or bridge shall thereforth be controlled and kept in repair by the council of the municipality." The first part of this section refers only to public roads and bridges "vested as a provincial work in her Majesty, or in any public department or board."

The second part refers to public roads or bridges under the control of the commissioner of public works.

That a distinction was intended is apparent, in that otherwise the first part of the clause would have continued, "but the Lieutenant-Governor may by proclamation declare any such public road or bridge to be no longer," &c.

I understand, then, that the second part of the clause is limited to a class of public roads and bridges within the wider scope of the first part. The reason for this distinction may be, and probably is, to limit the power of the Lieutenant-Governor in council, so that roads or bridges upon which tolls are established, and which are remunerative, or which may for other reasons be of peculiar advantage to the province, may not be given up without the consent of the legislature. The latter part of the second division of the clause seems also to indicate that the road

or bridge given up is such that tolls were or might have been levied thereon.

It is, I think, quite clear that the road or bridge to be given up by the Lieutenant-Governor's proclamation was under the control of the commissioner of public works.

The question in this case is not "in whom was the road or bridge *vested* at the time of the injury of which the plaintiff complains, but under whose control was it? Was it under the control of the commissioner of public works or of the council of the municipality?

The fact that a portion of a grant of the legislature of money to be expended on roads and bridges, under the direction of the government, has been expended on a particular road or bridge—either opening and forming it, or repairing it—is not *per se* conclusive evidence that it is a road or bridge vested *as a provincial work* in her Majesty.

There must be something more than that to make it a "provincial work," within the meaning of that section of the municipal act.

In this case that something has not been shewn, it does not appear, and cannot be assumed.

It appears to me, also, that there is an easy way of ascertaining whether any particular road or bridge is under the control of the department of public works. Section 18, R. S. O., ch. 30, provides that "All public works constructed or completed at the expense of the province shall, unless otherwise provided by law, be under the control of the department, and subject to the provisions of the act."

Section 22 of the same act requires that "The Commissioner shall make and submit to the Lieutenant-Governor an annual report on all the work under the control of the department, to be laid before the legislative assembly within twenty-one days from the commencement of each session, shewing," &c.

This report may be obtained without serious difficulty, and it will shew whether the road in question here was or was not at the time under the control of the public works department; and a search back amongst such reports

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would shew whether it was such a work. Nothing of this kind has been shewn, however, and therefore it must be assumed that the road in question is not under the control of that department.

Then it must fall under the provisions of section 531 of the municipal act, which provides that "Every public road, street, bridge, and highway, shall be kept in repair by the corporation," &c, There are exceptions to this but they do not affect this case.

With nothing further to be considered, I think I should be compelled to conclude that the municipality had control of the road, and it was under obligation to keep it in repair.

But the premises from which this conclusion is drawn are greatly strengthened, the major, by section 524 of the municipal act, and the minor by the fact proved, that public moneys of the municipality, and statute labour had been expended on this road. The questions of practice have been dealt with by my brother Armour, with whose conclusion I concur. The absolute terms by which the municipal act casts upon the council of each municipality the duty of keeping roads and bridges in repair, is likely to operate harshly in new municipalities, especially in out of the way and backward places, like the municipality now in question.

Although judges when called upon to expound the law in such cases, are bound to, and do, consider the circumstances, there is still an imperative harshness, which it is impossible to soften. But there is the statute, and judges can only expound it; and juries must deal with the facts of cases presented under it.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

ARSCOTT V. LILLEY AND HUTCHINSON.

Conviction for keeping bawdy house—Release of plaintiff pending appeal—Re-arrest and discharge on habeas corpus—Further arrest on original conviction—Action for penalty under 31 Car. II. ch. 2, sec. 6—Warrant of justice the order and process of court—Practice—Regularity of conviction and warrant.

The defendant L., a magistrate, had convicted the plaintiff for being the keeper of a bawdy house, and sentenced her to six months' imprisonment. Plaintiff, after undergoing two days' imprisonment, was released on bail, pending an appeal to the sessions.

The appeal was dismissed and plaintiff subsequently arrested upon a warrant issued by the defendant L. under advice of defendant H. the County Crown Attorney.

Upon return to *habeas corpus* she was discharged from custody under the latter warrant, upon the ground that it did not take into account the two days' imprisonment she had suffered prior to her appeal. Thereupon she was detained under a third warrant, on which nothing turned, and she was again arrested under a fourth warrant issued by defendant L. upon the original conviction.

In an action brought by the plaintiff for the penalty of £500 awarded by the 6th section of the *habeas corpus* act, 31 Car. II. ch. 2,

Held, reversing the judgment of CAMERON, C. J., at the trial, that the 6th section of the *habeas corpus* act, 31 Car. II. ch. 2, has no application to a case in which the prisoner is confined upon a warrant in execution.

Held, also, that the warrant in execution, issued by the convicting justice upon the discharge of the prisoner from custody for defects in the former warrant, was the legal order and process of the court having jurisdiction in the cause.

Semble, that the warrant issued after the dismissal of the appeal by the sessions, and which followed the original conviction in directing imprisonment for six months, without making allowance for the two days' imprisonment already suffered, was not open to objection.

The course to be taken by the court, on return of a *habeas corpus*, shewing prisoner detained under a defective warrant in execution of a conviction of a justice of the peace, discussed.

The conviction and warrants charged that plaintiff "did unlawfully keep a certain bawdy house and house of ill-fame for the resort of prostitutes, and is a vagrant within the meaning of the statute," &c., not alleging that she did not give a satisfactory account of herself.

Held, sufficient.

Regina v. *Arscott*, 9 O. R. 541, dissented from.

STATEMENT OF CLAIM.

1. Plaintiff was a widow residing in the town of London East, in the county of Middlesex.

2. Plaintiff was, on the 18th December, 1884, arrested and imprisoned under a warrant of commitment, issued by defendant Lilley, at the instance of defendant Hutchinson,

for having, on 24th September, 1884, at London East aforesaid, kept a bawdy house, and being a vagrant within the act respecting vagrants; whereupon plaintiff on 31st of December, 1884, obtained a writ of *habeas corpus* upon which she was discharged; and defendant, knowing that plaintiff had been discharged, contrary to the *habeas corpus* act [31 Charles 2nd, ch. 2], re-committed and imprisoned plaintiff for same offence, whereby defendants had forfeited the sum of £500 stg. to plaintiff, who sued defendants for same in this action under said statute.

Defence.

Not guilty by stat., 31 Car. 2 ch. 2, Public Act.

The action came on for trial at the Assizes held last fall at London before Cameron, C. J., without a jury.

At the trial the conviction, dated 24th September, 1884, was put in, charging that plaintiff did unlawfully keep a certain bawdy house and house of ill-fame for the resort of prostitutes, and was a vagrant within the meaning of the Statute entitled "An Act Respecting Vagrants," and adjudging plaintiff to be imprisoned at hard labor for six months.

Upon the back of the conviction was indorsed by the chairman of the sessions, "verdict guilty," and also a confirmation of the conviction; "and I direct the within named Esther Arscott to be punished according to the said conviction;" and an order for payment by plaintiff of costs of the appeal. There was also a full record of the confirmation of the conviction, and of the judgment of the sessions formally drawn up.

The *habeas corpus* was also put in.

The warrant of commitment was signed by and under the seal of the defendant Lilley, dated the 18th of December, 1884, and recited the conviction.

Upon 4th of February, 1885, Galt, J., ordered the discharge of plaintiff.

There was also put in a warrant of 6th February, 1885, reciting the conviction of 24th September, 1884, that plaintiff had served two days of her imprisonment, and

subsequently from 18th December to the date of the warrant, under a former warrant, from which she had been discharged owing to non-allowance of said two days; and then re-committing her for the residue of the six months, less the said two days, and less also from said 18th December, including said day, until and including said 6th February, 1885.

There were apparently four warrants in all. The second and fourth were put in at the trial, and the defendants, during the argument in Term, objected to the other two being considered by the Court. The *first* warrant was dated the 24th of September, 1884, the day of the date of the conviction, under which warrant the plaintiff was arrested and imprisoned on the 24th and 25th of September, and for the non-allowance of these two days as part of her imprisonment on the second warrant, dated the 18th of December, attached to the *habeas corpus*, she was discharged from custody by the order of Galt, J. Then warrant number *three*, dated 4th of February, 1885, was issued, and the plaintiff was detained on that, it was said, but nothing turned upon it, and that one was superseded by the *fourth* warrant, dated 6th of February, under which plaintiff was taken, at 12.45 p.m. of that day, immediately after having been discharged from custody under the order of Galt, J.

The warrant number *one* had always been in the gaoler's possession, and had never been formally withdrawn from him.

The case was reserved, and the learned Chief Justice afterwards gave judgment.

The parts of it which bear materially on the question are referred to below.

He said: "There is no doubt the defendants have incurred the penalty if the statute in question applies to the case.

"The language of the 6th section is very clear and unequivocal in its terms, which are certainly wide enough to cover the present case. * * The defendants contend

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that they do not come within the scope of the provision, as the plaintiff was convicted of the offence, and by sec. 3 of the act persons convicted, or in execution by legal process, are not entitled to the benefit of the act.

"The commitment on its face is for keeping a bawdy house and house of ill-fame, and being a vagrant within the meaning of the statute respecting vagrants, which is a charge of crime. The conviction is for that offence, but the conviction, if valid without warrant, would not authorize the detention or imprisonment of the plaintiff. If, therefore, the warrant was not a legal warrant, that being the only authority to the gaoler to detain the plaintiff, she clearly would be entitled to the benefit of the act and to her discharge thereunder. I think in such case it has never been doubted it was by *habeas corpus* the party wrongfully imprisoned was entitled to relief, and although the act was intended, as manifested by the preamble, to prevent long detention in bailable cases, the act is also to aid and extend the common law right to a *habeas corpus* to obtain relief from unjust imprisonment, or more correctly speaking, illegal imprisonment other than imprisonment by courts of record, whose proceedings can only be reviewed in error or by application direct to the court or a judge, where a judge is empowered to act either by his own special authority or as acting under the 6th section of the act, which is not by language limited or restricted to a discharge from imprisonment by *habeas corpus* issued under the act. The very words of the clause are: 'No person or persons who shall be delivered or set at liberty upon any *habeas corpus*,' &c."

He was also of opinion that Mr. Lilley, acting as mayor or justice of the peace, was not a court within the meaning of the act.

He said: "If the original conviction by the magistrate was right, and the appeal to the sessions did not deprive him of the right further to meddle with the matter, the result would seem to be that a person legally convicted would escape punishment altogether in a case like the present, if

the sessions made no order for the awarded punishment being carried out * * . I have entertained doubt whether Lilley should not be considered 'the court having jurisdiction of the cause,' the decision of Mr. Justice Galt not shewing that he discharged the plaintiff by reason of a total want of jurisdiction in the magistrates to convict."

The learned Chief Justice stated that his decision was upon the two grounds:

1. "Is the case within the act, the plaintiff having been convicted?

2. If it be within the act, was Lilley, while the conviction remained not quashed, but in force, the proper person to enforce the punishment imposed by the conviction?

I have already said the fact of the plaintiff being convicted did not deprive a court or a judge of the right to enquire on a *habeas corpus* whether the warrant of commitment was lawful and was authorized by a lawful conviction, and whether the plaintiff was in lawful custody; and secondly, that the defendant Lilley was not the proper person to enforce the punishment awarded by the conviction after the appeal to the sessions, and after the discharge and delivery of the plaintiff from imprisonment upon *habeas corpus* * * The court of general sessions of the peace had power to punish according to the conviction, and the judge before whom the plaintiff was brought on *habeas corpus* might also have remanded the plaintiff to undergo the residue of the punishment; but I think by the appeal to the sessions the convicting justice became *functus officio* as to the particular case, notwithstanding the Act 32–33 Vic. c. 31 sec, 70, (D.)

By 33 Vic. c. 27, (D.), amending sec. 65 of 32–33 Vic. c. 31, the sessions of the peace are to hear and determine the appeal and make such order therein as to the court seems meet, and shall, on affirmance of the conviction, order and adjudge the offender to be punished according to the conviction, and if necessary shall issue process for enforcing the judgment of the court * * By c. 31, sec. 70, above

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mentioned, it is enacted: 'In case an appeal against any conviction or order be decided in favour of the respondents, the justice or justices who made the conviction or order, or any other justice of the peace for the same territorial division, may issue the warrant of distress or commitment for execution the same as if no appeal had been brought.' This provision, read in connection with section 65, above referred to, can only apply to a case where no warrant or process of imprisonment has been issued before the appeal was made * * The original warrant of commitment is not vacated by the appeal unless the conviction on such appeal is quashed. That warrant remains with the gaoler, and under the process of the sessions the person convicted can be placed in custody to undergo the punishment awarded against him by the original conviction and warrant, but having regard to the 6th section of the *habeas corpus* Act I cannot satisfy myself that after the discharge under a *habeas corpus* any one except the court in which the plaintiff was bound to appear, or the court before whom the plaintiff was brought on the *habeas corpus*, or a judge under the act exercising the power of the court, could authorize the re-arrest or imprisonment."

Upon this the judgment was given for the plaintiff for the sum of $2,430, or the equivalent of £500 sterling, with costs, against the defendants.

January 12, 1886, *Hutchinson*, in person, moved to set aside the judgment. The *habeas corpus* issued was not properly under the statute of Charles II., but was a writ at the common law. The penalties of that act under the 6th section do not attach, because the warrant of commitment was issued under the proper authority of a court having jurisdiction, and because it was a warrant in execution and not a preliminary proceeding for investigation, and for trial afterwards. 3 Bl. Com. 138; *Rex* v. *Marks*, 3 East 157; *Ex p. Krans*, 1 B. & C. 258; 1 Ch. Cr. Law 129, shew the plaintiff should not have been discharged from custody, but remanded or a new warrant commanded.

The original warrant was still in the gaoler's hands and should have been returned by him to the first writ of *habeas corpus*, and that was sufficient for the detention of the plaintiff, as the gaoler must have known how much longer he had to detain the plaintiff upon her being retaken under it, as he was the same gaoler who had held her imprisoned for the two days before the appeal was taken to the sessions.

Aylesworth, for Lilley, the convicting justice. When the plaintiff was discharged for the alleged defect she was liable to be taken again, otherwise the discharge would be equivalent to a pardon: *Ex p. Milburn*, 9 Peters 710; *Yates* v. *Lansing*, 5 Johnson 282, and in Error 9 Johnson 395.

See also *Hurd* on *Hab. Corp.*, 398, 563; *Re Carmichael*, 1 U. C. L. J. N. S. 243; *Re Hobhous*, 3 B. & Ald. 420.

The first six sections of the *habeas corpus* act, which alone are in question here, apply to persons on commitment for trial, and not to those who are in execution after conviction: *The Attorney-General of Hong Kong* v *Kwok-a-Sing*, L. R. 5 P. C. 179. The second arrest complained of was an arrest made under authority of a court having legal jurisdiction to do so, and therefore that second arrest was one not prohibited but sanctioned by the sixth section of the *habeas corpus* act. He referred to *Cox* v. *Coleridge*, 2 D. & R. 86. The warrant, after the affirmance by the general sessions, could have been issued by that court: 33 Vic. ch. 27, sec. 1, sub-sec 3 (D.); or it might have been issued by the convicting justice, or by any other justice within the territorial division: 32 and 33 Vic. ch. 31 sec. 70 (D.) There is no proof in fact Lilley ever issued any warrant but what is called the second warrant, and from which Galt, J., discharged the plaintiff from custody; and the learned Chief Justice held, assuming Lilley had issued a prior warrant, that he could not issue a second warrant, because he was *functus officio* upon having issued the first warrant. The *habeas corpus*, by which the plaintiff was discharged by Galt, J.,

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was not a writ under the statute, but was a writ at the common law: *Rex* v. *Horne*, Cowp. 672; *Ex p. Lees*, E. B. & E. 828.

McCarthy, Q.C., contra. A good warrant may be put in before the argument is had on a *habeas corpus*: *Re Timson*, L. R. 5 Ex. 257; *Re Smith*, 3 H. & N. 237; *Re Phipps*, 11 W. R. 730; *Ex p. Cross*, 2 H. & N. 254. No other warrant was produced before Mr. Justice Galt than the one which is called the second warrant, issued upon the 18th of December, 1884. The earlier or first warrant, of the 18th of September, 1884, was not returned by the gaoler, which shewed he did not rely upon it, and that neither of the present defendants intended it to have been the warrant under which the plaintiff was then detained. The placing of a new warrant in the hands of the gaoler is evidence that it was in substitution of the preceding warrant: *Ex p. Snyder*, 64 Miss. 58. The second warrant was issued contrary to the 6th section of the statute of Car II. The convicting magistrate was not a court having legal authority to issue it. The sessions should have issued it, and the exact length of time of the unfulfilled original sentence could have been accurately provided for in that warrant: *Reg.* v. *Willmott*, 1 B. & S. 27; *Ex p. Willmott*, 30 L. J. M. C. 161. See also 33 Vic. ch. 27, amending sec. 65 of 32 and 33 Vic. ch. 31, (D.); *Church* on *habeas corpus*, 24. The *habeas corpus* is a remedial act: *Huntley* v. *Luscombe*, 2 B. & P. 530. The 6th section of that act applies to all criminal cases; it is general in its terms; it applies as well to commitments in execution as to preliminary examinations or trials. Civil cases are alone excepted from its operation. See particularly that part of the judgment of the Privy Council at p. 202: "They do not say, however, that this section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant on which he is detained shews no valid cause for his detention." After the unconditional discharge of the plaintiff the defendants had no authority to arrest her again for the same offence.

R. M. Meredith, on the same side. It cannot be disputed that the plaintiff was convicted of a criminal offence, for imprisonment with hard labor is a committal for a criminal offence.

He referred generally to the following cases: *Hays* v. *Armstrong*, 7 O. R. 621; 2 Ch. Gen. Sts., 4th ed. 144; *Easton's* Case, 12 A. & E. 645; *In re Douglas*, 12 L. J., Q. B. 49; *Huntley* v. *Luscombe*, 2 B. & P. 530; *Sweet's* Law Dic. Convict., 206; *Church* on *Habeas Corpus*, 23-24, as shewing that the 6th section of the Act of Car. II has a wider operation than contended for by defendants; 1 Ch. Gen. Pr. of the Law, 185, 186, 688; *Reg.* v. *Bassett*, 10 P. R. 386; *Yates* v. *People of New York*, 6 Johnson 335; Arch. Q. B. Pr., 14th ed. 743.

Aylesworth, in reply. *Reg.* v. *Bennett*, 3 O. R. 445, refers to many cases shewing a new conviction may be put in.

See also *Rex.* v. *Brooke*, 2 T. R. 190; The Vagrant Act, 32 and 33 Vic. ch. 28, (D.); *Reg.* v. *Clancey*, 7 P. R. 35; *Reg.* v. *Arscott*, 9 O. R. 541; *Crawford* v. *Beattie*, 39 U. C. R. 13, 24, 29.

March 8th, 1886. WILSON, C. J.—There are several matters which this case has given rise to which may be considered along with the principal question.

1. Should the court or judge, on the return of a *habeas corpus*, by which it appears the prisoner is committed upon a warrant in execution of a conviction of a justice of the peace, discharge the prisoner from custody, if the warrant appear to be defective?

2. Or should the prisoner be remanded and a valid warrant be lodged against him?

3. If the warrant recite a conviction, which by the recital appears to be invalid, should the prisoner be discharged without the production of the conviction?

4. If the conviction should be produced, is it the duty of the prisoner or the prosecutor to produce it?

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5. Does the sixth section of the *habeas corpus* act apply to a case in which the prisoner is confined upon a warrant in execution?

6. Is the second warrant in execution issued by a justice of the peace who made the conviction, upon the first warrant being held defective, issued by the legal order and process of the court having jurisdiction of the cause?

7. Was the warrant in execution void for which the prisoner was discharged from custody by Mr. Justice Galt? or was the objection taken to it cured by the statute hereinafter referred to? or was it amendable?

The following are cases in which the court did not discharge, but remanded the prisoner:

1. The warrant did not say how the penalty was to be apportioned—prisoner remanded—the Court presuming there was a legal conviction: *Rex* v. *Rogers*, 1 D. & R. 156. The court will not notice the defective warrant, unless the conviction be produced, presuming, until the contrary be shewn, that there is a legal conviction: *Rex* v. *Taylor*, 7 D. & R. 622. See also *Reg.* v. *Hawkins*, Fort. 272. The warrant in execution must so refer to the conviction as to give notice to those who are to act upon the warrant that there is a conviction, and put them upon inquiry what the terms of it are—that both instruments must be looked at by those who are concerned in the validity of the warrant whenever there is any defect in it. Both instruments are to be read together and to be held explanatory one of the other; and upon thus reading them, if the conviction justifies the commitment so explained, it is sufficient: *Daniel* v. *Phillips*, 5 Tyr. 293. When a commitment is without cause a prisoner may be delivered by *habeas corpus*; but where there appears to be good cause, and a defect only in the form of commitment, he ought not to be discharged: *Bethell's Case*, 1 Salk. 348. The commitment in that case was by a court of oyer and terminer.

A person in custody charged with murder, though confined without warrant, will not be discharged, as he may, in such case, rightly be in custody; he will be directed to

be taken before a magistrate to have an examination made: *Ex parte Krans*, 1 B. & C. 258. A document which is both a commitment and a conviction, and which is defective, will entitle the party imprisoned under it to be at once discharged: in *Re Hammond*, 9 Q. B. 92.

2. In the following case the party was not discharged, although the warrant of commitment in execution was defective in the following respects. The conviction, however, was before the court.

The warrant was for *unlawful* damage instead of wilful and malicious damage. It stated that injury was done to the land in place of *to the rushes upon the land*; it stated the the defendant was to pay a penalty to the complainant instead of describing it as *compensation*; and the imprisonment was directed to be *for one calendar month, or until the party be thence delivered by due order of law*, while the conviction was that the party be imprisoned for a term *not exceeding two calendar months, unless the said sum shall be sooner paid*, the court being of opinion the acts corresponding with our acts 32 and 33 Vic. c. 31, sec. 71 (D.), as amended by 33 Vic. c. 27, sec. 2 (D.), cured these objections: *Daniel* v. *Phillips*, 5 Tyr. 293.

3. The following are cases in which the defendants were discharged from custody for defect in the warrant:

In *Regina* v. *Chaney*, 6 Dow. P. C. 281, the defendant had been convicted for not taking a licensed pilot on board, and it did not appear from the warrant of commitment he had been requested to do so, or that any such request had been made in his presence. It appeared the writ of *certiorari* had been taken away, and the defendant could not therefore produce it. But it had not by express words been taken from the Crown, and the prosecutor could, therefore, have produced it, but it was not produced. Patteson, J., sitting in the Bail Court, said that the conviction might have been produced, and he might have looked at it: "Looking at this commitment, and I can look only at it, how can I say the conviction is good? * * The conviction as here recited is bad. The warrant of commit-

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ment founded upon it must be considered as bad also." He also said he did not hold *Rex* v. *Taylor*, 7 D. & R. 622, to be an authority that a party cannot be discharged on the ground of an error in the commitment.

The case of *Wickes* v. *Clutterbuck*, 2 Bing. 483, shews only that an action will lie against a magistrate for issuing a warrant in execution which states no offence. *Rogers* v. *Jones*, 3 B. & C. 409, is to the like effect.

An officer who had been convicted in the East Indies under the articles of war, was transferred to England and committed to prison there. On *habeas corpus* he was discharged, because he had committed no offence triable in England, and he had been imprisoned in England without lawful authority; *Re Allen*, 7 Jur, N. S. 234.

The conviction and committal were in the one document reciting an information that the defendant had absented himself from his service, but without saying, "without leave or lawful excuse." These facts appearing by the return, and the conviction of the party being of the offence, stated in the information, and no offence being stated in it, the conviction was bad and the party was discharged; *Re Seth Turner*, 9 Q. B. 80.

In *Regina* v. *Tordoft*, 5 Q. B. 933, the commitment and conviction were in the one document, and recited the information. No offence appeard in it. Lord Denman, C. J., said: "We cannot at all accede to the argument that this commitment is a distinct act from the conviction, which ought to be presumed good, though neither returned nor recited." The prisoner was discharged.

In *Ex parte Reynolds*, 8 Jur. 192, before Wightman, J., in Bail Court, prisoner discharged on the return of warrant of commitment, which recited a conviction which was defective, no other document being produced.

In *Easton's Case*, 12 A. & E. 645, the prisoner was also discharged from a defect in the warrant issued upon a conviction.

4 & 5. Will the court presume a good conviction to have been made when the commitment recites it as defective? Or

must the conviction be produced to give the prosecutor the benefit of there being a good conviction; and upon whom does it rest to produce it?

In *Rex* v. *Rogers*, 1 D. & R. 156, it is said the court is bound to presume there was a legal conviction to sustain the warrant. See also *Rex* v. *Taylor*, 7 D. & R. 622; *Rex* v. *Hawkins*, Fort. 272; and from *Daniel* v. *Philips*, 5 Tyr. 293, the like may also be inferred.

Regina v. *Chaney*, 6 Dow. P. C. 281, shows, if the *certiorari* is taken away from the party, the prosecutor may still have his writ, and he can produce the conviction; and if he do not, the court will decide upon the recital of it in the commitment.

In 9 Q. B. 99, Note, it is stated that the practice is, if the commitment be bad, the prosecutor is the party who is bound to produce the conviction, if it be in a document separate from the commitment.

In *Re Timson*, L. R., 5 Ex. 257, when prisoner brought up on *habeas corpus*, and the return shews a commitment bad on the face of it, the court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up and amending the commitment by it.

In *Ex parte Reynolds*, 8 Jur. 192, Wightman, J., in the Bail Court, said: "*Primâ facie* I must assume that the commitment does correctly recite the conviction. It seems to me also to be obligatory on those who allege that it is in a different form to bring it into court."

So in *Regina* v. *King*, 8 Jur. 271, Patteson, J., in Bail Court, said the commitment must set out an offence over which the magistrate has jurisdiction to make the conviction, for the court would not presume a conviction to be good which shews by the recital of it to be without jurisdiction. He further says, "I should, however, certainly not have held that I should be entitled to discharge the prisoner on account of any mere informality," such as there was in *Rex.* v. *Rogers*, 1 D. & R. 156, which certainly appears to be at variance with *Regina* v. *Chaney*, 6 Dow. P. C. 281; and it

was also said *Rex* v. *Taylor*, 7 D. & R. 622, was not an authority to shew that a party cannot be discharged on the ground of an error in the commitment. See also *Re Peerless*, 1 Q. B. 143.

Formal defects in the warrant of commitment in execution are curable: *Daniel* v. *Philips*, 5 Tyr. 293; *Bethel's Case*, 1 Salk 348. No doubt there may be defects in a commitment which would not be fatal, which would be so if they occurred in a conviction: *Ex p. Reynolds*, 8 Jur. at p. 193, per Wightman, J. The statute cures only defects of form if there is a good conviction: *Regina* v. *King*, 8 Jur. 271. *Certiorari* sent back to have seal put to the return and their addition of justices put to it: *Rex* v. *Kenyon*, 6 B. & C. 640.

A warrant of commitment in execution is invalid if it is without date, for the gaoler cannot know from the warrant itself how long to detain the defendant: *Ex p. Fletcher*, 8 Jur. 146, [I cannot say I see the force of the objection, for the gaoler could tell how long he was to detain the party from the time he got the party into his keeping;] contra *Ex p. Foulkes*, 15 M. & W. 612; *Bowdler's case*, 12 Q B. 612.

In *Ex p. Reynolds*, 8 Jur. at p. 194, Wightman, J., said: "The gaoler would be empowered under the commitment to require recognizances far greater in amount than is warranted by the act," unless the warrant was accurate and informed him precisely what it was he had to do.

6. Then as to the *habeas corpus* act.

The sections of the *habeas corpus* act which have to be considered are the following:

Sec. 1 recites that "great delays have been used by sheriffs, &c., to whose custody any of the King's subjects have been committed *for criminal or supposed criminal matters*, in making returns of writs of *habeas corpus* directed to them * * to avoid their yielding obedience to such writs contrary to their duty and the known laws of the land, whereby many of the King's subjects have been and hereafter may be long detained in prison *in such cases*

where by law they are bailable, to their great charges and vexation."

Sec. 2. "For the prevention whereof and the more speedy relief of all persons imprisoned *for any such criminal or supposed criminal matters*, be it enacted, &c., that whensoever any person or persons shall bring an *habeas corpus* directed unto any sheriff, &c., for any person in his or their custody, and the said writ shall be served upon the said officer, &c., that the said officer, &c., shall within three days after the service thereof [unless the commitment aforesaid were for treason or felony plainly and specially expressed in the warrant of commitment] upon payment or tender of the charges of bringing the said prisoner * * and bring or cause to be brought the body of the party so committed or restrained unto or before the Lord Chancellor, &c., before whom the said writ is made returnable according to the command thereof, and shall then likewise certify the true causes of his detainer or imprisonment. * * "

Sec. 3. "And to the intent that no sheriff, &c., may pretend ignorance of the import of such writ, be it enacted that all such writs shall be marked, &c., and if any person or persons shall be or stand committed or detained as aforesaid for any crime, *unless for felony or treason plainly expressed in the warrant* of *commitment*, in the vacation time and out of term, it shall and may be lawful to and for the person or persons so convicted or detained [*other than persons convicted or in execution by legal process*], or any one in his or their behalf, to appeal or complain to the Lord Chancellor, &c., and the said Chancellor, &c., upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise, upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorised and required, upon request made in writing by such person or persons, or any on his or their behalf, attested and subscribed by two witnesses who were present at delivery of the same, to award and

grant an *habeas corpus* * * * to be directed to the officer or officers in whose custody the party is so committed or detained, shall be returnable *immediate* before the said Lord Chancellor, &c.; and upon service thereof as aforesaid the officer, &c., in whose custody the party is so committed, or detained, shall within the the times respectively before limited bring such prisoner or prisoners before the said Lord Chancellor, &c., before whom the said writ is made returnable, * * with the return of such writ and the true causes of the commitment or detainer; and thereupon within two days after the party shall be brought before them, the said Lord Chancellor, &c., before whom the prisoner shall be brought, *shall discharge the said prisoner from his imprisonment, taking his or their recognizance.* * * * * *for his or their appearance in the Court of Queen's Bench the Term following, or at the next assizes, sessions, or general gaol delivery of and for such county, &c., where the commitment was, or where the offence was committed, or in such other court where the said offence is properly cognizable* as the case shall require; and there shall certify the said writ, with the return thereof, and the said recognizance or recognizances, *into the said court where such appearance is to be made, unless it shall appear unto the said Lord Chancellor, &c., that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences for the which by law the prisoner is not bailable.*"

5. "If any officer, under officer, &c., shall neglect or refuse to make *the return aforesaid*, or to bring the body or bodies of the prisoner or prisoners, according to the command of the said writ, within the respective times aforesaid, or upon demand made by the prisoner, or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver, to the person so demanding a true copy or copies of the warrant or warrants

of commitment and detainer of such prisoner which he and they are hereby required to deliver accordingly, shall forfeit," &c.

6. "And for the prevention of unjust vexation by reiterated commitments *for the same offence*, be it enacted that no person or persons which shall be delivered or set at large upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever other than by the legal order and process of such court wherein *he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause*; and if any person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, *for the same offence or pretended offence*, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds, *any colorable pretence or variation in the warrant or warrants of commitment notwithstanding*, to be recovered as aforesaid."

It appears to me the first section of the act is limited to cases *before trial*, for it provides against persons being "long detained in prison where by law they are bailable."

The second section is, in some respects, plainly limited by the first section. It provides that "for the prevention *whereof*;" that is, referring to such cases as are mentioned in the first section, "and the more speedy relief of all persons imprisoned for any *such* criminal or *supposed* criminal matters;" that is, to those criminal or supposed criminal matters mentioned in the first section *which are by law bailable*, although this last part may not be quite so clearly confined to the cases in the first section. I think, however, it is.

The section then proceeds, "that whensoever any person shall bring *any habeas corpus* directed unto any sheriff, &c., or other person whatsoever, *for any person in his or their custody* * * *unless the commitment aforesaid* were for

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treason or felony plainly and specially expressed in the warrant of commitment, &c."

If the words *unless the commitment aforesaid* restrict the second section to the cases to which the first section is confined, then the second section, as well as the first, extends only to commitments before trial, and I am of the opinion it does. It may, however, not be so confined to cases only before trial, as will be stated hereafter.

The third section appears to me to refer also to commitments only *before trial*, because it expressly excepts from it persons convicted or in execution by legal process, and because where the writ of *habeas corpus* issues and is returned, the Lord Chancellor, &c., may discharge the prisoner, taking his recognizance for his *appearance* in the King's Bench at the following term or at the next assizes, where *the offence is properly cognizable*, unless the party is detained upon legal process out of some court that has jurisdiction of criminal matters, or by some warrant for such matters or offences for *which by law the prisoner is not bailable.*

The fourth section is general in its terms, and may apply in any case as well before *as after trial*, but it has no special application here.

The fifth section reads also as if it were general in its operation. It is "that if any officer, &c., shall neglect or refuse to make *the returns aforesaid*, or to bring the body or bodies of the prisoner or prisoners, according to the command of the writ, *within the respective times aforesaid*, or upon demand made by the prisoner or person on his behalf, shall refuse to deliver, or within six hours after demand, shall not deliver to the person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly, all and every the head gaolers, &c., in whose custody the prisoner shall be detained, shall, for the first offence, forfeit," &c.

Upon this section of the Act the action of *Huntley* v. *Luscombe*, 2 B. & P. 530, was brought. There the party

was in prison under a warrant of commitment in execution and he brought an action against the gaoler for not delivering him a copy of the warrant, upon which he was detained, within six hours after demand. The action failed because the demand was made upon a turnkey, while the gaoler himself was about the prison at the time of the service, and it was not shewn when the demand ever reached the gaolor. The party was detained under a warrant of two justices of the peace upon the return of *nulla bona* to a previous warrant of distress to levy a penalty of £20 for an offence against the excise laws, until he should pay the penalty of £20. It was objected but not decided that the penalty was a civil matter and not a criminal or supposed criminal matter, in which case the *habeas corpus* act would not apply.

In argument for the defendant it was said by counsel that the plaintiff was a person who was detained in execution by legal process under the third section, and if the fifth section had to be connected with the third section the action could not be maintained.

The counsel for the plaintiff argued that the fifth section extended not only to those writs of *habeas corpus* which are given by the act, but to all other writs of *habeas corpus* at common law; and although a person in execution be not entitled to a *habeas corpus* under the new jurisdiction created by the third section, yet he is clearly entitled to an *habeas corpus* at common law.

The plaintiff's counsel continued: "But if the provisions of the *habeas corpus* act are extended only to such writs of *habeas corpus* as are provided under the directions of the act, all other writs of *habeas corpus* might in vain be issued by the courts, since the penalties imposed by the act for disobedience would not in such cases affect the officers to whom they were directed. Indeed it is clear from the act itself that the fifth section, which directs officers to make returns of writs of *habeas corpus* directed to them, extends to all commitments except those in which treason or felony is plainly expressed in the warrant, and

the fifth section imposes a penalty upon the officers neglecting or refusing to make 'the returns aforesaid'; which must extend to the returns mentioned in the second section. It may be observed that the third section seems to stand by itself, whereas the other parts of the act extend to all commitments except those in which treason or felony is expressed in the warrant. No evil can well arise from the construction contended for on the part of the plaintiff, whereas great danger may ensue from a contrary construction, for a prisoner who gets a copy of his commitment does not, of course, obtain his discharge, but only when he is committed improperly; whereas to hold that a prisoner in execution is not entitled to a copy of his commitment will suggest an effectual mode of preventing every prisoner from obtaining his discharge from any commitment, however illegal; as for instance, a commitment for six months where the law authorized only a commitment for three months; because, if the commitment be but framed in the shape of a commitment in execution, the party committed, not being able to procure a copy of his commitment, will not be able to ask for that relief to which he is entitled."

It was also argued that the conviction having been by information before justices of the peace, was a criminal matter.

There is, I think, no doubt the case of *Huntley* v. *Luscombe* was, and the case now before us is, a criminal matter: *Easton's Case*, 12 A. & E. 645; *Mellon* v. *Denham*, 5 Q. B. D. 467; *Regina* v. *Whitchurch*, 7 Q. B. D. 534; *Regina* v. *Roddy*, 41 U. C. R. 291, and the numerous cases there referred to.

If the court, in the case of *Huntley* v. *Luscombe*, had been of opinion the party in custody in execution could not maintain the action because he was in execution, they would probably have disposed of the action upon that ground; but they either thought it a more difficult matter to determine, than to determine whether the demand was a valid demand being made only upon a turnkey; or

they may have thought it a case in which the action was maintainable, although the party was in execution.

I have given the argument in full above, because it is the only case I can find exeepting the one which was cited in the Law Reports, and to which I shall hereafter refer; and the case of *Yates* v. *Lansing*, 5 Johnson 282, also referred to hereafter, affirmed in 9 Johns. 395.

It is necessary I should make some observations upon the arguments of counsel in *Huntley* v. *Luscombe*, for it contains all that can be said in support of the contention that the act extends as well to imprisonment when it is in execution as when it is before trial.

1. If a person in execution is not entitled to a *habeas corpus* under the third section of the act, he is clearly entitled to a *habeas corpus* at the common law; but that does not shew the provisions of the act, which Lord Alvanley, C. J., at p. 535, calls "grievous in its penalties," should be extended to the common law remedy.

2. If the act and the penalties under it do not apply to the writ at common law, it does not follow it would be in vain, for although the penalties under the act would not attach to the officers to whom it was directed, in case of disobedience, the party is not without remedy. He may have an action, or he may indict the party. And I think I may venture to say the court has authority to rule the officer to return the writ, as the court is entitled to have all writs returned, that it may be informed what has been done upon them; and the return of the writ would necessitate an answer by the officer as to what he had done upon it, and he could be ruled to bring in the body.

In *Wood's Case*, 3 Wils. 173, will be found a reference to the proceedings on writs of *habeas corpus* at the common law.

3. Then, it is said, it is clear the 5th section of the act was intended in some cases to extend further than the 3rd section, for the 2nd section extends *to all commitments* except those in which treason and felony are plainly expressed in the warrant, and the 5th section imposes a

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penalty upon officers neglecting or refusing to make the returns aforesaid, which must extend to the returns mentioned in the 2nd section.

The 2nd section, properly read, does not extend *to all* commitments in my opinion; for the section begins, "for the prevention whereof;" that is, the delays in the 1st section referred to; "and the more speedy relief of all persons imprisoned for any *such* criminal or supposed criminal matters," referring again to the criminal or supposed criminal matters in the 1st section mentioned; and being limited to *such* matters, it is further limited by excluding cases of treason and felony.

Then the 3rd section applies to all *such* writs; that is, to those so before limited, and the section besides excluding felony and treason excludes also persons convict, or in execution by legal process.

It is true the third section out of the first five sections is the only one which excludes persons convicted or in execution from the operation of these sections; and in that respect it may be said to stand by itself so far as these sections are concerned; but that does not extend the operation of the section to all cases not specially provided for by the act.

The rest of the counsel's argument does not advance the case, for there is still a remedy for all cases not within the act, without drawing along with them the grievous penalties of the statute.

The decision of the court is given only upon the point that the service of the demand for a copy of the warrant having been upon the turnkey, while the gaoler was about the gaol at the time, was not a good service upon the gaoler without shewing the demand had come, and when, to the knowledge of the gaoler, and so he was not liable to the penalties of the statute. The case being disposed of *in limine* there was no necessity for the court taking up any other part of it.

I am of opinion the 5th section, imposing penalties upon the gaoler, &c., for not giving the prisoner a copy of the

warrant, is confined to those cases only which are mentioned and referred to in the previous sections, as it refers to officers who "refuse to make *the returns aforesaid*, or to bring the body or bodies of the prisoner or prisoners, according to the demand of the said writ, *within the respective times aforesaid*," which are the times in the 2nd section mentioned; and I am of that opinion, although the 5th section is more general in its terms than any of the previous sections, and that it does not apply, so as to subject those officers offending to the penalties of that section, to any other than to cases of commitment before trial. That, however, does not dispose of this case: for this action is not against an officer for refusing to give a copy of the warrant, but an action upon the 6th section for arresting the party again for the same offence as that from which she was before discharged upon *habeas corpus*.

The 6th section is also very general in its terms. The only words in it which have a reference to the earlier sections are, after enacting no person delivered upon any *habeas corpus* shall at any time be again imprisoned for the same offence by any person, "other than by the legal order or process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause."

The words referring to the *recognizance to appear* seem plainly to point to a case of a previous commitment *for trial*; and the words, "or other court having jurisdiction in the cause," do not seem to alter the effect of the preceding words. In *The Attorney-General of Hong-Kong* v. *Kwok-a-Sing*, L. R. 5 P. C. at p. 202, Mellish, L. J., said, "These latter words, '*or other court having jurisdiction of the cause*,' were probably added to meet the case of an indictment having been moved by *certiorari* from one court to another." It is said an indictment, and as I understand by it an indictment for trial, not an indictment after a conviction upon it. But I think it might apply to other cases than to causes which were removed by *certiorari*. The recognizance might have been taken to appear in the

Queen's Bench, but as a court of oyer and terminer would have jurisdiction of the cause, the judge presiding at it might issue process to bring the party before him; or if the recognizance were to appear at the sessions of the peace, the judge of oyer and terminer might grant the warrant to bring the party before him for trial. No matter what other court may be referred to, the power of that other court to intervene is apparently before and for the purpose of trial, and not after conviction.

Great stress during the argument was laid by the counsel for the plaintiff upon the words in the judgment of Mellish, L. J., at p. 202: "They do not say, however, that the section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant on which he is detained shews no valid cause for his detention."

The expression "discharged unconditionally," immediately following the preceding quotation from the statute, "wherein he shall *be bound by recognizance to appear*," shews it to have been used merely with reference to the prisoner having been discharged without being bound by recognizance to appear.

In that case, too, the second arrest was before trial, and the first discharge was unconditional.

In *Ex parte Milburn*, 9 Peters 710, the prisoner for a misdemeanour was taken on a *capias* upon an indictment found, upon which he gave bail for his appearance. He did not appear, and process issued against him and his sureties in the recognizance. Another *capias* issued against the party to compel an appearance, which was returned *non est inventus*, and a third *capias* issued, on which he was taken. Cranch, C. J., discharged him upon *habeas corpus* from that arrest, [as I make out] because the process should have been a *pluries* and not a writ as in the first instance. Upon the special matter being returned by the marshall, the court ordered a bench warrant to be issued, on which the party was taken, and a motion was made for a *habeas corpus*. It was argued that after the discharge

of the Chief Justice, he could not be arrested a second time for the same cause, and that the only remedy against him was on the recognizance.

Mr. Justice Story said: "The points principally relied on are that the party is not liable to be arrested to answer the indictment after having given bail, although the recognizance has been forfeited, and the party has not appeared and answered, and been tried on the indictment; and that the discharge upon the *habeas corpus* was a bar to any subsequent arrest. * * * That would be to suppose the law allowed the party to purge away the offence and the corporal punishment by a pecuniary compensation." Both grounds of objection were over-ruled.

In *Yates* v. *Lansing*, 5 Johnson 282, it was held no action lay under the *habeas corpus* act against the Chancellor, who had ordered the plaintiff to be committed for contempt, and who was discharged on *habeas corpus* by a judge of the superior court, for committing the plaintiff for the same offence for which he had been discharged, because his commitment was a judicial one.

Kent, C. J., said: "If a person committed at a court of oyer and terminer, or sessions of the peace, of a felony, and imprisoned be discharged by *habeas corpus*, on the ground that the court had no authority to commit, or that the order of commitment was invalid, would any one doubt that the court might cause the convict to be further re-imprisoned either on the same warrant, if it judged it sufficient, *or by awarding a new and a better one?* The statute never intended such a destruction of principle as to entrust to a judge in vacation the power to control the judgment or check the jurisdiction of a court of record."

The case came up again in 6 Johnson 335, but on a point not material here. And it came up again, in Error, in 9 Johnson 395. The counsel for the defendant argued that the section of their act, corresponding with the 6th section of the 31 Car 2, ch. 2, only applied to cases in which the prisoner was to be tried for a bailable offence, for it referred to cases in which the party is bound by recog-

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nizances to appear, and that the object of the Act was to relieve the person from prison until he is tried, for the judge is to take sureties according to the quality of the prisoner and the nature of the offence, and the judge is not to discharge a prisoner who on the face of the commitment is in prison under conviction or in execution. See pp. 401 to 403.

The plaintiff's counsel maintained the contrary (see pp. 405, 406.) The court affirmed the former judgment.

In *Hallam's* Const. Hist., ch. 13, p. 19, of vol. iii. of the Boston ed. of 1861, it is said: "From the earliest records of the English law no freeman could be detained in prison except upon a criminal charge, or conviction, or for a civil debt. In the former case it was always in the power of the party to demand a *habeas corpus*, directed to the person detaining him in custody, to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency and remand the party, admit him to bail, or discharge him, according to the nature of the charge. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in *Magna Charta* [if indeed it were not much more ancient,] that the statute of Charles II. was enacted, but to cut off the abuses by which the government's lust of power and servile subtlety of Crown lawyers had impaired so fundamental a privilege." And on p. 21: "But it should be observed that as the statute is only applicable to cases of commitment on a criminal charge, every other species of restraint on personal liberty is left to the ordinary remedy as it subsisted before the enactment. Thus a party detained without any warrant must sue out his *habeas corpus* at common law."

I may refer here again to the earlier enactments affecting personal liberty, to *Wood's Case*, 3 Wils. 172. The English Act, 56 Geo. III. ch. 100, is in general such as our later Act is in R. S. O. ch. 70.

I am of opinion this action cannot be maintained, because the party in custody was imprisoned under a conviction,

and was in execution under legal process, and that the 6th section of the *habeas corpus* act does not extend to such a case. According to the authorities before referred to a person in custody may be discharged upon the production of the warrant of commitment in execution, reciting a conviction which is bad in law, without producing the conviction. The court will presume the conviction to be as it is recited. If it is alleged the conviction would, if produced, support the warrant, it is for the party asserting that to produce it. In some cases the party will be discharged from custody if the warrant be so defective that no conviction could support it. Our statute, however, must be considered in determining whether either the conviction or the warrants issued upon it can, if defective in any respect, be impeached.

The conviction in this case has been affirmed on appeal to the sessions, and the 32 and 33 Vic. ch. 31, sec. 65 (D), as amended by the 33 Vic. ch. 27(D), enacts that the Court of Appeal, in case of dismissal of the appeal or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction and to pay such costs as may be awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

The appeal is to be heard and determined on which the conviction has been made upon the merits, notwithstanding any defect of form or otherwise in such conviction; and if the person is found guilty the conviction shall be affirmed and the court shall award the same if necessary: ch. 31 sec. 68.

"In case an appeal against a conviction be decided in favour of the respondent, the justice or justices who made the conviction, or any other justice of the peace for the same territorial division, may issue the warrant of distress or commitment for execution of the same as if no appeal had been brought": sec. 70.

"No conviction affirmed, or affirmed and amended on appeal, shall be quashed for want of form, or be removed by *certiorari* into any of her Majesty's superior courts of record, and no warrant or commitment shall be held

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void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same:" ch. 31, sec. 71, as amended by 33 Vic. ch. 27, sec. 2 (D).

"In all cases where it appears by the conviction the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or, if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case": c. 31 sec. 73.

If the conviction which has been affirmed on appeal is not to be quashed for want of form, and if no warrant of commitment is to be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted and there be a good conviction to sustain the same, it must be matter of substance alone for which it can be quashed. If there be a matter of law to be considered by the general sessions, that court may reserve the questions of law for the higher court.

The conviction charges that the plaintiff "did on, &c., at, &c., unlawfully keep a certain bawdy house and house of ill-fame for the resort of prostitutes, and is a vagrant within the meaning of the statute," and on the application on *habeas corpus* to discharge the plaintiff from custody, 9 O. R. 541, before Mr. Justice Rose, in single court, the learned judge had the four warrants of commitment before him by *certiorari* and *habeas corpus*.

The plaintiff was discharged from custody because the warrants of commitment merely shewed the plaintiff was charged with and convicted for keeping such house of ill-fame, without alleging that she "did not give a satisfactory account of herself."

The paragraph of the act is as follows: "All keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequent-

ing such houses not giving a satisfactory account of themselves."

The learned judge held the not giving a satisfactory account of themselves applied to the whole of the classes of persons mentioned in the paragraph, and was not confined to the "persons in the habit of frequenting such houses;" and he was more convinced that the construction he put upon the paragraph was correct, because in 32 and 33 Vic., ch. 32, sec. 2, sub-sec. 6, (D.), provision is made for punishing the keepers, inmates, or habitual frequenters of bawdy houses. That provision is, "with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill fame, or bawdy house." The provisions are not alike in the two acts.

The difficulty I find in adopting the construction of the learned judge is this, what satisfactory account are the keepers of bawdy houses and houses of ill-fame or houses for the resort of prostitutes to give of themselves? What possible account can they give of themselves if the charge be true, than that they do keep such houses? If they do not keep such a house they will be acquitted. Persons in the habit of frequenting such houses possibly may be able to give a satisfactory account of themselves. They may go to preach to, or to admonish the inmates of such houses—to visit them in sickness, to acquire statistical information, or for police purposes, or for the discovery of crime, or criminals, or their apprehension, or the recovery of stolen goods, or for the collection of rent or debts; and these in my opinion are the persons who are to be required to give a satisfactory account of themselves; because, although they may be in the habit of frequenting such houses, they may be able to give the most satisfactory account of themselves. It would be idle to ask the other classes to give a satisfactory account of themselves for their keeping a bawdy house, or house of ill-fame, or a house for the resort of prostitutes. It is the *keeping* of such places which is the offence.

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The preceding paragraph, that "all common prostitutes or night-walkers wandering in the fields, public streets, or highways, lanes, or places of public meeting or gathering of people, not giving a satisfactory account of themselves," shall be arrested as vagrants, requires that these unfortunate people shall not be interfered with unless wandering in these named places; nor even then, unless they fail to give a satisfactory account of themselves; and it is quite manifest they may be able to give a very satisfactory account why they are found at the time in such places: *Regina* v. *Levecque*, 30 U. C. R. 509.

The learned judge was of opinion that none of the warrants showed that a crime had been committed, and he discharged the applicant from imprisonment under them.

I form a different opinion as to the validity of the warrants or warrant upon which the plaintiff was confined, than that to which the learned judge came. I think the warrant was valid on its face, and that it recited a valid conviction.

The whole trouble has arisen upon the warrants. It is not absolutely necessary they should be each separately observed upon, if this action, which is the principal question, is not maintainable. It is not, however, quite out of place to do so.

The first warrant was unquestionably a valid warrant in all respects. It was dated the 24th of September, 1884, and imposed six months imprisonment, and the plaintiff was taken upon it that day and imprisoned until the following day, when she entered into a recognizance to carry the case to the sessions of the peace in appeal, upon which she was discharged from custody.

The second warrant was dated on the 18th of December, 1884, after the affirmance of the conviction by the sessions in appeal, the sessions having adjudged the plaintiff "to be punished according to the said conviction;" that would be for six months less the two days she had been already imprisoned under the first warrant; but the warrant

specified the period to be for six months without saying from what time the six months were to be computed, and making no reference to an allowance to be made for the two days of imprisonment already suffered; so that the time would apparently count from the date of the arrest under that warrant: *Ex p. Foulkes*, 15 M. & W. 612.

But I am not at all certain the warrant was not curable by the 32 and 33 Vic. ch. 31, sec. 71 (D.), as amended by the 33 Vic. ch. 27, sec. 2 (D.), which enacts that "no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same." See *In re Elmy*, 1 A. & E 843; *In re Smith*, 3 H. & N. 227; *In re Timson*, L. R. 5 Ex. 257; and why, as the second warrant literally followed the judgment, could not the two days have been ordered to be noted by way of endorsement on the warrant in like manner as a payment in part of a judgment may be endorsed upon the execution?

In *Daniel* v. *Phillips*, 5 Tyr. 293, the warrant was to detain the party "for one month, or until he be thence delivered by due order of law;" and it was held to be cured by the like section of the statute from which our section was taken, the conviction being for six months' imprisonment, "unless the said sums shall be paid."

Parke, B., said, in giving the judgment of the court: "It is unnecessary for us to decide whether the imprisonment would have been justified if the conclusion of the warrant had not contained ambiguous words capable of explanation by the context, and had been plainly wrong, as if the commitment had been for two months and the application for one, unless the money should have been first paid, though looking at the very large words of the 39th section, even such a defect may have been intended to be cured."

If the gaoler receive a prisoner, on the same day as the warrant is dated, to detain such prisoner for a certain time, he assumes the imprisonment is to be computed from that

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day. If he do not receive the prisoner upon the day of the date of the warrant, which must frequently be the case, as the defendant cannot always be arrested on that day, nor it may be for months afterwards, he knows the imprisonment is to be computed from the day the prisoner is delivered to him. If a first warrant be defective upon which a person is imprisoned, and a second one be given to the gaoler in place of the first one, the second warrant should properly be dated as of the day of the first warrant, which is superseded, and the imprisonment then goes on under the second warrant. But, if after a term of imprisonment under the first one, a new one be put in its place, of a later date than the first one, and the term of imprisonment be for the same duration of time as the first warrant, the gaoler, so far as his information from the warrant is concerned, is required to keep the defendant in custody from the date of the new warrant, which would seem to be objectionable.

The question is, whether the gaoler, being the same person who was the gaoler who received both the warrants, and who, at the time he got the second warrant, still held the first one, and who must have known as a fact the time of imprisonment there was under the first warrant, and the full period of imprisonment which was imposed upon the defendant, could not have been ordered by the court to have the second warrant corrected and amended by the first warrant; and I am of opinion he would himself be bound to take notice of what he himself had done under the first warrant. It is clear the sessions may, "if necessary, issue process for enforcing the judgment, if affirmed, and it is also clear the justices who made the conviction, or any other justice for the same territorial division, "may issue the warrant of distress, or commitment for execution of the same, *as if no appeal had been brought.*"

I do not see, however, how the costs of the appeal can be included in the justice's warrant on the original conviction; probably they are provided for under the recognizance. In Error, in the Exchequer Chamber, after affirmance, the

execution was sent out from the original court, with a few words added to it for the costs in Error.

The third warrant of the 4th of February, 1885, made the allowance for the two days, but as it was made before the order of Mr. Justice Galt, of the 6th of February, for the plaintiff's discharge, was made, it was withdrawn, and the fourth warrant of the 6th of February, 1885, was made, allowing the two days confinement before the appeal, and the imprisonment for the period between the second and fourth warrants: in other respects it is like the second warrant.

The fourth warrant, in my opinion, was and is a valid warrant, as before stated.

Then is Mr. Justice Rose's judgment in the single court binding upon us, so that we must treat the warrant as an invalid proceeding?

This is not an appeal from his decision, as the appeal is from the single court to the Court of Appeal. We may, however, without saying whether we are now bound to follow that decision or not, treat it at the present time as the judgment of a co-equal court, and even then we may in such case not follow such a decision; and this is a case in which we may take that course, for we are quite satisfied the fourth warrant was and is a valid warrant. If it be valid, this action must fail for that cause, because we re-establish and set it up again. But the decision of this case does not rest only upon the validity or invalidity of of the warrant.

There is another point which arises upon the 6th section, which has not been considered yet. It arises, however, only if the second arrest here complained of was an arrest under a warrant which was not issued by the legal order or process of such court, wherein the plaintiff was bound by recognizance.

The plaintiff was not bound by any recognizance to appear "excepting by the recognizance to enter and prosecute the appeal, and to abide by and duly perform the order of the court to be made upon the trial of the appeal:" 32 &

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33 Vic. ch. 31 (D.), in the schedule. The warrant was not issued by the general sessions of the peace. It was issued by the original convicting justice. Was he within the words, "or other court having jurisdiction of the cause," assuming the warrant complained of was otherwise within the prohibitory provisions of the *habeas corpus* act? I am of opinion he was. He was the proper person to issue it, for a justice of the peace, sitting not merely to make a preliminary enquiry, but to try and judicially dispose of a case like the one in question, is acting as a court: *Dawbury* v. *Cooper*, 10 B. & C. 227; *Collier* v. *Hicks*, 2 B. & Ad. 662; 32 and 33 Vic. ch. 31, sec. 29 (D).

The result of this case is that in my opinion the judgment for the plaintiff should be set aside, because the plaintiff was a person convict and taken upon process in execution; and because the fourth warrant was a valid and legal warrant, and because the warrant in execution, being issued by a justice of the peace, who was the convicting justice in this case, was issued by a court having jurisdiction of the cause, and the 6th section of the *Habeas Corpus* Act, 31 Car. II., ch. 2, does not apply to such a case; and that the judgment be entered for the defendants, with the costs of the trial and of this motion.

ARMOUR, J., concurred.

O'CONNOR, J., not having been present during the argument, took no part in the judgment.

Judgment for defendants, with costs.

[CHANCERY DIVISION.]

MACDONALD v. McDONALD.

Foreclosure suit—Computation of interest—More than six years' arrears—Action on covenant—Amendment—R. S. O. ch. 108, sec. 17—R. S. O. ch. 61, sec. 1.

On an appeal from a report of a master who had allowed more than six years of arrears of interest in taking an account of what was due on a mortgage containing a covenant to pay interest.

Held, that in a foreclosure suit, interest when due for more than six years should be allowed in taking the mortgage account instead of allowing it for six years only, and compelling the plaintiff to bring another action on the covenant to recover the balance.

Held, also, that more than ten years' arrears of interest had been rightly allowed; *Howeren* v. *Bradburn*, 22 Gr. 96, commented on; *Allan* v. *McTavish*, 2 A. R. 278, followed.

When a decision of the Court of Appeal in England is at variance with one of the Court of Appeal of this Province, the latter should be followed here, as the former court is not the court of ultimate appeal for the Province: *Sutton* v. *Sutton*, 22 Ch. D. 511, not followed.

THIS was an appeal from a report of the master at Cornwall.

The suit was brought in 1881 by the Hon. Donald Alexander Macdonald against Ann McDonald and others for foreclosure on a mortgage.

The bill was an ordinary Chancery bill for foreclosure, with the indorsement mentioned in G. O. Ch. 436 schedule S, save that the clause referred to in argument was struck out.

The mortgage was dated in 1867, but a payment had been made in 1872, which paid up the interest, and in taking the account the master had allowed interest from that year up to the time of making the report, December 21st, 1885.

From this report the defendant Ann McDonald appealed on the ground that only six years arrears of interest should have been allowed under R. S. O. ch. 108, sec. 17, or that in any event, in analogy to the shortened period of limitation, no more than ten years arrears should be allowed.

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Nelson, for the appeal. The plaintiff's bill of complaint does not allege any covenant for payment, and does not make any claim on such a covenant. The master has really allowed eighteen years interest when the payment made in 1872 is not taken into consideration; but even subsequent to that payment he has allowed thirteen years, which he should not have done. He should only have allowed six years arrears: R. S. O. ch. 108, sec. 17. No more than six years can be allowed when no claim is made on the covenant: *Sinclair* v. *Jackson*, 17 Beav. 405; *Wiley* v. *Ledyard*, 10 P. R. 185; *Airey* v. *Mitchell*, 21 Gr. 510; *Caroll* v. *Robertson*, 15 Gr. 173; *Caspar* v. *Keachie*, 41 U. C. R. 599. Even if plaintiff had sued on the covenant and more than six years were allowed, the plaintiff would not be entitled to recover at most more than ten years interest: R. S. O. ch. 108, sec. 23; *Allan* v. *McTavish*, 2 A. R. 278; *Boice* v. *O'Loane*, 3 A. R. 176; *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, Ib. 579; *Wright* v. *Morgan*, 1 A. R. 613. The indorsement on the bill (Schedule S, G. O. Chy. 436,) is altered, and the claim for execution against goods and lands is struck out by the plaintiff showing clearly he made no claim on the covenant but solely against the land.

Holman, contra. The master's computation is right: *Allan* v. *McTavish*, 2 A. R. 278 agrees with *Howeren* v. *Bradburn*, 22 Gr. 96, that the plaintiff is entitled to a remedy on the covenant, and this court will give him relief in this suit without compelling him to bring another action on the covenant. Even if there is no specific claim on the covenant in the bill, the bill and indorsement together substantially make that claim.

Nelson, in reply. *Howeren* v. *Bradburn*, was a suit for redemption, which is a suit merely for an account. This is a suit for foreclosure to recover land. I also refer to *Coldwell* v. *Hall*, 9 Gr. 110; *Edmunds* v. *Waugh*, L. R. 1 Eq. 418; *Ford* v. *Allen*, 15 Gr. 565; *Heath* v. *Pugh*, 44 L. T. N. S. 327, 6 Q. B. D. 345; 7 App. Cas. 235; *Harlock* v. *Ashberry*, 18 Ch. D. 229; 19 Ch. D. 539.

February 3, 1886. PROUDFOOT, J.—The bill in this case was served in June, 1881. It does not appear when it was filed. It is upon a mortgage, but sets out no covenant for payment, and prays for foreclosure in default of payment, and for delivery of possession. The endorsement on the bill was in the form S. to General Order 436, save that it strikes out the clause, "and the plaintiff will be entitled forthwith to execution against the goods and lands of you * * to recover payment of the amount due by you." To that remedy the plaintiff would only have been entitled on making a case for it and praying for it: General Order 455.

The defendants filed a disputing note as they were notified they might do in the indorsement.

In taking the accounts the master at Cornwall has allowed interest to the plaintiff from the date of the mortgage in 1867. There was a payment of $40 in 1872, which more than covered the interest to that date, so that interest has been allowed from 1872, a period of thirteen years.

The defendants appeal from the report, because more than six years arrears has been allowed; and at all events contend that not more than ten years arrears should have been allowed, from analogy to the shortened period for limitation.

The R. S. O. ch. 108, sec. 17 provides that no arrears of interest in respect of any sum of money charged upon * * land, * * shall be recovered, * * but within six years next after the same has become due. And the R.S.O.ch. 61, sec. 1, gives twenty years within which an action may be brought upon a covenant.

In the present case the mortgage contains a covenant for payment. I do not think the plaintiff should be barred from seeking relief upon the covenant in this action, since it would be quite open to him to sue at once in another action upon it.

While *Howeren* v. *Bradburn*, 22 Gr. 96, expresses the rule to be applied to such cases, under our improved system of judicature, the plaintiff should be at liberty to

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amend his bill if necessary by stating the covenant and praying relief upon it, and then he will be entitled to recover arrears for a longer period than six years. It is true that *Howeren* v. *Bradburn* was a case of redemption, but the whole *ratio decidendi* proceeds upon the ground that the price of redemption and foreclosure is the same. Blake, V. C., says: "Apart from the administration of justice act, the defendant could prove for the principal money and six years' arrears, and then go to a court of law and recover on the covenant the seven years arrears, and put his *fi. fa.* in the hands of the sheriff, and thus charge the lands with the thirteen years arrears of interest. This being so, and looking at the scope of the administration of justice act, more particularly sections 1 and 32, I think I would not be carrying out the spirit of the enactment, if I granted the partial relief by giving six years' arrears, and left the defendant to his common law remedy for the balance." That reasoning applies as fully to a case of foreclosure as of redemption, and in that case the defendant was permitted to amend his answer to entitle him to this extended relief.

That case has been approved of in *Allan* v. *McTavish*, 2 A. R. 278, 287.

The case of *Allan* v. *McTavish*, also answers the other ground of appeal, that not more than ten years arrears should have been given. It is true that the Court of Appeal in England has taken a different view of the effect of the reduction of limitation, and held that it applied to the covenant as well as to the land: *Sutton* v. *Sutton*, 22 Ch. D. 511. But *Allan* v. *McTavish*, is the decision of the highest appellate tribunal in the province, to which an appeal lies from me. The Court of Appeal in England is not the court of ultimate appeal for the province. And therefore whatever my own view might be I feel constrained to decide according to the opinion of our Court of Appeal.

This appeal is therefore dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

SMITH V. MCLELLAN.

Marriage settlement—Power of appointment—Execution of or delegation of power—Vendor and purchaser—Power of revocation.

In a marriage settlement it was provided that "from and after the decease of the survivor of them," the said husband and wife, the lands settled should be held "upon trust for all or any one or more of the children of the said intended marriage * * but if there shall be no child of the said intended marriage, in trust for the said W. K. S. (husband) and his heirs absolutely after the decease of M. M. S. (wife) if he shall survive her, but if he shall die in her lifetime, then" to be held in trust "for such person * * as he the said W. K. S. by any deed or deeds with power of revocation, and new appointment to be by him signed * * or by his last will and testament in writing, or any codicil thereto * * shall direct and appoint * *"

W. K. S. predeceased his wife, leaving no children. By his will he devised to his wife all his real and personal estate, and proceeded as follows: "I do also transfer unto her all the powers vested in me to bequeath, convey, execute by will or otherwise, all or any of certain properties conveyed to her by deed of settlement * *." M. M. S. subsequently appointed the lands to her own use, and made a sale of part of them. On the statement of a special case for the opinion of the Court as to whether the purchasers should be compelled to carry out their purchase,

Held, that the will of W. K. S. was not an execution of the power but a valid delegation of it to his wife: that an appointment in favour of herself could only be properly made in pursuance of the power by a deed, with power of revocation, or in favour of another by will: and that a purchaser from her under an execution of the power by deed, would not be compelled to accept the title because of its revocable character.

THIS was a special case for the opinion of the court, stated between Martha Minerva Smith, and David Curtis, as plaintiffs, and Donald McLellan, and Alexander McLagan, as defendants.

The case set out that in the year 1869, the plaintiff Martha Minerva Smith, then being Martha Minerva McDonnell, and one William Kennedy Smith being about to intermarry, a marriage settlement was agreed upon and executed, and in part set out a settlement shewing that one Bathsheba Smith settled certain lands on trustees "to the use of the said Bathsheba Smith for her life, and from and after her decease then upon trust to pay the rents * * unto the proper hands of, or to permit them to be received by the said Martha Minerva McDonnell, and to the intent

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that the said messuages, lands, tenements, and hereditaments, and rents, issues, and profits of the same may during the said coverture be for the sole, separate and particular use and benefit, and at the sole and uncontrolled disposal of the said Martha Minerva McDonnell, notwithstanding her said coverture, and may not be subject to the debts, control, forfeiture, or engagements of the said William Kennedy Smith, her intended husband, but without power of anticipation, and in case the said Martha Minerva McDonnell should die in the lifetime of the said William Kennedy Smith then in trust, to permit the said William Kennedy Smith to receive the rents, issues, and profits of the said premises during his natural life, and from and after the decease of the survivor of them the said * * upon trust for all or any one or more of the children of the said intended marriage * * but if there shall be no child of the said intended marriage in trust for the said William Kennedy Smith, and his heirs, absolutely after the decease of the said Martha Minerva McDonnell, if he shall survive her, but if he shall die in her lifetime then for such person or persons, and for and upon such trusts, intents, and purposes, and with and subject to such powers, provisoes and declarations as he the said William Kennedy Smith by any deed or deeds, with power of revocation and new appointment to be by him signed, sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto, or any writing purporting to be his last will, or to be a codicil thereto respectively, shall direct or appoint, and in default of such direction or appointment, or so far as any such direction or appointment shall not extend upon trust for the right heirs of the said William Kennedy Smith:" that the marriage duly took place, but there was no issue: that the said William Kennedy Smith made his will on the 4th day of October, 1871, and died, without having altered or revoked it, on the 6th day of May, 1873: that his said will was in these words: "I do hereby give unto

my dear wife Martha Minerva all my real and personal estate whatever and wheresoever, to hold unto her, her heirs, executors, administrators and assigns according to the respective natures and qualities of the said premises, absolutely and forever.

I also do transfer unto her all the powers vested in me to bequeath, convey, execute, by will or otherwise, all or any of certain properties conveyed to her by deed of settlement by Bathsheba Smith, said deed bearing date * * *:" that the said Bathsheba Smith died on the 28th of March, 1879: that the said Martha Minerva Smith on the 4th of June, 1880, under the power contained in the settlement, and claimed under the will of William Kennedy Smith appointed the lands to her own use: that the real estate of the said William Kennedy Smith other than that which he had a power of appointment under the said marriage settlement was of very little value, and consisted of some building lots near Brantford: that David Curtis was the sole surviving trustee under the settlement: that part of the lands were agreed to be sold by the plaintiffs to the defendants as trustees of one Donald Nicholson, deceased, and the questions submitted for the opinion of the Court were:

Whether the will of the said William Kennedy Smith was a valid execution of the power contained in the settlement in favour of his wife, or whether there was by his will a valid delegation to the said Martha Minerva Smith of the power vested in him under the settlement whereby she became empowered to make the appointment in favour of herself, and

Whether she had an indefeasible title in fee simple in the lands, and

Whether the defendants should be compelled to carry out their purchase?

The case came on for argument on February 17, 1886, before Boyd, C.

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McMahon, Q. C., and *Moss*, Q. C., for the plaintiffs. Mrs. Smith has agreed to sell part of the lands covered by the settlement, and the defendants, the purchasers, are willing to carry out the sale, but they are trustees so the title must be free from doubt. The plaintiffs contend that the property passed to Mrs. Smith under the will of her husband (BOYD, C.—Where would it go if it did not pass under the will?) To the right heirs of William Kennedy, Smith, the husband. It is a mere question of intention, and there is no doubt from the wording of the will that he intended to give her everything, and did so, and that the property passed to her: *Carver* v. *Richards*, 27 Beav. at pp. 495-6. 1 *Jarman* on Wills, 4th ed. 680-1; *Walker* v. *McKie*, 4 Russ. 76; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172; *Ames* v. *Cadogan*, 12 Ch. D. 868. In this case the language of the will is much stronger than that in *Ames* v. *Cadogan*. The language used passed all his estate whatever its nature or quality was. In *Sugden* on Powers, 8th ed. 350, referring to *Denn* v. *Rooke*, 5 B. & C. 720, it is said that if it be inferred that the testatrix meant thereby (will) to give the entirety, it will not necessarily follow that *she intended to execute her power*. It may be that she intended her will to work by her interest in the tenements. The estate can pass by the will of the donee of a power even without any mention being made of the power: *Deedes* v. *Graham*, 16 Gr. 167. (BOYD, C.—But in that case there was no other property that could pass under the will, and in this case there is.) Yes, but of such a small amount as not to be worthy of consideration. By the second part of the will it would appear that he thought the marriage settlement gave the wife the property, subject to any rights he might have, and he tried to give her all those rights. He had unlimited power as to his disposal of the property, not being confined to any class of relations or otherwise, and so he had absolute ownership subject to the power: *Sugden* on Powers, 8th ed., 181-195; *White* v. *Wilson*, 1 Drew. 304; *Boyes* v. *Cook*, 14 Ch. D. 53. The will contains a delegated power to the wife, and she has

executed it and the fee is in her. The current of modern authorities seems to be in favour of giving a liberal construction to the exercise of powers. The older cases required a reference to the power or the property: *Harvey* v. *Stacey*, 1 Drew. 73. This was subsequently relaxed as to the property: *Cuninghame* v. *Anstruther*, L. R. 2 Sc. Ap. 233. It is not necessary to shew how the intention was manifested: *In re Wait—Workman* v. *Petgrave*, 30 Ch. D. 617. The power in this case gave W. K. Smith the whole benefit, or at least a power he could exercise for his own benefit, and he gave all that to his wife.

E. Martin, Q. C., and *Kittson*, for the defendants. The defendants are trustees, and they want a good marketable title. What was W. K. Smith's interest? He never had any as long as his wife lived, and he could only appoint subject to revocation. Even if he had an estate for life and a power of disposition by deed or will added, that would not amount to an absolute gift so as to vest the property in the donee: *Farwell* on Powers, 33. In this case W. K. Smith had no interest under the settlement unless his wife pre-deceased him, leaving no children. The settlement shews its object to be to prevent him having a controlling interest as long as possible. A power as distinguished from a trust must be strictly applied; *Farwell* on Powers, 268. The will was made before our Wills Act, R. S. O. c. 106, was passed, and so the cases cited do not bear on this case, as they were decided under the English Act. If a power requires the deed of revocation and limitation of new uses to contain a power to revoke by deed, yet upon the execution of such reserved power of revocation, the donee need not reserve another power to revoke: *Sugden* on Powers, 8th ed., 389. The testator had property of his own, and the will shews he knew how to give, so the devise operates on that and left the power unexecuted. The only right, if any, that he gave his wife was what he had himself, and that was a right to dispose of the property by will or by a deed containing a power of revocation. The will should not be allowed to be inoperative, but if the testator has

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other property that other property will pass, and it is only in a case where there is no other property for it to operate upon that it will be held that the power was exercised: *Deedes* v. *Graham*, 16 Gr. 169; *Brodrick* v. *Brown*, 1 K. & J. 328; *Brookman* v. *Hales*, 2 Ves. & B. 45; *Theobald* on Wills, 2nd ed., 170; *Evans* v. *Evans*, 23 Beav. 1. The second part of the will shews the husband only intended to put his wife in his own place, and a power cannot be delegated: *Sugden* on Powers, 8th ed., 179. A power tantamount to an ownership may be delegated, but the power here is not equivalent to that: *Farwell* on Powers 362. Even if the power was delegated Mrs. Smith's exercise of it is not sufficient, as the deed executed by her has no power of revocation in it, and that is what the settlement requires: *Ewart* v. *Ewart*, 11 Ha. 279.

McMahon, Q.C., in reply. The Wills Act has nothing to do with the question, whether this is a general power of appointment or not. *Boyes* v. *Cook*, 14 Ch. D. 56, shews what the donee of a power like the one in question has the right to do. I refer also to *Bailey* v. *Lloyd*, 5 Russ 330.

March 10, 1886. BOYD, C.—The husband had no present estate in the land contained in the settlement. He had the power of appointing it in the most general way by deed or will in case he predeceased his wife, which event happened. The case states that he owned building lots of small value near Brantford. In October, 1871, he executed a will which disposed of all his real and personal estate in very comprehensive words in favor of his wife, and he then in and by the will proceeded to transfer to her all powers vested in him by virtue of the settlement referring to land comprised therein as her property.

Upon a uniform current of authority I am bound to hold that the land as to which he had only a power is not embraced in the first part of the will, which speaks of "my property." As said by Bacon, V. C., in *Wildbore* v. *Gregory*, L. R. 12 Eq. 487, "he cannot be considered by using the words "my property" to have intended to deal with

property over which he had only a power of appointment, when there was property of his to which the words, giving full effect to them according to the terms of the will, exclusively of the settlement, would apply." Besides, in this case the will expressly draws the distinction between what he calls "my property," and "her property," the latter being identified as that which was conveyed by the deed of settlement. I am therefore very clearly of opinion that only the last part of the will can be regarded as referring to the settled property: *Maples* v. *Brown*, 2 Sim. 327; *Roach* v. *Haynes*, 8 Ves. 590, and *Evans* v. *Evans*, 23 Beav. 1.

The question is thus narrowed to the effect of that clause, which transfers to her all powers vested in him. Can this be regarded as a defective execution so as to call forth the assistance of the court to make it operative in the wife's favour? Now the cardinal rule is that in such cases you must find something in the context of the will, or in the circumstances of the testator which indicates an intention to execute the power: *Holmes* v. *Coghill*, 12 Ves. 215. After some hesitation I think the better conclusion is that here the testator has refrained from making an appointment, but intends that it shall or may be made by his wife to whom he delegates the power. Had this been a case in which there could not be a delegation it may be that sooner than that these words should be regarded as superfluous or inoperative the court might construe them as an execution which equity would perfect. But full effect can be given to the exact words used, and, if so, they should retain their obvious meaning.

Sugden lays it down (Powers, p. 180-1) that when a power is tantamount to an ownership, and does not involve any confidence or personal judgment, and no act personal to the donee is required to be performed, it may be executed by attorney in the same manner as a fee simple may be conveyed by attorney. And *Farwell* at p. 362, refers to the language used by Kindersley, V. C., in *White* v. *Wilson*, 1 Drew. 304: "It is clear that when a person

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has an absolute power of appointment, he may appoint to certain persons or classes of persons in such shares as another person shall nominate."

The power given in this settlement is, for and upon such trusts, intents, and purposes, &c., as the husband may direct and appoint. This places the entire dominion in his hands, and the property is potentially in his control as absolute estate: *Troughton* v. *Troughton*, 3 Atk. 656. The authority was such as could be delegated to another, in my opinion, and full effect can thus be given to this part of the will. The construction of this clause is within the authority of *Garth* v. *Townsend*, L. R. 7 Eq. 223, rather than of *Kennard* v. *Kennard*, L. R. 8 Ch. 227.

I do not doubt that Mrs. Smith can appoint in her own favour by revocable deed or in favour of another by will in the same manner and to the same extent as the original donee of the power could have done, and she thus gets practically the ownership and beneficial enjoyment of the property as the testator intended.

I therefore answer the questions submitted thus:

1. The will of W. K. Smith was not an execution of the power, but a valid delegation of it to his wife.

2. The appointment in favor of herself can only be properly made in pursuance of the power, and that is by a deed with power of revocation.

3. She would thus have vested in her the fee simple, subject to the power of revocation.

4. The purchasers would not be compelled to accept a title from her under an execution of the power by deed because of its revocable character.

G. A. B.

[QUEEN'S BENCH DIVISION.]

LAXTON V. ROSENBERG.

Landlord and tenant—Receipt of rent after action brought—Waiver—Intention.

In ejectment plaintiff alleged a demise to defendant as a monthly tenant. Defence, a yearly tenancy. After notice to quit, and after action brought, plaintiff received from defendant a payment on account of rent, which he shortly afterwards returned to defendant: *Held*, affirming the judgment of ROSE, J., at the trial, that there is no distinction in principle between the effect of payment of rent, as such, after action brought, upon the determination of the tenancy by notice to quit and by forfeiture, and that therefore the payment of rent in this case after action brought, had no effect upon this action, either as a bar to it or as a waiver of the notice to quit.

Held, also, that the intention with which the rent was received must be considered.

THE plaintiff by his statement alleged that (1) on or about 20th November, 1884, he let to the defendant, as a monthly tenant, at a monthly rent of $18, certain lands, describing them, the tenancy to commence on the 1st day of December, 1884; (2) defendant took possession of said lands under the terms of said tenancy, and had continued to occupy them on said terms, subject, however, to the notices thereafter mentioned; (3) by notice to quit, duly given by plaintiff to defendant more than one month previous to 30th September, 1885, plaintiff required defendant to deliver up peaceable and quiet possession of said lands to him; (4) defendant wholly disregarded said notice to quit, and remained in possession of said lands after said 30th September, notwithstanding that plaintiff after said date requested him to give up same; (5) plaintiff again, on 29th October, 1885, gave to defendant notice to quit and give up possession of said lands at the expiration of the next ensuing month; (6) plaintiff had duly terminated said tenancy; (7) defendant had wholly disregarded both of said notices, and still kept possession of said lands, and refused to give up same.

Plaintiff claimed immediate possession and $100 for mesne profits from 1st October, 1885, costs, and further and other relief.

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The defendant (1) denied that plaintiff let lands to him as a monthly tenant, or that he took possession thereof, or occupied the same on terms stated. (2) Plaintiff gave notice to quit in the third paragraph stated, and defendant immediately gave plaintiff notice that he was not a monthly tenant but a yearly tenant, and thereupon plaintiff abandoned such notice and did not act thereon, but received the rent up to and inclusive of 1st December, 1885. (3) Defendant denied that he was served with notice in the 5th paragraph of plaintiff's statement mentioned, and denied that said tenancy was terminated before commencement of suit. (4) Defendant said that when he leased said lands they consisted of a small dwelling house and paint shop attached, which shop plaintiff agreed should be altered into a butcher's shop for the business defendant had previously carried on in Terauley street, in Toronto, and which business plaintiff induced defendant to sell so that he might lease plaintiff's said lands, and said alterations would require a considerable outlay as well as some repairs to the dwelling house. Plaintiff and defendant entered into an agreement that defendant should lease said lands from 1st December, 1884, for six months certain, for the purpose of ascertaining whether he could build up a profitable butcher trade in that locality, and if defendant desired to keep said lands on after the expiration of that time he was to have them as long as he wished, and it was further agreed that defendant should pay rent at the rate of $18 per month, and should be at the expense himself of all such repairs and alterations as he (defendant) chose to make. Defendant accordingly made such necessary repairs and alterations for the purpose of his said business, to the extent of $100 at least, and notified plaintiff that he wished to keep on said lands, to which plaintiff assented, and negotiations were entered into for the purchase of said lands by defendant, and defendant thereby became a yearly tenant, which tenancy could only be terminated by a six months' notice to quit; and defendant set up a counterclaim for said repairs and alterations to the extent of

$100 at least, and for a further sum of $400 for loss and damage to his business by removal, if it should be held that plaintiff was entitled to have possession of said lands.

Issue.

The cause was tried at the last Winter Sittings of this court at Toronto, by Rose, J., and a jury.

The action was commenced on 1st December, 1885, and after the cause was entered for trial defendant moved to add this further statement of defence, "that since the former defence was pleaded in this cause, and on 5th January, 1886, defendant paid to plaintiff, and plaintiff accepted and received from defendant, the sum of $18 in full of the rent of the premises in question in this cause up to 31st December, 1885, and plaintiff thereupon gave defendant a receipt for such rent in the words and figures following, that is to say:

"$18.00 "TORONTO, January 5th, 1886.

"Received from Mr. S. Rosenberg the sum of $18, being one month's rent to December 31st, 1885.

"JOHN LAXTON.

"Defendant thereupon claims that the action may be dismissed out of this court, with costs, to be paid by the plaintiff to the defendant."

Plaintiff swore that he leased the lands in question to defendant by the month at $18 a month: that the bargain was made in the evening in his own house about the middle of November, 1884, and that no bargain was made at any other time: that the term was to commence from the last of November or first of December; and that one Clarke was at his house at the time.

Clarke swore that he heard the conversation: that the bargain was for a monthly hiring at eighteen dollars a month, to commence either the last of that month or the beginning of the next.

Defendant denied that he ever made any bargain for the premises at plaintiff's house, or had any conversation there on the subject: that he was going down Beverley street with plaintiff when plaintiff told him he would charge

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him $18 a month: that he told plaintiff that he would not take the place on any other condition except for six months: that he told him he would take no place except for six months at a time, when he said that was all right; plaintiff said defendant was to have it for six months, and defendant said he would take it for that time: that after defendant had paid the second or third rent plaintiff came to his house: that defendant then asked plaintiff about a writing, that he had better give him a few lines that he had got the place for six months, and that plaintiff told him he had got the place without writing for six months.

On cross-examination defendant said that the bargain was for $18 a month: that he took the place for the six months' time, and as long as he liked afterwards, with the privilege to have it so long as he liked afterwards; that was the arrangement; he was quite sure of that, and it never was charged that he told plaintiff he would rather pay the rent every month than by the quarter, every three months: that the plaintiff left it to him to pay by the month or every three months.

Julia Hawthorne, a sister of plaintiff's wife, swore that she heard a conversation between plaintiff and defendant at defendant's house: that plaintiff and defendant were speaking together, and plaintiff was saying, at least defendant was saying, about taking the house for six months, and he took it on the condition he would stay in it for six months; and plaintiff said afterwards he could do as he pleased, at least, rent it as he pleased; that was all she heard.

On cross-examination she said that plaintiff said, you have taken the premises for six months, you have leased it for six months, and the defendant said yes, and the defendant was saying something, she did not recollect what it was then, but defendant said something about afterwards, and plaintiff said, "Do as you please afterwards." After he said, "You have got the premises for six months." Defendant said something about afterwards, and he said afterwards, "Do as you please."

Defendant's wife swore that at the time plaintiff was at her husband's house her husband asked him for the writing he promised him. Plaintiff said he had his word for it, and that is as good as his writing. He said he had got it for six months, and he could have it after that as long as he liked. As to the payment of the note on the 5th of January, 1886, defendant said that he met plaintiff on Beverley street, and told him he was just up at his house to pay the rent, and he said, "Is that so?" He had got the receipt with him. He reached in his pocket and brought a receipt and a roll of bills out. He asked him had he got two dollars, that he had got four five dollar bills: that he looked right up the street: that he had the receipt out of his pocket at that time. He said he had only one dollar bill, and he would have to go into his house to get change from his wife. He gave him the four five dollar bills, and he returned him two dollars, and gave him the receipt: that he got $17 sent back the next day in a letter from plaintiff, and that he took it back again and gave it to the servant girl at plaintiff's house.

On cross-examination, defendant said he went to plaintiff's house the last of the month when the rent was due: that he always liked to pay his rent: that he did not know for sure it was the last or not, but he went there several times: that the first time he saw the servant girl, and asked her if plaintiff was in: that he had come to pay the rent: that she went back to tell Mrs. Laxton: that the girl came back and said Mrs. Laxton was sick in bed, and did not know anything about it, to come back at night: that he did not ask his solicitor about the payment of the December rent: that he didn't ask him any question: that he did not know any better than to pay the rent as he always did: that he took the receipt to his solicitor: that he took it down for fun.

Annie Sweeney, plaintiff's servant, swore defendant came to the door. She did not know who it was, but when she went to open the door a man was standing right at the door. She didn't know who it was. She opened the

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door, and he said, "Give that to Mr. Laxton." He then pitched a letter into the doorway and walked away: it was brought in and there were seventeen dollars in it.

Plaintiff's wife swore that defendant came on Saturday, the 2nd of January, and wanted to pay the rent, but he did not because she hadn't the receipt: that he came again on Monday and wanted to pay the rent: that she told him she hadn't the receipt: that he said it did not matter about her having a receipt, that he would leave the money and she could send the receipt, when she told him that other times he would not leave the money when she had the receipt, and that she would not take the money then till she had the receipt: that he called again about ten o'clock that night and asked if Mr. Laxton was in, when she said "no"; she told him not to come back, she would send the receipt and he could send the money: that he came again on Tuesday, but she did not see him.

Plaintiff, on cross examination, was asked and answered as follows:

Q. Now, a few days ago, did you take the rent from Mr. Rosenberg? A. I did in mistake, yes.

Q. You took it then? A. Yes.

Q. How did you come to make mistake; where were you when he paid you rent? A. I was on Beverley street.

Q. Had he been at your house before that? A. Two or three times, so my wife said.

Q. Had you left a receipt there for him? A. I had not written one out.

Q. Do you swear to that? A. I swear to that, not before that day.

Q. You swear you had not a receipt written out before that day? A. No; not before the time he paid me the rent.

Q. You did not leave it with your wife, to be given to him when he paid the rent? A. No, I did not: I had not written it out.

Q. When you met him on Beverley street, did you ask him for the rent? A. No.

Q. What was said; who opened the conversation? A. Of course he had not been friendly with me for a long time.

Q. What was the matter? A. He had not been speaking; he had been discourteous to me all along until that day; that day he came up to me, very pleasant and nice; I had just left Mr. McLean's, and was busy. He said, have you a receipt? I said yes, I wrote it this morning, you have been at my house up there so much.

Q. Did you pull the receipt out of your pocket? A. No; not then.

Q. Do you swear to that? A. No, not then; I went up to my house.

Q. Didn't he offer you the rent, and you had to go to your house in order to make change—you had only a dollar of change? A. Yes.

Q. He had twenty dollars, and you took that and gave him back two dollars? A. Yes.

Q. If he had had the eighteen dollars, you would have handed him the receipt then? A. No, because the receipt was not dated.

Q. That had been written out only that morning? A. Yes, only that morning.

Q. The money was paid in your own house then? A. Yes, in my own house; nothing was put in the receipt then but the date.

Q. It was on the 5th of January then you received this eighteen dollars from Mr. Rosenberg? A. Yes.

Q. How did you happen to take that; is there any explanation you can make of that? A. I said to you, before I took the last month's rent, two months previous to this, the November, I said to you, may I go and take the rent—you said yes, and tell him to leave the place; I thought that meant to go on and take the rent right along.

Q. You say you understood from the advice you had from your solicitors you were to go on taking the rent? A. Yes, I did not know any difference.

Q. Was it under this state of facts you took the rent from Rosenberg? A. Yes,

Q. When did you learn the contrary? A. I did not know until I came in to your office, and you said to me, Laxton, what did you take that rent for? I said, what rent? You said Mr. Jarvis has been in with a receipt and said you took the rent, and I said, yes, I had taken it under a wrong impression.

Q. You knew the case would be on here in a few days for trial? A. Why, certainly, I was bringing in the witnesses.

Q. Was there anything said, when this rent was paid, about further occupation of the premises? A. No; not a word.

Q. Did you have any intention to waive notice and waive suit at that time? A. None whatever.

Q. You say nothing was said about any occupation of the premises, or any lease? A. Oh no.

Q. Was there anything said about the suit then? A. I think not; I expected the suit would settle the whole thing.

Q. What did you do with the eighteen dollars you received? A. When you told me that, I asked your advice, what was to be done with it.

Q. What did you do in consequence of that? A. I wrote a letter to him, telling him I had taken the eighteen dollars in mistake, now the suit was pending.

Q. Is this a copy of the letter? A. Yes.

Q. And was this posted to him? A. Yes, the same day.

Q. And what amount of money was enclosed in it? A. Eighteen dollars.

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Q. And you obtained a registry receipt for it? A. Yes.

MR. WATSON—I believe my learned friend admits receipt of the letter with money in it.

MR. JARVIS—With seventeen dollars in it, which was returned to him immediately.

MR. WATSON—I put in a letter written by the defendant's solicitor, on the 5th of January, to the plaintiff's solicitor. I would like my learned friend to produce a letter written by us in answer to that letter of the same date.

MR. JARVIS—I do not feel called upon to produce your not very courteous letters.

MR. WATSON—It is a letter written on the same day, to the defendant's solicitor.

MR. JARVIS—You need not read it; I do not think such a letter should be written; it is not couched in very courteous language.

MR. WATSON—It is a letter I want in evidence, that is all; I think it will be supported by the court.

Q. I believe the letter you sent to Mr. Rosenberg was afterwards thrown into your house; have you any personal knowledge of it? A. I was told when I came in.

Q. You have no personal knowledge of it? A. No.

BY MR. JARVIS—Do you swear you enclosed eighteen dollars in that letter? A. Yes.

Q. Positive about that? A. Yes.

Q. Did you mail it yourself? A. Yes, and doubled up the money in it.

Q. Have you never heard of it since? A. Heard of what?

Q. Heard of the return of the money? A. Yes, I heard it was thrown into my house.

On 5th of January, 1886, the date of the receipt, the defendant's solicitor wrote to plaintiff's solicitor that "the defendant paid and the plaintiff accepted the rent of the premises in dispute for both the months of November and December. This, I think, puts an end to the ejectment at any rate." Plaintiff's solicitor replied repudiating the payment, and expressed their determination to proceed with the case which had been entered for trial the day before. Notice was proved to have been given in October to quit at the expiration of the ensuing month's tenancy. The learned Judge gave judgment in favor of the plaintiff.

11th February, 1886. *S. M. Jarvis* moved to set aside the judgment and to enter it for the defendant, or for a new trial, upon the grounds (1) that the judgment was con-

trary to law and evidence in this, that the evidence shewed that the defendant was not a monthly tenant of the premises in question; and (2) that the plaintiff had waived his notice to quit and right of action by accepting rent from the defendant during the pendency thereof, as shewn by the receipt filed.

Watson shewed cause.

March 8, 1886. ARMOUR, J.—I am inclined to think that the defendant was, upon his own shewing, after the first six months had expired, a tenant only at will.

According to his statement of defence he was to hold the lands in question for six months, and after that "as long as he wished," and according to his evidence "so long as he liked afterwards."

The bargain being thus an express one no other would be implied, and the tenancy would be as expressed, a tenancy at will, and not as might otherwise have been implied a tenancy from year to year: *Doe Bastow* v. *Cox*, 11 Q. B. 122.

A tenancy at the will of the lessee is a tenancy by construction of law at the will of the lessor also: *Coke* Litt. 55*a*.

But the learned Judge has found upon the evidence, and has, I think, rightly so found, that the tenancy was a monthly tenancy from the first.

Then what was the effect of the payment, after the determination of the tenancy and after the action had been brought, of the rent which accrued due for a period after the action was commenced?

It was argued that the learned Judge had not allowed this to be set up to the action, and that we ought not to allow it; but the learned Judge treated it as if it were set up, and I think the defendant was entitled to set it up as of right. See Order 16, Rules 4 and 5, Judicature Act; *Kinnear* v. *Tarrant*, 15 East 622; *Todd* v. *Emily*, 9 M. & W. 606; and *Dunn* v. *Hill*, 11 M. & W. 470.

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Being set up it might have been replied or demurred to, and we have to consider whether in view of the facts proved it constitutes a defence.

The learned counsel for the defendant insisted that the fact of the payment must alone be looked at and not the intention with which it was paid or with which it was received, and looking at it in this way it operated as a complete waiver of the notice to quit and of the right of action, and was a bar to the action.

There is no doubt that, whatever his design was as to the effect of the payment upon the action, the defendant paid it as rent and the plaintiff received it as rent, and had no action been brought it might and probably would have been held to be a waiver of the notice to quit.

I can see no distinction in principle between the effect of the payment of rent, as made in this case after action brought, upon the determination of the tenancy by notice to quit, and the effect of the payment of rent made after action brought upon the determination of a tenancy by reason of a forfeiture: in each case the landlord by an unequivocal act elects to treat the tenant no longer as a tenant but as a trespasser.

If there is no such distinction in principle I think this case is concluded by authority, and that the payment of the rent after the action was brought had no effect whatever upon the action either as a bar to it, or as a waiver of the notice to quit, or of the right to bring the action.

I refer to *Doe Morecraft* v. *Meux*, 1 C. & P. 346; *Bridges* v. *Smyth*, 5 Bing. 410; *Jones* v. *Carter*, 15 M. & W. 718; *Toleman* v. *Portbury*, L. R. 6 Q. B. 245; *S. C.*, L. R. 7. Q. B. 344, and *Grimwood* v. *Moss*, L. R. 7 C. P. 360.

If such a distinction however exists the question would be, under the authority of *Doe dem. Cheny* v. *Batten*, Cowper 243, *quo animo* the rent was received, and I think it clear upon the evidence that the defendant was paying it with the design that it should affect the action, and that the plaintiff was receiving it without any intention of thereby interfering with the action, and thinking that he

was entitled to it, as the defendant was still in possession; and he was entitled to the money, but not as rent or under any contract, but as mesne profits for the defendant wrongfully remaining in possession and depriving him of it.

As soon as he discovered that his receipt of the rent might prejudice his action he at once returned the money, and the defendant suffered no wrong by his receipt of it.

It was not set up that the receipt of the rent created a new contract of tenancy, and the parties had no intention of creating one, but it was set up only as an affirmance of the continuance of the old contract.

I refer to *Croft* v. *Lumley*, 6 H. L. Cas. 672, where all the previous cases on the subject of waiver may be found; but in that case the payment of rent was made before action brought; and to *Doe Digby* v. *Steel*, 3 Camp. 116.

I think that we ought also to give the plaintiff his mesne profits, calculated on the basis of the rent he was paying, as follows:

Rent for December	$18 00
" " January	18 00
" " February	18 00
" to 8th March inclusive	4 00
	$58 00
Less December's mesne profits paid as rent	18 00
	$40 00

In my opinion, therefore, the motion must be dismissed, with costs, and judgment given for the plaintiff to recover the land in question and forty dollars for mesne profits, with full costs of suit.

WILSON, C. J., and O'CONNOR, J., concurred.

Motion dismissed, with costs.

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[QUEEN'S BENCH DIVISION.]

REGINA v. RAMSAY.

Canada Temperance Act, 1878, secs. 105, 111—Justices of Peace—Jurisdiction—Certiorari—Appeal to Quarter Sessions—Conviction quashed.

Where a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety.

In cases where a magistrate has jurisdiction *certiorari* is absolutely taken away, but an appeal to the Sessions still exists, which however is itself also taken away by sec. 111 of the "Canada Temperance Act, 1878," where the conviction is before a stipendiary magistrate.

It is imperative, under sec. 105 of the above Act, that an information thereunder be laid before two justices, and that they both be named in the summons. Where, therefore, a summons stated that an information had been laid only before the justice who signed it, and yet called upon the defendant to appear before another named justice as well,

Held, that the justices had no jurisdiction, and that the defendant's appearing before them did not confer it. A conviction was therefore quashed.

THIS was a motion, on the return of a writ of *certiorari*, to quash a conviction of the defendant, under "The Canada Temperance Act," for selling liquor by an agent in the county of Simcoe, after the date when the said act was in force in that county.

Bell, for the motion.
Howson, contra.

The facts, with the grounds of objection taken to the conviction, appear in the judgment.

March 19, 1885. GALT, J.—There were several objections taken by Mr. Bell, the first and most important being that the magistrates had no jurisdiction.

The defendant resides in the city of Toronto and carries on business there as a wholesale merchant. At the time when the sale took place, he dealt in spirits, &c. A sale was made by one of his agents in the county of Simcoe, of a quantity (five gallons of whiskey.) This was done without the knowledge of the defendant, but he subsequently ratified it, and the whiskey was sent from his warehouse to the purchaser and re-

ceived by him. One ground of objection was, that the examination of the defendant was improper; but no objection was raised by him to answering the questions, and it is therefore too late now to take the objection. If the magistrates had jurisdiction then they were the proper parties to decide on the evidence. See *Regina* v. *Wallace*, 4 O. R. 127, where the question is fully considered. It was urged by Mr. Howson that in cases like the present, "*certiorari*" was taken away by section 111 of the act. That section is: "No conviction, judgment, or order in any such case shall be removed by *certiorari*, or otherwise, into any of Her Majesty's Superior Courts of Record, nor shall any appeal whatever be allowed from any such conviction, judgment, or order to any Court of General Quarter Sessions or other court whatever, when the conviction has been made by a stipendiary magistrate," &c. Mr. Bell rested on the case of *Regina* v. *Klemp*, 10 O. R. 143, as deciding that a *certiorari* still lies when the conviction has not been made by a stipendiary magistrate, &c., under section 111; but it was not necessary to decide that question, as the learned Chief Justice declined to quash the conviction on the merits.

In my opinion, in cases where the magistrates have jurisdiction, the writ of *certiorari* is absolutely taken away, but a right of appeal to the Quarter Sessions still exists, and it is this latter right which is taken away when the conviction is before a stipendiary magistrate, &c., the removal by *certiorari* being taken away in all cases.

It appears from the evidence that an information was laid on the 2nd July against the defendant, on which a summons was issued, which summons is as follows:

"Summons to Defendant.

To W. J. Ramsay, of the City of Toronto, in the County of York.

Whereas, information hath this day been laid before the undersigned, one of Her Majesty's justices of the peace, &c., &c., these are therefore to command you, &c., &c., to be and appear, &c., before me and Henry Bird, two justices of the peace for the said county of Simcoe, to answer to the said information, and to be dealt with according to law.

(Signed,) NATH. KING, J. P."

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By the 105th section of the act, "If such prosecution is brought before any other two justices of the peace the summons shall be signed by one of them, and no other justice shall sit or take part therein unless by reason of their absence, or the absence of one of them, nor yet in the latter case unless with the assent of the other of them." It appears to me impossible for the legislature to have used plainer language, and it is imperative that an information under the act must be laid before two justices of the peace, and that the summons shall be signed by one of them, and they must both be named in the summons, because it is by those two only the case can be tried (except as mentioned in the statute.) It is not in my opinion sufficient for the justice of the peace issuing the summons to state that the case will be tried before himself and another named justice; because, unless the information had been laid before them both, the latter would have no jurisdiction. In the case before me, for all that appears, the information was laid before Mr. King only, and if so, his naming Mr. Bird as his associate before whom the case would be tried would not enable the latter to sit. They had, therefore, no jurisdiction. It is true the defendant appeared before them, but if they had not jurisdiction his so doing would not confer it. This rule must be absolute to quash the conviction. There will be no costs.

Conviction quashed, without costs.

[QUEEN'S BENCH DIVISION.]

McQUAID V. COOPER ET AL.

Provisional Judicial District of Thunder Bay—47 Vic. ch. 14, secs. 4, 5, (O.) —Title to land—Certiorari.

Held, that the jurisdiction conferred on the District Court of the Provisional Judicial District of Thunder Bay by 47 Vic. ch. 14, secs. 4, 5 (O.), is not subject to the exceptions to the general jurisdiction of the County Courts mentioned in R. S. O. ch. 43, sec. 18, and that, therefore, that District Court has power to try actions in which the title to land comes in question.

THIS action was brought in the District Court of the Provisional Judicial District of Thunder Bay to recover damages for the conversion by the defendants of the plaintiff's goods, consisting of tamarac and other timber, manufactured piles and other timber, severed from the soil and then in plaintiff's possession.

The defence was that the defendants were the servants of one J. F. Dawson, and in charge of his land in the township of McIntyre in the district of Thunder Bay, and while in charge of such lands, as such servants, notwithstanding notice to the contrary, the plaintiff wrongfully entered upon a portion of the said lands, and wrongfully cut and was cutting and removing therefrom timber growing thereon, the subject matter of the plaintiff's complaint, and the defendants seized the said timber for and on behalf of said Dawson, the owner thereof.

Issue.

The action was brought on for trial 10th November, 1885, and after the trial was entered upon the learned Judge of that court made the following indorsement on the record: "On the cross-examination of the plaintiff it appeared to me that the question of the title to the land whereon the piles and other timber mentioned in the plaintiff's statement of claim were cut was brought into question, whereby my jurisdiction to try this cause is ousted, and I so find. But I am of opinion that a writ of *certiorari* should issue out of the Supreme Court of Judicature to remove this cause

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into that court." He thereupon discharged the jury sworn to try the cause.

Thereafter a motion was made to O'Connor, J., in Chambers, for an order for a writ of *certiorari* to remove the cause into this court, which motion that learned Judge on the 8th of January, 1886, dismissed, with costs.

On the 3rd February, 1886, *Watson* moved by way of appeal from this decision and substantively for an order for a writ of *certiorari* to remove the cause into this court.

Aylesworth, shewed cause.

March 8, 1886. ARMOUR, J.—If the District Court of the Provisional Judicial District of Thunder Bay had jurisdiction to try this cause, notwithstanding the title to land was brought in question, that court ought to have tried it, and ought still to try it, and we ought not to order the writ of *certiorari* to issue to remove it into this court.

Whether that court had jurisdiction to try it is determinable by the provisions of 47 Vic. cap. 14, sec. 4, by which it is provided that "Subject to the exceptions in the next section contained, the District Courts of Algoma and Thunder Bay shall, *in addition to the jurisdiction possessed by County Courts*, each have jurisdiction and hold plea, subject to appeal,

1. In all personal actions where the amount claimed does not exceed $400.

2. In all actions and suits relating to debt, covenant, and contract; provided always, as to the additional jurisdiction hereby conferred, that the contract was made within the district, or the cause of action arose therein, or the defendant resides therein.

3. For the recovery of the possession of real estate in the district.

4. In replevin, where the value of the goods or other property or effects distrained, taken, or detained, does not exceed the sum of $400 and the goods, property, or effects to be replevied are in the district.

5. After a trial in ejectment, or in replevin, where the value of the goods claimed exceeds $200, or in any other case where the cause of action is beyond the jurisdiction possessed by County Courts, and a verdict or judgment exceeding $200 is obtained, any party entitled to move to set aside or vary the verdict or judgment, or to enter a non-suit, may, if he so desires, instead of moving in the District Court, and without removing the cause into the High Court by *certiorari* or otherwise, move in the High Court for such rule or order as he claims to be entitled to."

Section 5 provides that "the said District Courts shall not have jurisdiction in any of the following cases: (1) Actions for a gambling debt, or upon a note of hand or other document given wholly or partly in consideration of a gambling debt; (2) actions for malicious prosecution, libel, slander, criminal conversation, seduction, or breach of promise of marriage, if the damages sought to be recovered exceed $200; (3) actions against a Justice of the Peace for anything done by him in the execution of his office, if the damages claimed exceed $100."

"The jurisdiction possessed by County Courts" is that conferred by sections 19 and 20 of R. S. O. ch. 43, subject to the exceptions contained in section 18, which provides that "the said courts shall not have cognizance of any action (1) in which the title to land is brought in question; or (2) in which the validity of any devise, bequest or limitation under any will or settlement is disputed; or (3) for any libel or slander; or (4) for criminal conversation or seduction; or (5) against a justice of the peace for anything done by him in the execution of his office, if he objects thereto."

This jurisdiction so possessed by the County Courts was conferred upon the District Courts of Algoma and Thunder Bay by 47 Vic. ch. 14, sec. 4 (O.), and in addition to that jurisdiction the jurisdiction in the actions and to the amounts therein set forth, which last mentioned jurisdiction is not subject to the exceptions contained in R. S. O. ch. 43, sec. 18, but is subject only to the exceptions contained in section 4.

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That the said last mentioned jurisdiction is not subject to the exceptions contained in R. S. O. ch. 43, s. 18, but is subject only to the exceptions contained in section 4, is manifest from this last mentioned jurisdiction including the jurisdiction to try actions for the recovery of the possession of real estate in the district, which would necessarily involve the bringing in question the title to land, and might involve a dispute as to the validity of a devise, bequest, or limitation under a will or settlement. It is also manifest from jurisdiction being conferred upon these courts, as appears by necessary implication from section 5, to try actions of libel, slander, criminal conversation, and seduction, where the damages sought to be recovered do not exceed $200.

It is plain, in my opinion, that the District Court of the Provisional Judicial District of Thunder Bay was not ousted of its jurisdiction to try this cause by reason of the title to land being brought in question therein, but had jurisdiction to try it notwithstanding that fact, and ought to have tried it, and ought still to try it.

The motion will therefore be dismissed, with costs.

WILSON, C. J.—The only question is, when it appeared by the evidence that the title to the land upon which the timber was came in question, whether the learned Judge in the Thunder Bay District Court was right in staying further proceedings by reason of the supposed want of jurisdiction to try the question of title to the land.

The 47 Vic. c. 14, sec. 4, sub-sec. 3 (O.), expressly gives him jurisdiction, and the right to hold plea subject to appeal for the recovery of the possession of real estate in the district.

As the judge of the District Court has power to try actions for the recovery of the possession of land, that is, actions of ejectment, independently of the value or extent of the land, he has the power as a mere consequence to try the title to the land in any other case in which the question of title comes in question.

It would be strange if he could not give judgment for cutting a tree upon land because the title to the land was raised, when he has the power to give judgment for the land itself and every tree upon it, and when the title to the land is not only incidentally raised but is the question directly in issue for that between the parties.

O'CONNOR, J., not having been present during the argument, took no part in the judgment.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. CHAYTER.

Hawkers and pedlers—46 Vic. ch. 18, sec. 495, sub-sec. 3—48 Vic. ch.. 40, sec. 1, (O.)—Electro-type ware—Sale of without license—Conviction quashed.

"The Consolidated Municipal Act, 1883," (46 Vic. ch. 18) sec. 495, sub-sec. 3, empowers the Council of any County to pass by-laws for licensing, &c., hawkers, &c., going from place to place, &c., with any goods, wares, or merchandize for sale, and by 48 Vic. ch. 40, sec. 1, (O.) the word "hawkers" shall include all persons who, being agents for non-residents of the county, sell or offer for sale tea, dry goods, or jewelry, or carry and expose samples of any such goods to be afterwards delivered, &c.

Held, that electro-type ware was not jewelry within the above enactment, and a conviction for selling this without license was therefore bad, and in this case was quashed, though the fine imposed had been paid.

Held, also, that the words "other goods, wares, and merchandise," in the conviction, were too general.

March 19, 1885. *W. A. Foster*, Q. C., obtained an order *nisi* to quash a conviction for breach of a by-law of the municipal council of the county of Huron, made on the 4th of December, 1885, on the grounds:

1. Neither the depositions nor the conviction disclosed any offence committed by the defendant.

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2. The conviction was invalid, as it did not specify and describe any specific and particular goods, wares, and merchandise offered for sale by the defendant.

3. The defendant, by offering electro plated ware [referred to in the evidence] for sale by sample, as an agent, the goods to be delivered at a future time, committed no offence against the said by-law or the law.

March 23, 1885. *Foster*, Q. C., in support of the order *nisi*.

No one appeared contra.

The facts appear in the judgment.

March 30th, 1886. WILSON, C. J.—The municipal act, 1883, sec. 495, enacts the council of any county * * may pass by-laws for the following purposes:

Sub-sec. 3: "For licensing, regulating, and governing hawkers or petty chapmen, and other persons carrying on petty trades, or who go from place to place, or to other men's houses, on foot or with any animal bearing or drawing any goods, wares or merchandise for sale, or in or with any boat, vessel or other craft, or otherwise carrying goods, wares or merchandise for sale." The rest of the sub-section does not apply here.

By the 48 Vic. c. 40, sec. 1 (O.), "the word *hawkers* shall include all persons who, being agents for persons not resident within the county, sell or offer for sale tea, dry goods or jewellery, or carry and expose samples or patterns of any of such goods, to be afterwards delivered within the county to any person, not being a wholesale or retail dealer in such goods, wares or merchandise."

The by-law is framed in the words of these Acts.

The defendant stated that he lived in Seaforth: that he offered no jewelry for sale; he offered silver plated goods by sample, to be delivered afterwards if he made a sale: that he travelled for Hodges, Winan & Company of Toronto, as their agent, by whom he was paid no salary but a commission on sales: that the company he represented manufacture the goods he offered for sale: that he did not see

them do it, and cannot say all the goods he offered for sale were manufactured by them.

There is a great deal of this evidence, quite sufficient to sustain the conviction if the conviction is free from the objections taken to it.

The defendant paid the fine at the time he was convicted. The conviction states the defendant was convicted, for that he "did offer for sale at the said town of Seaforth electrotype wares, and other goods, wares, and merchandise, as an agent, by sample, to have the said goods delivered at a future time, and did sell and agree to deliver to one E. Durrant such goods, as such agent, contrary to law, and the by-law, passed on the 4th December, 1885, number 9, of the county of Huron."

The conviction is, "Be it remembered, &c., that Michael W. Chayter, in employment of John Lee, is convicted before the undersigned, two of her Majesty's justices of the peace for the county of Huron, for that he, the said Michael W. Chayter, did," &c., as above.

It does not appear the defendant was a person carrying on a petty trade, or was a hawker going from place to place, or to other men's houses, having goods, wares or merchandise for sale; nor that he had not a license to go about so to do; nor that the person for whom the defendant was the agent was not the manufacturer of such goods; nor that the defendant had not a written authority from his employer so to act; nor does it shew the employer of the defendant was not a resident within the county of Huron; nor does it shew that the goods being sold by sample, under the 48 Vic. c. 40 (O.), were teas, dry goods or *jewellery*, or samples of such goods.

As to the term *jewelry*, it is a term not aptly described by the words of the conviction, "electrotype wares and other goods, wares and merchandise."

Jewelry is the term given to ornaments or decorations for the person; and so far as I can form an opinion, distinct from mere articles of dress, and distinct also from the tattooing, painting, or cutting of the person. A feather in

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the hair, or a fish bone through the nose may be an ornament, but neither of these articles is jewelry. So the war paint of the Indian is not, nor are the painted eyes of the Eastern women, jewelry.

Jewelry, as commonly understood, consists of ornaments of gold or silver, or precious metals, or precious stones. Richly cut glass, or highly finished steel may, perhaps, be also held to be jewelry.

Jewelry may be made of electro-type ware, but electro-type ware is not jewelry any more than the rude gold or the rough and unpolished precious stone is jewelry.

Then, as to the remaining words of the conviction, that the defendant sold other goods, wares, and merchandise. These words are too general as stated in the conviction; see *Rex* v. *Selway*, 2 Ch. 522. In criminal pleadings, the goods in larceny are always specifically described. "Goods, wares, and merchandise" include *gravel* in a statute, subjecting to toll, amongst other things, bricks, flag-stones, and stones, and for every ton weight of all "other goods, wares and merchandise whatsoever." See *Coulton* v. *Ambler*, 13 M. & W. at pp. 416-417.

Shares in a joint stock bank were held not to be goods, wares, and merchandise within the 17th section of the Statute of Frauds: *Humble* v. *Mitchell*, 11 A. & E. 205.

So *scrip* in a railway company was held not to be goods, wares and merchandise: *Knight* v. *Barber*, 16 M. & W. 66.

Lawton v. *Hickman*, 10 Jur. 543, was an action for goods sold and delivered, &c. Plea, that the goods and chattels mentioned were divers, to wit, ten shares, of £25 each, of and in the capital stock of a joint stock bank, called, &c. Demurrer, among other causes, for suing for these bank shares as goods and chattels. Held, there was nothing in that objection.

The very fact that "goods, wares and merchandise" are a description which may or may not include what some may call goods, wares or merchandise, or which may or may not be held judicially to be so, shews the necessity there is for describing the kind of goods, wares or mer-

chandise in the conviction, that the court may be able to know whether the articles covered by that general description are or are not goods, wares and merchandise. It is quite clear these terms are not necessarily confined to *tea, dry goods, or jewelry,* which are the articles mentioned in the 48 Vic. c. 40; and so the *other* goods, wares and merchandise, besides the electro-type ware, mentioned in the conviction, cannot be understood as meaning a sale of goods contrary to the by-law or the statute. Electro-type ware is no doubt goods, &c., but the conviction does not shew the electro-type was *jewelry,* which is the only word in the 48 Vic. c. 40 which can be said to be applicable in this case. The conviction is certainly objectionable, and although the fine has been paid the conviction must be quashed.

Conviction quashed.

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[QUEEN'S BENCH DIVISION.]

DEVERILL v. COE.

Assessment—Non-resident land—Mistake in payment—Sale for taxes—Avoidance of sale—Incurable defects.

By R. S. O. ch. 180, secs. 108, 109, the county treasurer is to furnish the clerk of each municipality with lists of lands three years in arrear for taxes, and such clerks are to keep the lists in their offices for inspection, and are to give copies to the assessors who are to notify the occupant and owner, if known, by means of the assessment notice, that the land is liable to be sold for arrears of taxes. By secs. 155 and 156 a tax deed is to be final and binding on the former owners and all claiming under them if the lands are not redeemed in one year, and the deed is to be valid against all parties if not questioned by some interested person within two years from the time of sale. The land in question was, in 1879, assessed as non-resident. Defendant became the owner in 1878, and having come to reside thereon in the former year, improperly paid these taxes to the collector instead of to the treasurer. No notice of arrears was given to the then owner and occupant, and they were not entered on the roll for 1882, as required by the Act. The defendant paid all taxes subsequently demanded, including those for 1882, but the land was, notwithstanding, put up and sold for the taxes of 1879, a trifling sum, on the 30th December, 1882. The treasurer's deed was dated 15th February, 1884.

Held, that the sale could not be supported, as the notice required by sec. 109, that the land was liable to be sold for taxes, had not been given, and that such irregularity was not cured by secs. 155 and 156 of the Act.

Hutchinson v. *Collier*, 27 C. P. 249; *Church* v. *Fenton*, 28 C. P. at p. 404, doubted by Wilson, C. J.

Per ARMOUR, J.—The substantial compliance with the provisions of R. S. O. ch. 180, secs. 108-111 inclusive, is a condition precedent to the right to sell non-resident land for taxes.

Quære, per WILSON, C.J., whether there was not evidence that the land was not sold in a "fair, open, and candid manner."

Observations on the impropriety of tax sales as now conducted under legislative authority.

ACTION for the recovery of land.

The statement of claim set out:

1. That the plaintiff bought lot No. 14, as laid down upon registered plan No. 426, being subdivision of lot 38 in the 2nd concession from the Bay, in the county of York, at a public sale, held on the 30th of December, 1882, by the treasurer of the county of York, for arrears of taxes due on said lands, with costs.

2. That the taxes were due and in arrear upon the lands so sold to the plaintiff for a sufficient time to entitle the treasurer to sell the same.

3. That the plaintiff procured a conveyance to himself, [not said to be of the said land] from the said treasurer, dated on or about the 15th day of February, 1884, which was duly executed, and which he caused to be duly registered on the 25th day of June, 1884, in the proper registry office.

4. All things had been done, &c., to entitle the plaintiff to recover possession of the said lands.

5. The defendant was in possession of the said lands, and refused to give them up to the plaintiff.

The plaintiff claimed:

1. Possession of the same.

2. $25 for mesne profits from the date of the deed till possession given to plaintiff.

3. Such further relief, &c.

Statement of defence:

1. The defendant denied the allegations in the 1st, 2nd 3rd, and 4th paragraphs of the statement of claim.

2. That there was sufficient distress at all times upon the land mentioned, and the sale of the land was invalid.

3. The defendant admitted he was in possession, and alleged the plaintiff was not entitled to possession.

Replication.

1. The plaintiff joined issue upon the 1st and 3rd paragraphs of the statement of defence.

2. The plaintiff said the 2nd paragraph of the statement of defence was no answer to the plaintiff's claim, the deed not having been questioned, before some court of competent jurisdiction, by some person interested in the land sold, within two years from the time of sale, and he claimed the same benefit, by reason of this objection, as if he had demurred to the said statement of defence.

The action was tried before Galt, J., without a jury.

The learned judge found the taxes in question, that is for the year 1879, had been paid before the land was sold for taxes, and he gave judgment for the defendant.

November, 23, 1885. *McCarthy*, Q.C., and *J. E. Robertson*,

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moved to set aside the judgment and enter it for the plaintiff. The land was properly assessed and returned as non-resident land in 1879. The defendant was assessed for it in 1880, 1 and 2. The taxes for 1879 were not paid, and in 1882 the land became liable to be sold for these unpaid taxes. The county treasurer in 1882 sent to the township clerk the list of lands liable to be sold in that year for arrears of taxes. The township clerk gave a copy of that list to the assessor. The assessor for that year did not return this land in 1882 as occupied land, nor that the defendant was resident upon it. The roll was afterwards returned to the county treasurer and the usual proceedings were taken to sell the land, and it was sold for the arrears of taxes for 1879, on the 30th of December, 1882, and the plaintiff became the purchaser and he got his deed of the land on the 15th of February, 1884. The taxes for 1879 were $3.20. The defendant's wife said she paid these taxes, but she said the amount was about $6, to Mr. Wilson, the collector. If she paid the taxes to the collector in 1880 he had no right to receive them, as they were not upon his roll; the county treasurer alone could receive the payment of them, as they were due in respect of being due upon non-resident land. There is nothing to invalidate the title of the plaintiff to the land. If the assessor for 1882 had done his duty the land would not have been sold, but the plaintiff is not responsible for the assessor's default. They referred to *Fenton* v. *McWain*, 41 U. C. R. 239; *Claxton* v. *Shibley*, 9 O. R. 451-5; *Bank of Toronto* v. *Fanning*, 18 Grant 391; *Silverthorne* v. *Campbell*, 24 Grant 17; *Carson* v. *Veitch*, 9 O. R. 706: *Beckett* v. *Johnston*, 32 C. P. 301; *McKay* v. *Crysler*, 3 S. C. 436; *Jones* v. *Cowden*, 34 U. C. R. 345, and in Appeal, 36 U. C. R. 495; *Church* v. *Fenton*, 28 C. P. 384, and in Appeal, 4 A. R. 159; R. S. O. ch. 180, secs. 130, 147, 155, 156.

H. W. M. Murray and *Delamere*, shewed cause. The taxes were paid. It was not shewn how or when the lands were advertised for sale. Sections 27 and 88 shew how non-resident lands are to be dealt with. The county treasurer had not received a return of the list which he had

sent to the township clerk, so as to authorize him to treat the land as still liable to be sold. There was no demand made for payment of the taxes under section 109, and the omission to make a demand is not a curable defect, and besides there was sufficient distress upon the land. The defendant's name was entered on the roll or list of lands described as non-resident, and being there it should have been entered on the collector's roll, and the collector would have authority to collect the arrears. This action was brought within two years from the deed to the plaintiff, and the two years count from that time, although the statute says within two years from the time of the sale: *Hutchinson* v. *Collier*, 27 C. P. 249; *Church* v. *Fenton*, 28 C. P. at p. 404. They also referred to *Charlton* v. *Watson*, 4 O. R. 489.

McCarthy, Q.C., in reply. The defendant bought the land in 1878, and the assessment for 1879 was made while the land was vacant, and was made under section 27 in the manner therein prescribed, where, as in this case, the owner had not required to have his name entered on the roll: sections 3, 16, 88, 90. The fact of payment is very much to be doubted. But if payment were made, it was made to a person not entitled to receive it. Irregularities in these proceedings are cured by section 156. If advertisements of sale be required to be produced they can still be furnished. *Fitzgerald* v. *Watson*, 8 O. R. 559.

March 8, 1886. WILSON, C. J.—I shall refer shortly to some of the provisions of the statute. The county treasurer may at any time distrain upon any lands of non-residents in arrears for taxes in the township and may issue his warrant to the collector for that purpose.

The township assessment rolls for 1879 and 1880 were destroyed when the town hall was burned in 1881. There is no doubt, however, that the land in question for 1879 was assessed and returned as non-resident land. The taxes after that year were regularly paid and the land from 1880 was assessed and returned as occupied land.

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In 1879 the land in question was returned by the clerk of the township as non-resident land to the treasurer of the county, shewing the taxes not to have been collected.

On the 31st of January, 1882, the county treasurer sent a list of lands liable to be sold for taxes in 1882 to the clerk of the township, in which list was contained the land in question: section 108.

The township clerk, Mr. Leslie, said he gave a copy of the last mentioned list to the assessors on the 15th of February, 1882. He also said he got from the county treasurer in October, 1882, a list of lands returned as occupied in that year situate on the *east* of Yonge street, and he cannot find any such return made to him of land west of Yonge street, where this land is.

The assessors did not return any other land to the clerk as occupied in 1882, but the one relating to land on the east of Yonge street.

In October, 1882, after that return by the assessor, he, the township clerk, got the list of lands from the county treasurer so returned as occupied. The land in question is not in that list.

Mr. Brown, the assessor in 1882 for land west of Yonge street, where this land is, gave evidence as follows: "I never" (that is, in 1882) "got any instruction or list of arrears of taxes. I never knew it was my duty to take it out during assessment time. There is no entry of any arrears of taxes on my assessment roll. I never knew there were taxes due on this land."

In cross-examination the evidence is as follows:

Q. "In 1882 the list appears to have been sent by the county treasurer to the township clerk, and the township clerk tells us that he gave that list to you, or a copy of as much of it as referred to your assessment?" A. "I have never seen anything with any lot of Coe's on it."

Q. "Every year it is the duty of the township clerk to give to the assessor a list of lands which are liable to be sold in that year. Now do you mean to say you did not get such lists?" A. "I never knew I had anything to do with it when I was assessing."

Q. "Do you undertake to say, although Mr. Leslie has sworn contrary, that you did not get the list of lands liable to be sold for taxes in 1882?" A. "I do not remember anything about it, and I will say to the best of my knowledge I did not get it.

Q. "If Mr. Leslie says you did get it you won't contradict him?" A. "I will not."

Q. "Mr. Coe was living on the land in 1882?" A. "Yes."

Q. "So you are the man that appears to have neglected his duty?" A. "I do not think so."

Q. "The township clerk says he gave you the list, and that you did not return Mr. Coe as a resident?" A. "I did not understand it was part of my duty. If I thought it was my duty I would do it."

Mrs. Coe said the house they put up in 1879 was burned on or about the 12th of July, 1880, and she paid Wilson, the collector for 1879, before the house was burned, and he gave her a receipt for the taxes, and the receipt was destroyed in the fire.

Now, as to the evidence so far, there are two defences offered; firstly, that the taxes were paid about the end of 1879 to Wilson, the collector; secondly, that the statute was not followed, and the sale is void.

As to the payment of the taxes, the evidence may or may not be correct. If the payment was made at any time in 1879 or 1880 to Wilson, the collector, he would have no authority to receive it, because, as collector, he had nothing to do with the non-resident lands of 1879, and the payment, if made, was made to a person not authorized to receive it, and it was not shewn he was in the habit of receiving such taxes to the knowledge and with the assent of the council.

Then as to the alleged irregularities or defects, they appear to be as follow:

1. The alleged non-delivery by the clerk of the township to the assessor for 1882 of a copy of the list of lands which the treasurer of the county had furnished to the

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clerk of the township, upon which the taxes were in arrear for the three years next preceding January, 1882, and liable to be sold for arrears of taxes in the year 1882, according to sections 108-109.

2. That the assessor for 1882, if he did get such list, did not (and the evidence is quite clear as to the assessor's default, if he did get such a list) ascertain if any of the lots or parcels of land contained in the list were occupied, nor did he notify the occupants and owners thereof, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land was liable to be sold for arrears of taxes; nor did he enter upon the list "occupied and parties notified," or "not occupied," as the case may be; nor did he sign and return the roll to the clerk of the township; nor did he certify and make oath as to his having performed his duties with respect to such list according to sections 109 and 110.

3. That the township clerk did not in 1882 examine the assessment roll, when returned by the assessor, and ascertain whether any lot, contained in the list, received by him from the treasurer under section 108, was entered upon the roll of the year as then occupied, nor did he forthwith furnish to the treasurer a list of the several lots which appeared on the resident roll as having become occupied: section 111.

As to the alleged delivery of this list by the township clerk to the assessor for the year 1882, there is the positive statement of the clerk that he did deliver a copy of the list which had been furnished to him by the county treasurer. He said he got it from the treasurer about the 1st [of February, 1882, and he gave it, or sent it, to the assessor on the 15th of that month. The assessor is just as positive, on the other hand, that he never got it, but he said he would not contradict the township clerk if the clerk said he had given it to him (the assessor.) He still said, however, he never received it.

The learned Judge did not express any opinion whether the list last referred to was delivered by the township

clerk to the assessor in 1882. I am rather inclined to think upon the evidence, the clerk did deliver it to the assessor, for he says he made a memorandum of the delivery at the time, and he had no manner of doubt he had made such delivery; while the assessor said, "I never knew it was my duty to take out any list of arrears during assessment time. I never knew there were taxes due by Coe. I never knew I had anything to do with lands liable to be sold for taxes while I was assessing. I did not understand it was my duty, if I found Coe living on the land in 1882, to return the land as occupied. If I had thought of it, I would have done it."

If I have to choose between these two officers, I should say the evidence of the township clerk, who says he did his duty, and made a memorandum of having done it, and who must, therefore, have known his duty, must be held to outweigh the evidence of the assessor, who says he did not know it was his duty to return year by year whether those lands which were liable to be sold for arrears of taxes were occupied or not, and to notify the parties concerned of such fact.

The next question is, what effect has the utter neglect of the assessor to act upon the list of lands liable to be sold in 1882 for arrears of taxes, assuming as I do for this purpose that the assessor did receive such list? If he did receive it he most certainly did not perform his duty in any way with respect to it.

His duty was:

1. To ascertain if any of the lots or parcels of land contained in the list were occupied or were incorrectly described. There was no difficulty in doing that, for Coe was living upon the land from the summer of 1879, and from that time forward, and Brown, who was the assessor in 1879, was the assessor for the years 1880, 1881 and 1882, and found Coe in possession of the land in these years.

2. To notify such occupants and owners, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land was liable to be sold for arrears of taxes.

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All this could easily have been done, and it was of the very greatest consequence the occupants and owners should be so notified of the danger they were in of losing their land by the ruinous process of a tax sale.

3. To enter on the list, "occupied and parties notified," or "not occupied," as the case may be.

4. To return such list with the assessment roll to the township clerk, with a certificate of having performed the duties required of him, and to certify the same by his oath.

If that duty had been performed the township clerk would have informed the county treasurer the land of the defendants was occupied: section 111. And the county treasurer could have returned to the township clerk an account of the arrears of taxes due on the land: sub-sec. 2. And the township clerk could have put the arrears upon the collector's roll for 1882, and no doubt the defendant would have paid them: sub-sec. 3.

If not paid they could have been distrained for by the county treasurer: section 125; or, the lands could then have been rightly sold.

The assessor is liable to conviction before two Justices of the Peace for neglect of any of the above duties: section 115.

The question is, is the neglect of duty of the assessor such a defect in the procedure towards a sale of the land for arrears of taxes as will invalidate the sale?

That depends upon the effect of sections 155, 156. The first of these sections declares that "if any tax in respect of any lands sold has been due for the third year or more years preceding the sale thereof, and the same is not redeemed in one year after the sale, such sale and the official deed to the purchaser of any such lands (provided the sale be openly and fairly conducted) shall be final and binding upon the former owners of the lands and upon the persons claiming by, through, or under them, it being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof."

The latter section is: "Whenever lands are sold for arrears of taxes, and the treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding except as against the Crown, if the same has not been been questioned before some court of competent jurisdiction, by some person interested in the land so sold, within two years from the time of sale."

Under these provisions it has been decided that the two years count from the making of the deed by the treasurer, and not from the date of the public sale: *Hutchinson* v. *Collier*, 27 C. P. 249: *Church* v. *Fenton*, 28 C. P. at p. 404.

The deed to the plaintiff was made by the county treasurer on the 15th of February, 1884, and the action was begun on the 6th of May, 1885; so, according to these decisions, the defendant may, in this action, question the validity of the deed. The sale by the treasurer was on the 30th of December, 1882; so that the action was brought after the expiry of two years from the sale. But I doubt whether the two years count from the date of the deed. The sections say *from the time of sale*, and the sale referred to is the sale by the treasurer. The deed is the *evidence* of sale.

The question is, as the assessor for 1882 did not notify the defendant, upon his assessment notice or otherwise, that his land was liable to be sold for the arrears of taxes, is that a defect which invalidates the sale for such arrears of taxes?

The defendant, upon my assumption that he did not pay the taxes of 1879, or if he did, that the payment was made to an unauthorized person, must be taken to have known, as he bought the land in 1878, that he was liable to pay the taxes upon it for 1879, although the land was at the time it was assessed in 1879 assessed rightly as non-resident land. The roll was open to his inspection at all times: sec. 43.

The legislature, to provide against the carelessness or forgetfulness of the owners of land with respect to arrears of taxes, and to protect them from the loss of their land

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for non-payment of such arrears, has specially required the county treasurer to furnish to the clerk of each municipality a list of lands liable to be sold for taxes in arrear for three years; and that the clerk shall furnish to the assessor a copy of such list, and that the assessor shall —the words are—"it shall be the duty of the assessor to ascertain if any of the lots or parcels of land contained in such list are occupied, and to notify such occupants, and also the owner, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes:" secs 108, 109; and that the clerk shall compare the assessment roll with that list, and find whether any lot in that list is entered on the assessment roll for that year as occupied; and that he shall further notify the county treasurer of the same:" sec. 111.

The assessor, assuming he got the list in question, did not do one single act under these sections, and the defendant had no notice of the danger his land was in, and it was sold and sacrificed, as is usual, at a tax sale.

The legislature has further provided, for the protection of owners of land, that the assessor shall make oath that he has performed his duty in these respects; and that the township clerk shall amend the resident roll by the returns made by the assessor, and notify the county treasurer of such amendments; and that the county treasurer shall then return to the clerk an account of the arrears due on each lot; and that the clerk shall put the amount on the collector's roll for that year, in order that the arrears may be collected in the ordinary course of collection: sections 110, 111:

All these provisions for the protection of the defendant, and of others situated as he was, he was deprived of getting the benefit of, in consequence of the express notice he was entitled to receive by the plain language of the statute being withheld from him.

Putting lands on the non-resident list in place of the occupied or resident list is a curable irregularity: *Bank*

of Toronto v. *Fanning*, 18 Gr. 391; *Fenton* v. *McWain*, 41 U. C. 239. That the assessor did not return to the clerk, nor as a consequence that the clerk did not return to the county treasurer, that lands in the non-resident list have since become occupied, were held to be also curable: sections 110 and 111; *Claxton* v. *Shibley*, 9 O. R. 457. So, also, that the list of lands in arrear liable to be sold, although not authenticated by the seal of the county and the signature of the warden, and which had not been annexed to the warrant for sale, are also curable defects: *Fenton* v. *McWain*, 41 U. C. R. at p. 245.

It is true the direct notice required to be given to the person whose land is liable to be sold is a matter of procedure, and matters of procedure are frequently said to be, if not followed, curable by sections 155 and 156. Procedure must not, however, be construed too loosely. Having a collector's roll is a matter of procedure, but it cannot be said the want of such a roll would be a curable defect. If the assessor neglected to leave a notice of assessment for the person assessed under section 41, that, I think, would be a curable defect, for everyone knows he has to pay his taxes yearly, and if he did not receive a notice of his assessment he would know there was some neglect or mistake about it, and he has always the means of knowing what his taxes for the year are: section 43. The most that could happen to him would be a difficulty in appealing, if he would have to appeal, but that might be corrected afterwards by the council. The omission could not be attended with any serious consequences.

The notice under sec. 109 is a notice of a different kind. It is not the usual yearly notice which every one looks for: it is a notice which no one does or has reason to look for, and the want of the notice may be attended with the most serious consequences, the loss of his land.

It is true the lands to be sold are advertised in the *Gazette* and in a local newspaper of the county, and notice is given that unless the arrears and costs are paid the land will be sold by a day named; but people do not so much

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as they should concern themselves about such general notices.

An advertisement is nothing like the direct notice required to be given by sec. 109.

The notice of assessment for 1882 given to the defendant was the ordinary one shewing the taxes for the year; *but there is no notification upon it, as required by sec. 109, that the land is liable to be sold for arrears of taxes.*

The defendant had no reason to make enquiry for any other or further liability against him for that year than was contained in the assessment notice left for him.

I am inclined to think the omission of the assessor to give this notice to the defendant, that his land was liable to be sold for taxes, is not, although matter of procedure, a matter of such mere routine, like the ordinary notice of the annual assessment, that, looking at the serious consequences of the omission, it should be deemed to be a curable defect. It is more than an irregularity—it is a defect of really vital importance, and the neglect of such duties is made specially a penal offence on the part of the assessor by sec. 115. But I find a difficulty in saying that the defect is one which can prevail against secs. 155 and 156 of the Act.

The case of *Smith* v. *The Midland R. W. Co.*, 4 O. R. 494, to which my attention was lately directed, was an action for the recovery of part of the defendants' railway, which was sold for arrears of taxes. The county treasurer made the return to the township clerk of this, among other lands, liable to be sold for taxes. The township clerk's return of occupied lands did not contain that land and the land was sold.

The Chancellor was satisfied the county treasurer had furnished to the township clerk a list of the lands liable to be sold for taxes, and that the clerk afterwards retured the list to the treasurer of the lands mentioned in it which had become occupied. But "there is no evidence as to what was done with this list by the local officer, that is the assessor. It is not shewn * * that it was delivered

to the assessor, or that, if delivered to him, the assessor dealt therewith as provided by sects. 111 and 112 of the Act. * * However the facts may be, it appears to be the intention of the Act not to vitiate a sale on account of the default of subordinate officers in observing statutory requirements. He had no intimation by the return of occupied lands that the premises in question were exempt from immediate sale, by sec. 131 of the act. In these circumstances a sale having taken place for taxes actually in arrear for the required length of time, followed by a deed which has not been questioned until two years, I am of opinion the sale and deed are not now impeachable for the default (if there be a default) of the subordinate local officers in carrying out the special provisions of the act."

As the collector cannot enforce payment by distress until after he has made a demand for payment, although the distress could do no great harm even if it were made without a demand, for the party could still pay and would lose nothing by the unauthorized proceeding, one would think that the express notice which the Act requires to be given to the owner, that his land is liable to be sold, should be shewn to have been given before the land can be sold; for it is quite another thing neglecting to notify the owner that his land will be sold unless he pay the taxes in arrear, for if not notified he suffers as in this case an almost irremediable wrong. It is somewhat like condemning a person without giving him the opportunity of defending himself. It is a proceeding contrary to natural justice. The difficulty is to get over the very positive language of the statute.

The taxes were in arrear for three years. The sale, there is no reason to doubt, was openly and fairly conducted in the ordinary sense of these terms, unless selling the land, situated as it is, for $4.04, which was about the one hundreth part of its value, can at this day be said to be *unfairly conducting the sale.* The land was not redeemed in one year after the sale, and the statute says the sale shall in such a case be final and binding, and as if to make

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it as emphatic as possible, the act declares, "it being intended by this act that all owners of land shall be required to pay the arrears of taxes due thereon within the three years, or redeem the same within one year after the treasurer's sale thereof."

It was not the intention of the legislature to do injustice to the owner; on the contrary, it has provided as carefully for the owner's interest, and even against his neglect, as it is possible to do.

The strict enactments of secs. 155 and 156 should be relaxed, and perhaps something might be done in favour of such persons as the defendant, by some retroactive enactment, who are still in possession of the land.

But what would be infinitely better would be to put an end to the sale of lands for taxes. These sales were adopted here at a time when the country was thinly settled, and large tracts of land were held by absentees and other non-residents, and the taxes could not otherwise at that time be collected which were chargeable against them, and lands were comparatively of little value. The country is in a different condition now, and it is full time to stop these sales, which are used for the benefit of speculators only, and who are furnished by government with the power of depriving the innocent but careless landholder of his property, or of enforcing from him the most extortionate demand for getting back what is in justice his own.

Means may be devised by the legislature to have these arrears placed yearly upon the collector's roll for collection until they are paid, and if they are not paid in some few years, say five, let the municipality become the owners of such lands upon some terms and conditions which may give the owner a chance of redemption for a longer period, and if not redeemed, with power to the council to sell such lands by public sale, and to apply the proceeds for the benefit of the municipality. If any one is to profit by these sales let it be the municipality, or in other words the public, and not the private and unmeritorious speculator.

I have now to state the grounds upon which my judg-

ment is based; but as a preliminary I must restate some of the facts I have before adverted to.

In this case there are two points to be considered. The first is that it was sworn the taxes were paid to the collector in 1879, and the learned judge so found.

It is true the collector, not having that land upon his roll in 1879, nor any claim against the defendant, had no right to take such payment, and the township would not lose its claim to the sum, unless the collector had paid it to the municipality, which he certainly did not. But if the payment were made by the defendant he would not know after making it that his land was still chargeable with the tax; and he would have no reason to look for any further notice claiming that year's taxes to be still unpaid.

In such a case I think the sale of the land, although the two years had gone by, could still be questioned. The other point is this. If the taxes for 1879 were not paid even irregularly, and they were paid irregularly if they were paid at all, then the defendant must have known his land was charged with that sum; and if he is not to be excused for his ignorance of the law, when it is sought to apply its provisions against him, he must equally be entitled to presume that the requirements of the law [although, in fact, he knows nothing about them] will be observed when they are to be exercised for his benefit.

He had a right then to assume that if the taxes upon his unoccupied land in 1879 were claimed as being still unpaid, or because they had not been lawfully paid, he would be notified, according to sec. 109, that such claim was made for payment, and that he would be expressly told that his land was liable to be sold for such taxes if he did not pay them, and that a notice to that effect would be put upon his ordinary assessment notice in and for the year 1882.

The assessor did serve the ordinary assessment notice upon the defendant in 1882 for the taxes of that year, but there was no mention made of the arrears for 1879, nor any notice that the land was liable to be sold for such arrears if he did not pay them.

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The effect of that notice was that the assessor claimed in 1882 only part of the taxes he should have claimed in place of the whole, and the part not claimed was by far the most important part to be claimed, so far as the defendant was concerned.

The defendant paid over all that was claimed of him in 1882, and having done that he could not suppose there was more against him, and he could not possibly have thought that his land was to be sold for anything which he should have paid in that year. That is a case in which the owner of the land has been deceived by the assessor, withholding part of the claim that was against the land, and leading the owner to believe that the sum he did claim was the whole the owner had to pay.

It is a case more likely to deceive than the neglect to give notice at all. In the one case the party knows he has to pay taxes, although he has no notice; in the other he cannot possibly know he has to pay more than he is asked for and afterwards does pay.

If it can be said the effect of sections 155 and 156 is to make valid all sales for taxes, so long as there are in fact taxes in arrear, notwithstanding every kind of neglect and misconduct of the municipal officers, there is nothing more to be said; but if that is not the effect of these sections, where is the point to begin at which invalidity may be set up? Can it properly be said there are taxes in arrear so as to justify the sale of the land when the party has paid all he has ever been asked to pay, and I must add, by way of qualification, when he had no reason to believe in fact there was anything in arrear, or that there was more payable than he had paid? Yet I cannot avoid saying I am somewhat doubtful of the correctness of my answer in a case of such extreme hardship as this is, and I must say also my mind has been rather more against the defendant than for him.

I am of opinion however, after the fullest and most anxious consideration, that these sections do not authorize the sale of land for arrears of taxes, however great the

irregularities or misconduct of the municipal officers may be; and there are cases in which such sales may be questioned even after the lapse of two years from the time of the sale, and that the present is one of these cases.

The words at the end of section 155, I think, indicate that a case of this kind is not concluded from being questioned at any time. They are, "it being intended by the Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof." The words, "shall be required to pay the arrears of taxes," mean shall be obliged to pay. They do not mean the party shall be asked or requested to pay, but that he shall pay the arrears which are as of right due and payable; but, even in their strict meaning, that he "shall be obliged to pay the arrears." How can he be obliged to pay the arrears if he does not know there are any to pay, or if he has been misled so that he cannot know it, and so long as he does pay all he has ever been *required* to pay?

If I had not finally, and as I have said, with hesitation, come to the conclusion that the sale cannot be supported, I should have been in favour of giving the defendant an opportunity, if he desired it, of trying the question whether the sale of this land can be allowed to stand, or can in law be said to have been *fairly conducted*, when three or four acres of land; worth three or four hundred dollars, were sold for only $4.04.

I do not pretend to say, nor do I think, there was any unfairness on the part of the treasurer in the ordinary sense of that term; but it may be argued that the mere fact of selling land of so much value for so low a price was an unfair proceeding, however honestly the officer was acting. It was unfair to the owner of the land in that sense. No agent, trustee, auctioneer or sheriff could sell in such a manner; and the purchaser must have known he was getting an unfair bargain. The treasurer, under sec. 137, is to exercise some consideration for the owner; for if

he sell a part of the land he is to sell "in preference such part as he may consider best for the owner to sell first;" and why should he not consider also the owner's interest as to whether he should or should not sell his whole land for a most inadequate price? The defendant may not desire to try that question, as he has judgment upon the grounds stated; but if he desire it, we shall reserve the right to deal with that part of the case, in the event of our judgment being appealed from and reversed.

The motion, with that reservation, will be dismissed, with costs.

ARMOUR, J.—In my opinion the substantial performance of the provisions of R. S. O., ch. 180, secs. 108, 109, 110, and 111, is a condition precedent to the right to sell non resident land for taxes.

These provisions first appeared in the Act 27 Vic. ch. 19, which was an Act passed, as stated in the preamble, for the greater protection of persons owning non resident lands in Upper Canada, and also for the more sure collection of the taxes thereon. And it is impossible to construe these provisions so as to give effect to the intent and purpose of the Act, and to afford the protection it was designed to give, without construing them to be conditions precedent to the right to sell such lands for taxes.

If these provisions are to be construed as merely directory and as matters of mere procedure which the officers charged with the performance of them may omit or neglect as their ease or pleasure may prompt, without such omission or neglect being any hindrance to the valid sale of such lands for taxes, then the passing of the act containing them was an idle ceremony, and the protection intended by the Act to be afforded to the owners of such lands will be rendered wholly futile.

The township officers in the case before us wholly neglected their duty, and did not even pretend to observe these provisions; and as these officers are the officers of the very municipality for the benefit of which these taxes were

to be collected, I do not think the defendant's land should be practically confiscated through their neglect.

I do not appreciate very highly the hardship to the speculator in the purchase of lands for taxes, whose chief hope of gain lies in the owner of the land being kept in ignorance that his land has been sold for taxes, and who trafficks upon the chance of this ignorance continuing until he may be able, as he hopes, to deprive him of his land.

I do not think that the taxes for which the land in question was sold could be said to be due and in arrear so long as this condition precedent was unperformed in such a manner as to support the sale of the defendant's land; nor could the defendant's land be said, in the absence of the performance of this condition, to be land sold for taxes due, or for arrears of taxes, within the meaning of the Assessment Act, so as to render the sale valid and binding after the intervals fixed by the Act.

The taxes must be legally due, and the arrears must be taxes legally in arrear, so that the land may be legally sold, for otherwise sections 155 and 156 of the Assessment Act do not apply,

I refer to *McKay* v. *Crysler*, 3 S. C., per Gwynne, J., at p. 489, and per Henry, J., at p. 471.

In my opinion the motion must be dismissed, with costs.

O'CONNOR, J., not having been present during the argument, took no part in the judgment.

Motion dismissed, with costs,

[QUEEN'S BENCH DIVISION.]

REGINA v. REED.

Municipal Corporations—By-law—Passing of in anticipation of statute—Variance—Conviction quashed—45 Vic. ch. 24 (O.)

A conviction for violating a by-law was quashed, the by-law having been passed on the 27th March, to go into force the 3rd April following, in anticipation of an Act, 45 Vic. ch. 24 (O.), passed the 10th March, to go into operation the 2nd April then next ensuing.

Sub-section 2 of sec. 8 of the act subjects "such vendors of articles in respect of which a market fee may be now imposed as shall voluntarily use the market place for the purpose of selling such articles," whereas the 12th section of the by-law in question was, "any person or persons who shall voluntarily come upon the said market place, &c., for the purpose of selling," &c.

Held, that "Vendors, who shall voluntarily use the market place for the purpose of selling" was not identical with or equivalent to "any person or persons who shall voluntarily come upon the said market place for the purpose of selling;" nor was the expression "use the market place for the purpose of selling" the same as "come upon the market place for the purpose of selling;" and that the conviction was bad on this ground also.

Held, also, that the conviction was bad, as differing from both statute and by-law, being for refusing to pay the fees on eight quarters of beef "exposed for sale," whereas, the 13th section of the by-law applied only to cases of butcher's meat exposed for sale.

Dickson, Q. C., (*Fullerton* with him), moved absolute an order *nisi*, to quash a conviction made by the police magistrate of the city of Belleville under by-law No. 494, for the management, regulation, &c., of the market. They referred to *Regina* v. *Pipe*, 1 O. R. 43; *People's Milling Co.* v. *Meaford*, 10 O. R. 405.

The grounds stated, among others, were:

5. The municipality of the city of Belleville had no power to impose the market fees or tolls, sought under the said by-law to be collected from the said Wesley Reed.

6. The said by-law number 494 was passed 27th day of March, 1882, under or pretending to be under the authority of 45 Vic. ch. 24, (O.) which did not come into force until 2nd April, 1882.

7. The said by-law discriminated in favour of any farmer or other person offering for sale (but not for selling) any of the enumerated articles, (butcher's meat of various

kinds, particularly set out in the 13th section of the by-law) when the same should be actually raised or produced by such person on his or her farm or place, or had been in the actual possession of any such person not less than six months.

G. Henderson, Q. C., shewed cause.

It appeared that on 10th of March, 1882, 45 Vic. ch. 24 (O.) was passed, to go into operation on the 2nd of April, following. On the 27th of March the council of the city, in anticipation of the act's going into operation, passed the by-law No. 494, to go into operation on the 3rd of April, that is, on the day after the act of the legislature should commence to take effect. The by-law, as expressed on its face, was passed under and in pursuance of the 8th section of the act, which was as follows:

"The foregoing sections of this act, from one to seven inclusive, shall not apply to any municipality which shall pass, and so long as it shall keep in force, a by-law providing that the vendors of any articles, in respect of which a market fee may be lawfully imposed, may without paying market fees, offer for sale, or otherwise dispose of, any articles, at any place within the municipality, excepting only at and upon the market place or places thereof."

(2.) "Such by-law may, nevertheless, provide for the imposition and collection of market fees from such vendors of articles, in respect of which a market fee may now be imposed under the said municipal acts, as shall voluntarily use the market place for the purpose of selling such articles."

The 12th section of the by-law provided that "any person or persons who shall voluntarily come upon the said market place, &c., for the purpose of selling upon said market place, &c., any grain, meat, &c., so as to obtain the advantages of said market place, shall, before exposing for sale or selling any of the said articles, pay to &c., the market fees required by the by-law."

Section 13 of the by-law was: "All butcher's meat that

may be exposed for sale or disposed of in the market &c., shall be subject to the following charges in addition to the charges on each wagon, &c.: for every quarter of beef, ten cents: for every quarter of veal &c., three cents, &c.: Provided further, that such additional charges shall not be required to be paid by any farmer or other person offering for sale the above enumerated articles, when the same shall be actually raised or produced by such person on his or her farm or place, or shall have been the property in the actual possession of any such, not less than six months."

March 30, 1886. O'CONNOR, J.—The 6th ground of objection must in my opinion prevail. I think it is fatal to the by-law. The by-law was passed, as appears, in the interval between the day on which the act of the legislature passed and the day on which it was limited to go into operation.

During that time the act was inoperative, not in force, as if it had not passed at all, and no act could be done or justified under and by virtue of it. It could during that interval confer no power or authority whatever. It therefore follows that when the council passed the by-law No. 494 they had no power or authority to do so: it was therefore a void act, a nullity, void, not merely voidable, by law. The council might have passed the same by-law after the act went into operation, or they might have passed another adopting and legalizing it, but it does not appear that they did. They have, it is true, passed a by-law to amend it, by adding something thereto; but a nullity cannot be amended; that which is not, cannot be added to, subtracted from, or multiplied, simply because it is not, does not exist.

Then, as to the 5th objection. Sub-section 2 of the act subjects "such *vendors* of articles, in respect of which a market fee may be now imposed, &c., as shall voluntarily use the market place for the purpose of selling such articles." But the 12th section of the by-law is, "Any person or persons who shall voluntarily come upon the said market place, &c., for the purpose of selling upon such market

place, &c., so as to obtain the advantages of said market place, shall," &c.

The expression "vendors who shall voluntarily use the market place for the purpose of selling," is not identical with, nor is it equivalent to, the expression in the by-law, "any person or persons who shall voluntarily *come* upon the said market place for the purpose of selling upon such market place, so as to obtain the advantages of the said market place."

The latter is a broader and much more comprehensive expression than the former—the statutory one. "Any person or persons who shall" is equivalent to "all persons who shall," &c.; but all persons are not vendors.

Then, "use the market place for the purpose of selling" is not the same as "come upon the market place for the purpose of selling." A person may go (come) upon the market place for the purpose of selling, and yet not *use* it; that is, he may not sell or even offer for sale, even though he went on it for the purpose.

Then, the conviction differs from both statute and by-law. It is for refusing to pay the fees on eight quarters of beef "exposed for sale on Belleville Market by Wesey Reed."

The 13th section of the by-law applies only in cases of butchers' meat exposed for sale, but that is not what the conviction is for.

These grounds appear to me abundantly sufficient to warrant the quashing of the conviction.

It is unnecessary, then, to consider the other grounds stated by way of objection in the order *nisi*.

As I said at the argument the 7th ground seems to be a formidable one; but I have not considered it specially; indeed I have not had time to do so satisfactorily to myself, and therefore express no decisive opinion, or rather no opinion, thereon.

I may say that it was argued on behalf of the city that the council had power, under the municipal institutions act, in force at the time the by-law of the 27th of March,

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1882, was passed, and irrespective of the act of March, 1882, to pass such an act. But the by-law recites that it is passed, and it only claims to be passed under and by authority of the act of March, 1882; and it is only in case such a by-law "shall be passed"—that is, passed after the act goes into operation—that the matter of the 8th section has application or force: without the 8th section there would be no need of or authority for the by-law.

The order *nisi* will be absolute, with costs against the complainant.

Order nisi absolute, with costs.

[CHANCERY DIVISION.]

PLATT v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Action—Breach of covenants for title—Continuing damages—Survivorship of right of action—Motion to set aside order of revivor.

S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order was now sought to set aside on the ground that the right of action did not survive to her.

Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued since his death, for which *Semble*, the heir, or devisee, might bring an action.

In the case of such covenants running with the land where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death, passes to the heir or devisee; but where not only the breach took place, but damages accrued in the life-time of the ancestor, the remedy for these damages passes to the personal representative.

THIS was a motion to set aside an order of revivor on the grounds and under the circumstances mentioned in the judgment.

By way of supplement, it may be stated that the action was brought by Samuel Platt against the Grand Trunk Railway Company, claiming damages for breach of covenants of title, and in his statement of claim the plaintiff set out that by deed of February 3rd, 1873, and made in pursuance of the act respecting short forms of conveyances, in consideration of $5,100, the defendants granted to Alexander T. Patterson, his heirs and assigns in fee simple, certain tracts or parcels of land situate in Goderich, in the county of Huron, comprising a mill site on the river Maitland, also the easement and privilege of erecting and maintaining a dam upon and across the said river Maitland, so high as to take up eight feet of the fall of the said river, but no more, and of constructing and maintaining a sufficient head-race from the dam to the mill site; also of constructing a switch from the said mill site to the main line of the railway of the defendants near Goderich harbor, in so far as the same should run on, over, or through certain lands of the defendants, which lands the plaintiff proceeded more particularly to set out. He went on to allege that by the said deed the defendants covenanted with Patterson, his heirs and assigns, that for and notwithstanding any act, deed, matter, or thing by the defendants, done, executed, committed, or knowingly, or wilfully permitted or suffered to the contrary, they the defendants then had good right, full power and absolute authority to convey the said lands and other the premises and appurtenances thereby conveyed or intended so to be with every of their appurtenances unto the said Patterson in manner aforesaid, and according to the true intent and meaning of the said deed: that the defendants by the said deed further covenanted with the said Patterson, his heirs and assigns, that it should be lawful for him from time to time, and at all times thereafter, peaceably and quietly to enter upon, have, hold, occupy, possess, and enjoy the said premises thereby conveyed or intended so to be, with their and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and every part thereof, without any let, suit,

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trouble, denial, eviction, interruption, claim, or demand whatever, of, from, or by the defendants or any person claiming or to claim, by, from, under, or in trust for the defendants: that by various mesne conveyances the said lands and premises, and the said mill site, easements, and privileges as fully described in the said deed, became vested in the plaintiff in fee simple: that neither at the date of the said deed, nor at any time since could a dam be erected and maintained upon and across the river Maitland, so high as to take up eight feet of the fall of the said river, but no more, without submerging, and penning back the water of the river upon certain other lands which had been conveyed by the defendants to various parties prior to the said deed to Patterson, under whom the plaintiff claimed, without any reservation by them of the easements and privileges granted by the defendants to the said Patterson; that by reason of the said prior conveyances, and otherwise the defendants had not at the date of the said deed to Patterson, nor at any time since, good right, full power, and absolute authority to convey the said lands, or the premises thereby conveyed or intended so to be, nor any right, power, or authority to convey to him, his heirs and assigns, the said mill site, easements, and privileges, by reason whereof the same became and were of no value to the plaintiff, and the plaintiff lost and was defrauded of the money paid by him therefor, and lost, and was deprived of valuable erections built by him on the said land and mill site, for the purpose of using the same as a mill site: that before the commencement of this action, one Attrill claiming as owner of the said lands previously conveyed by the defendants as above mentioned, and having full power and authority so to do under the said conveyances, obstructed and prevented the plaintiff from the use and enjoyment of the easements and privileges of erecting the dam across the river as aforesaid, and of the mill site aforesaid; and the plaintiff claimed that an account might be taken of the damages sustained by him by reason of the breach by the defendants of the

covenants for title and quiet enjoyment contained in the deed made by them to the said Patterson.

After the case was set down for hearing, the plaintiff died intestate, and his administratrix obtained the order of revivor, which the defendants now moved to set aside on the grounds stated in the judgment.

The motion came up for argument in January 25th, 1886, before Proudfoot, J.

S. H. Blake, Q. C., for the motion. In equity damages in such a case as this are given once for all: *West* v. *Parkdale*, 7 O. R. 270, 8 O. R. 59. There is no one before the court who can claim future damages: *Rawle* on Covenants, 4th ed., p. 318. A covenant for title once broken is broken once for all, though it is otherwise as to a covenant for quiet enjoyment: 26 Alb. L. J. 224, 245; *Spencer's Case*, 1 Sm. L. C. 8th ed., p. 89; *Williams* on Executors, 8th ed., vol. i. p. 808: *Gamble* v. *Rees*, 6 U. C. R. 396; *Scott* v. *Fralick*, 6 U. C. R. 511; *Rowe* v. *Street*, 8 C. P. 217; *Scriver* v. *Myers*, 9 U. C. R. 255; *Cuthbert* v. *Street*, 9 C. P. 115, 386; *Martyn* v. *Williams*, 1 H. & N. 817; *Beauchamp* v. *Winn*, L. R. 2 Eq. 302.

J. Maclennan, Q. C., contra. It cannot be maintained that the action does not survive: O. J. A. 1881, r. 383. The damage occurred while Platt was in possession, and according to the English authorities, these damages are to be recovered by the administratrix, and not by the heir. The plaintiff here seeks to recover for damages done only to him, if any damage has occurred to the heir he can sue for it: *Kingdon* v. *Nottle*, 1 M. & S. 354; 4 M. & S. 53. The heir has nothing to do with what is sought in this action; *Sugden's* Vend. and Purch., 14th ed., p. 577. As to the mortgage, if this is a valid objection, it is a defence to the original action: *Thornton* v. *Court*, 3 DeG. M. & G. 293. I also cite *Twycross* v. *Grant*, 4 C. P. D. 46; *Lewin* on Trusts, 7th ed., p. 654, n. x.

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Blake, in reply. O. J. A., 1881, r. 383, makes no alteration as to what actions shall survive. *Banning* on Limitations, p. 178, gives the effect of *Kingden* v. *Nottle*, *supra*. If the damage is continuing, the heir has a right to sue; *Mitchell* v. *Darley Main Colliery Co.*, 14 Q. B. D. 125.

January 28th, 1886. PROUDFOOT, J.—Motion to set aside an order of revivor obtained under the following circumstances:

The action was brought by Samuel Platt against the defendants for breach of covenants for right to convey certain land and for quiet enjoyment. The defendants had granted the land with the right to raise a dam across the river Maitland to a certain height. But it was found that the dam could not be raised to that height without flooding lands previously granted by the defendants. The covenant for title was broken as soon as made. And the covenant for quiet possession is said to have been afterwards broken.

In his statement of claim, the plaintiff claimed for damages sustained and to be sustained by the plaintiff by reason of the breach of these covenants.

After the case was set down for hearing, the plaintiff died intestate, and his administratrix has obtained an order to revive the suit in her name.

The motion now made is to set aside that order, because the right of action, if any, is not one that survives to the representatives of Samuel Platt, and if it survives, it survives to the real representative, or to the real and personal representative jointly, and because the legal estate is outstanding in a mortgage.

There is no doubt the action survives, the question is to whom it survives?

In the case of such covenants as run with the land where only a formal breach takes place in the life of an intestate, the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach has taken place but damages have been incurred in

the life time of the intestate, the remedy for these damages passes to the personal representative: *Kingdon* v. *Nottle*, 1 M. & S. 365, 4 M. & S. 53; *King* v. *Jones*, 5 Taunt. 418.

In the present case damages are alleged to have occurred in the intestate's life time, and for these the administratrix is entitled to sue.

But it is said that in the case of a breach of the covenant for title, the damages are estimated once for all, and there is no liability for continuing damage. I believe the rule appears to be such in some if not all of the American cases. But so long as *Kingdon* v. *Nottle* stands the rule must be considered otherwise here. It is quite possible that if the defect of title is such that nothing passes to the grantee, then one recovery would put an end to the liability: *Mayne* on Damages, 4th ed., p. 197. But it is not so here, for the land passes but without the beneficial privilege, the mill site, for which it was bought. Thus the grantee has the land but daily suffers loss for the want of the mill site.

It was contended, however, that as the plaintiff asked by his statement of claim for damages sustained *and to be sustained*, that is the whole present and prospective injury, and as his death has prevented him from recovering the future damages, the right to them passes to the heir, and the plaintiff has no right to sue in respect of them.

The plaintiff might of course have waived any right to sue for continuing damages, but the action is not brought upon any such waiver, the plaintiff seeks all that the law would give him.

Mr. Mayne, in his work on Damages, 4th ed., p. 93, says: "Cases of much greater difficulty often arise, where the question is, up to what time, subsequent to the cause of action, damages may be assessed. Whether they must be limited by the commencement of the action, or may be calculated up to the time of verdict, or to an indefinite period afterwards. The result of the decisions seems to be that damages arising subsequent to action brought, or even to the date of the verdict, may be taken into consideration

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when they are the natural and necessary result of the act complained of, *and where they do not themselves constitute a new cause of action.*" And at p. 96: "Where the damages subsequent to the commencement of the action are not the necessary result of the alleged wrong, *or where they might be the foundation of a fresh action*, they cannot be included in the verdict of the jury." And at p. 97: "In cases of nuisances and continued trespasses upon land, *as each instant the nuisance or trespass is continued is a fresh ground of action*, it is clear the jury cannot give damages beyond the commencement of the existing suit."

In the present case the covenant for title is a continuing one, and therefore may be sued upon from time to time according as fresh damage arises, and therefore the plaintiff Samuel Platt could only have recovered damages to the commencement of the action. And for these his personal representative is entitled to sue. This action has nothing to do with damages that have accrued or may accrue since that time, and for those I suppose the heirs or devisee may bring an action.

I do not find that anything was determined in *West* v. *Parkdale*, 7 O. R. 270, 8 O. R. 59, at variance with this view, or that a different rule is to prevail in assessing damages in such cases in equity than prevails at law. In that case some difficulty was suggested as to the remedy for the continuing nature of the trespass. Counsel for the plaintiff obviated the objection by expressing his readiness to take one assessment of damages as all that the plaintiff sought.

The last objection, that the legal estate is outstanding, is set up as a defence in the statement of defence. If it is a good defence the order to revive does not affect it.

The motion is therefore refused with costs, to be costs in the cause to the plaintiff in any event. Leave is also granted to the defendant to add a new defence to his statement of defence as stated on the application. Costs of this also to be costs in the cause to the plaintiff in any event.

A. H. F. L.

[COMMON PLEAS DIVISION.]

BAKER ET AL. V. MILLS.

Will—Debts—Whether general charge to pay—Trespass—Entry by devisee necessary to maintain.

A testator by his will directed his executors to pay all his debts, &c., out of his estate. Then followed specific devises of his estate to his wife, children, and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, &c., then in the next place to sell and dispose of lot B, also so specifically devised. The executors before disposing of lots A and B, sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced.

Held, affirming the judgment of ROSE, J., that by reason of there being no such entry or possession the action was not maintainable.

Per CAMERON, C. J.—To entitle the plaintiffs to recover either at law or in equity, an entry upon the land by the plaintiffs must have been made at a time when they had a right to make such entry to carry the legal possession with it.

Held, also, *per* ROSE, J., (1) that the general language of the will was controlled by the codicil, and so the debts were not charged on the unappropriated estates; and therefore the executors had no power to sell the timber on the land in question: (2) that if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold; and, (3) that the purchaser, not shielded by sec. 30 of 29 Vic. ch. 20 (O.), was bound to see that the power was rightly exercised.

THIS was an action of trespass to land—for cutting timber.

The plaintiffs' statement of claim in substance alleged, that one Peter Stephen Cronter was at the time of his death the holder and owner of lot number 29 in broken concession A. of the township of Brighton: that prior to his death, on the 9th September, 1865, he duly made his last will and testament sufficient to pass real estate, and thereby devised to the plaintiffs, Rosewell Nathaniel

Baker and Albert Wentworth Baker, two of the testator's nephews, the north fifty acres of the said lot to their use and occupation when they should attain the age of twenty-one years, which age they attained within the last five years and not before: that at the time of the testator's death the said fifty acres were covered with timber trees of good beech and maple, and other wood, which under the will passed and descended to the plaintiffs and became their property: that the said timber increased and enhanced the value of the said fifty acres: that some years after the death of the testator, and before the plaintiffs attained the age of twenty-one years, the defendant wrongfully and illegally broke and entered said north fifty acres, and cut down, seized, took and carried away and removed from the said lands all said timber and trees, and disposed thereof, and converted the same to his own use, and deprived the plaintiffs of the use and possession thereof. By reason of the premises and of said wrongful acts, trespasses and conversions of the said defendant, the plaintiffs had sustained damages to the extent of $1,500, and the right had accrued to the plaintiffs to sue for, have, and recover from the defendant the full value of the said timber, trees and wood, with interest thereon from date of said cutting and removing thereof, and the committing of said grievances. And the plaintiffs prayed that they might be paid the said value and interest.

The defendant by his statement of defence denied the allegations in the statement of claim; and alleged that on the 30th day of April, 1864, the testator by deed by way of mortgage granted and conveyed to the Canada Permanent Building and Savings Society the said land; and the said society, upon default in payment of the money secured by the said mortgage, under and by virtue of a power of sale therein contained, before the trespasses complained of were committed, and before the plaintiffs attained the age of twenty-one years, sold and conveyed to the defendant the said lands, and all the interest of the testator, his heirs and assigns therein. And the defendant further alleged that the plaintiffs never had any interest in or possession of the said land.

The cause was tried before Rose, J., without a jury, at Cobourg, at the Spring Assizes of 1885.

The damages claimed and agreed to, in case the plaintiffs were entitled to recover, were $600.

The plaintiffs claimed as devisees of one Peter Stephen Cronter, who died on or about the 24th of September, 1866, at Brighton, Northumberland.

By his will, dated 28th August, 1866, he directed his executors and executrix, his wife, "to pay all my just debts and funeral expenses, and the legacies hereinafter given out of my estate."

Then followed several specific devises of his real estate to his wife, children and nephews, and of his household furniture to his wife; and a direction to his executors to sell the chattels (excepting the household furniture bequeathed to his wife), and out of the proceeds to pay the debts, and to invest the balance for benefit of his wife and children.

By a codicil, dated 19th September, 1866, he substituted for clauses 3 and 4 of the will a clause directing his executors and executrix, if necessary, to "sell in the first place" a certain parcel of land described as the north nine acres of Lot 29, in Concession B, of the Township of Brighton, which, by the third clause of the will was devised to one of his sons, Willis Edward Cronter, "to pay off any debts or incumbrances against my said estate; and, in the event of such sale and disposal being insufficient to pay such debts and incumbrances, then, in the next place, to sell and dispose of the south fifty acres of the north half" of said lot devised by the fourth clause of his will to his daughter; and, if such lot were sold, then, in that case, he directed that the said north fifty acres of the south half of said lot, referred to in the second clause of the will, should, on the death of his wife, become the property of his daughter.

Among the specific devises was that of the lot in question to the plaintiffs, then infants. The language, it was admitted, was sufficient to give a vested estate in fee simple.

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At the time of the devise and death of the testator the land in question was mortgaged.

Immediately after the death of the testator, the executors sold the growing timber on the land in question to the defendant, who purchased in good faith, after being advised by his solicitor that the executors had a right to sell to pay debts.

He paid as consideration money, $600.

Subsequently, on 18th December, 1871, the defendant purchased the land from the mortgagees under the above mentioned mortgage, they exercising the power of sale after default.

It was said that the executors, instead of applying the money obtained from the defendant, as also other moneys of the estate, in payment of debts, misappropriated the same for their own benefit—in all, some $2000.

The learned Judge, having reserved the giving of judgment for further consideration, on the 12th May, 1885, gave judgment dismissing the plaintiff's action, with costs, on the ground that the plaintiffs had never made an actual entry into or upon the said land, and could not maintain an action of trespass for the wrong complained of.

The reasons for arriving at this conclusion are contained in the following judgment of the learned Judge:

ROSE, J.—The defendant contends that the will, by its terms, charged the debts upon the land, and that whatever might have been the powers of the executors prior to 29 Vic. ch. 20, by that act they had power to sell, and the purchaser was, by sec. 36, not required to inquire as to the proper exercise of the power.

It seems to me that when the will was drawn the testator thought the personal estate would prove sufficient to pay the debts, but becoming doubtful made the codicil.

Reading the will and codicil as one instrument in the order as directed by the codicil, the result would be: 1st. A direction to the executors and executrix to pay debts and legacies out of the estate. 2nd. A specific devise to his wife, the executrix. 3rd. A specific appropriation of particular estates for the payment of debts. 4th. A direc-

tion to pay debts out of personalty, which failing the real estate was to be resorted to.

While the general direction to pay debts out of the estate might amount to a charge of the debts upon the estate, real and personal, the cases of *Thomas* v. *Britnell*, 2 Ves. Sr. 313, and *Palmer* v. *Graves*, 1 Keen 545 are authorities shewing that the specific appropriation does not create a charge on the real estate not specifically appropriated.

I observe that Mr. *Hawkins*, in his treatise on Wills, p. 283, states that "the doctrine of these cases is doubtful." Upon referring, however, to the last edition of *Jarman* on Wills, 4th ed., p. 591-2, I find they are still cited as authority on that point.

Apart from authority, where the will directs the executors to resort to the personalty in the first instance, which failing, then to lot A, and if that is not sufficient, then tol ot B, one would hardly think there was power to sell lot C without resorting in the first instance to lots A and B.

In this case, the lots specifically appropriated were not sold prior to the sale of the timber to the defendant; and, even if the language of the general direction to pay debts out of the estate is large enough to create a charge, the subsequent provisions of the will prevent the purchaser obtaining the benefit of sec. 36 of 36 Vic. ch. 20 (O.). (sec. 20 of R. S. O. ch. 107), for sec. 33, to which it refers, applies only where the testator "does not make any express provision for the raising of such debt," and here such provision is made by the specific appropriation of the lands mentioned in the codicil.

I am of the opinion, therefore, (1) that the general language is controlled by what follows in the codicil, and that the debts were not charged upon the unappropriated estate, and hence the executors had no power to sell the timber. (2) That if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold; and (3) That the purchaser, not shielded by sec. 30 of 29 Vic. ch. 20, was bound to see that the power was rightly exercised.

It is not perfectly clear that a charge of debts gave any power of sale prior to 29 Vic. ch. 20. See *Grummet* v. *Grummet*, 14 Gr. 648, 22 Gr. 400. And, therefore, if that statute does not apply, it would be doubtful if any power of sale existed in this case, even if there was a charge.

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There remains the question as to the right of the devisee of an equity of redemption to maintain trespass before entry.

It will be remembered that the plaintiffs at the death of the testator were infants. Before they attained their majority the land was sold by the mortgagees. The lot was an uncultivated timbered lot. No entry was made before the sale by the mortgagees, and none was possible thereafter.

"By the common law, an heir or devisee cannot maintain trespass until he has entered and taken actual possession. But if he enters after the injury is committed, he may maintain an action for a trespass committed before his entry, and after the death of his ancestor or devisor. In such case his entry gives him, in law, a possession by relation from the death of the devisor or ancestor: *Waterman* on Trespass, vol. ii., p. 438, referring to *Com.* Dig. *Trespass, B.* 3; 1 *Chitty* on Pleading, 177; *Barnett* v. *Earl of Guilford*, 11 Ex. 19, 24 L. J. Ex. 281. See *Jowett* v. *Haacke*, 14 C. P. 447. Reliance must not be placed upon the head note in the latter case as it is much stronger than the judgment."

In *Barnett* v. *Earl of Guilford*, at p. 33, Parke, B., speaks of this "relation back" as "a relation created by law for the purpose of preventing wrong from being dispunishable."

In *Donovan* v. *Herbert*, 4 O. R. 635, at p. 640, Wilson, C. J., says: "Actual occupation of the land is not required to give a right to maintain trespass by one *who has the legal title*. It is sufficient that he *enter* upon the land so as to put himself in legal possession of it."

I think the plaintiffs have no right to maintain an action of trespass; and that judgment must be entered for the defendant, with costs, including costs of the argument of the demurrer, which substantially raised this question.

Judgment for defendant.

During Michaelmas sittings *Reeve*, Q.C., moved on notice to set aside the said judgment, and to enter judgment for the plaintiffs for the sum of $600, or such other sum as to the Court should seem fit, on the following grounds: (1) the judgment is contrary to law and evidence, inasmuch as the plaintiffs proved a good cause of action against the defendant for waste: (2) the evidence disclosed a permanent injury by the wrongful act of the defendant to the estate in reversion

or remainder in fee simple of the plaintiffs' in the land, and therefore the plaintiffs were entitled to recover without proof of entry: (3) the evidence showed that the defendant after wrongfully cutting down the trees carried away the same, and converted the same to his own use, and when the trees were severed they became the goods and chattels of the plaintiffs, who acquired an immediate right to the possession, and entitled to maintain trespass or trover against the defendant.

The plaintiffs further moved to amend their statement of claim, if necessary, by alleging a permanent injury to and depreciation of the estate in reversion or remainder of the plaintiffs by the wrongful act of the defendant.

During the same sittings, November 25, 1885, *Reeve*, Q. C., supported the motion, and referred to *Waterman* on Trespass, vol. ii. 174, 399; *Mann* v. *English*, 38 U. C. R. 240; *Chestnut* v. *Day*, 6 O. S. 637; *Lambe* v. *Teeter*, 20 U. C. R. 82; *Honywood* v. *Honywood*, L. R. 18 Eq. 306; *Scott* v. *Vosburg*, 8 P. R. 336; *McLean* v. *Burton*, 24 Gr. 134; *Coote* on Mortgages, 4th ed., 704; *Washburn* on Real Property, 4th ed., vol. i., p. 150-3; *Butler* v. *Kynnersley*, 2 Bligh N. S. 374; *Craig* on Trees and Woods, 133; *Dickinson* v. *Mayor of Baltimore*, 48 Md. 583.

Shepley, contra, referred to *Waterman* on Trespass, vol. ii., 399; *Berry* v. *Heard*, Cro. Car. 242; *Revel* v. *Watkinson*, 1 Ves. Sr. 93; R. S. O. ch. 107, sec. 7; *Craig* on Trees and Woods, ch. 15, pp. 127-140; *Jarman* on Wills, 5th Amer. ed., vol. 3, p. 398 *et seq.*; *Hawkins* on Wills, 283; *Theobald* on Wills, 2nd ed., 632; *Jones* v. *Williams*, 1 Coll. 156; *Graves* v. *Graves*, 8 Sim. 43; *Yost* v. *Adams*, 8 O. R. 411; *Cornewall* v. *Cornewall*, 12 Sim. 298.

Reeve, Q. C., in reply, referred to *Colye* v. *Finch*, 5 H. L. 905, 922; *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *Warren* v. *Davies*, 2 My. & K. 49; *Douce* v. *Lady Torrington*, 2 My. & K. 600; *Harrold* v. *Wallis*, 10 Gr. 197; *Re Bailey*, 12 Ch. D. 268, 272; *Re Cameron*, 26 Ch. D. 19.

January 2, 1886. CAMERON, C. J.—The evidence disclosed, and there was no controversy to the contrary, that

the testator at the time of his death had only an equity of redemption in the land, and that the legal estate was vested in the Canada Permanent Building and Savings Society by the mortgage made to them by the testator. The evidence further showed that the defendant, upon the supposition that the executors and executrix under the testator's will had a right to sell the same, purchased the trees upon the land in question, converted the same into cordwood, and removed and sold the wood: that the defendant paid the agreed price to the executors or executrix, or some of them; and subsequently after the alleged trespass acquired the fee in the land by purchasing the same from the Building Society under the power of sale contained in the mortgage.

It was not contended by the plaintiffs that the title of the defendant at the time the action was brought was not a valid title in fee. When the testator died the land in question was in a state of nature and uncultivated, and so there was no one in the actual occupation thereof at the time the trees were cut. The executors under the will of the testator had neither the actual possession nor the right thereto. In what they did they assumed to act under a supposed power in them to sell the land to pay the testator's debts, by reason of the charge of the debts upon the estate, which they assumed and were apparently advised were a charge upon the land generally, as well as the personalty and the lots specially mentioned in the codicil.

There is no doubt the learned judge was right in the opinion he expressed that an heir at law or devisee cannot maintain trespass before entry. The authorities are uniform as to this; and Mr. Reeve did not question the law as so laid down, but contended that equity as well as law is to be administered in all the Divisions of the High Court, and no matter what the form of the pleadings may be if the evidence establishes a good cause of action, that cause must be regarded by the court and the right shown adjudged to the plaintiffs. That the evidence did shew in this case that at the time of the trespass the plaintiffs had the equity of redemption, which, according to the doctrine of the court

of Chancery, made them actual owners of the land subject to the mortgage, as a mere security for the debt, and the equity of redemption being diminished in value by the removal of the trees, at the instant of removal a right of action vested which the subsequent destruction of such equity of redemption by the mortgagee selling the land under the power of sale did not divest, and the necessity for an entry on land to enable persons in the position of the plaintiffs to maintain the action of trespass only pertained to that common law action, and was not regarded in equity. He cited no authority that supports this distinction.

In actions of waste and for injuries to the reversion the theory is, that there is some one other than the reversioner who has and is entitled to the immediate possession, and is in a position to maintain trespass for the injury to such possession; and it would be unjust not to give to him in reversion compensation for the permanent injury done to the land, diminishing the value of the reversion, while lawfully excluded from possession by him who has the possession and the right thereto.

In the present case the plaintiffs, if they had possessed the legal estate, might have entered, and such entry would have related back to the time of the trespass, and would have enabled them to recover the full damage they suffered from such antecedent trespass.

The necessity to make such entry is certainly an antiquated rule that might very well be dispensed with in the present day, but it has the support of such a mass of authority that no judge can properly disregard it. If it has outlived through changes made by statute in the law relating to real property the reason upon which it was founded, it is for the legislature to remove it, and not for the courts, which are controlled and governed by precedent.

Though I confess I think where changes are effected by statute in the common law, courts should have power to modify all the common law rules, the reason for the establishment of which has by the change been removed, to suit the

altered state of the law, as no doubt they have where the rule has direct relation to the change effected. But actual possession which in the case of an heir-at-law or devisee could be acquired by a mere entry upon the land is essential to the maintenance of the action.

To make such entry have the effect of relation back to the time of trespass he who makes the entry must have legal title. In this case the legal title was not in the plaintiffs, and the mere entry would not have given the right to maintain trespass. But actual possession by an intruder will give a right of action against a wrongdoer entering upon such possession: *Charteres* v. *Cowper*, 4 Taunt. 547.

Mann v. *English*, 38 U. C. R. 240, is an authority for holding that trespass will lie by the mortgagee against the mortgagor after default, where the mortgage contained a covenant by the mortgagor not to cut timber, which is perhaps not quite reconcilable with *Ashfield* v. *Ready*, 5 Ex. 539, where it was held the mortgagee could not maintain trespass against a tenant of the mortgagor entering after the mortgage until entry, and then only for trespass committed after such entry.

The plaintiffs' principal contention, however, as I have already indicated, is that in equity they have a right to recover the loss and damage they sustained by the diminished value of the estate or right in reversion. But this is opposed to the decision of the Court of Appeal in *Higginbotham* v. *Hawkins*, L. R. 7 Ch. 676, which is a case in principle very similar to the present, with the difference that the plaintiff in that case was entitled to the legal estate in remainder, while in this there was merely an equitable interest at the time of committing the wrong complained of, and which at the time the action was commenced had ceased to exist. The plaintiffs were entitled to the remainder in fee after the extinction of certain life estates. During the continuance of the first and second life estates waste had been committed, and the second life tenant was the executrix of the first. The

plaintiffs filed the bill praying for an injunction to restrain threatened further waste, and for an account as to the waste already committed. Sir James Bacon, V. C., granted the relief prayed both in respect of the waste committed by the first tenant and the second.

On appeal the decision was reversed as to the amount claimed against the estate of the first life tenant, on the ground that as no injunction could be granted in that case the remedy was one to be be pursued in a common law court and not in Equity.

Sir William James, L. J., in delivering the judgment of the Court of Appeal said, at p. 679: "Now the mere fact that the present tenant for life was also the executrix cannot make any difference; and to so much of the suit as seeks an account of what was received by the preceding tenant for life there appear to be two answers. In the first place it is clearly established that a bill does not lie for an account of timber felled any more than for any other money demand, except when the account is asked as an incident to an injunction, and that when the plaintiff has no right to an injunction he has no right to an account, and his remedy is at law alone. In this case the account prayed against the estate of the deceased tenant for life is not incident to the injunction against the present tenant for life."

There is no doubt that under the Judicature Act the Divisional Court of Chancery could try this action, but it would be as a common law court; that is, what it would be necessary to establish in a common law court to maintain the action would have to be proved in Chancery.

In this case the plaintiffs would be obliged to prove that they had before action made an entry upon the land and at a time when they had a right to make such entry to carry the legal possession with it. The plaintiff's cause of action therefore fails both at law and in equity.

I have not considered the question whether there was a power of sale vested in the testator's executors and executrix, and which question my learned brother Rose

decided in favour of the plaintiffs' contention; and while not dissenting from him I should like to have a further opportunity of considering the authorities bearing upon the question before adopting the conclusion he has reached.

The canon of decision in such cases is to ascertain from the whole will what was the testator's intention as to the power he was conferring upon his executors: charging his estate with the payment of his debts may or may not, according to the other provisions of the will, amount to a charge of the personalty only, or it may also embrace the realty.

In this case it is manifest the testator intended the personalty to be the first source resorted to for the payment of debts; but it is also clear that he had in his mind that that source might prove insufficient; and the direction in his codicil, that particular lands should be resorted to in a particular order to make good the deficiency does not necessarily shew that his intention was only to charge those lands. This being so, I do not wish, as it is not essential to the decision of the case, to express an opinion as to the proper construction of the power conferred.

The plaintiffs' motion must be dismissed, with costs.

I would add that the contention of Mr. Reeve is well founded, that when timber is felled unlawfully on land in the occupation of a tenant for life or for years at the moment of severance the property in such timber becomes the property of the reversioner or remainderman in fee. But that is where the legal estate in reversion or remainder is in him who has the reversion or remainder in fee, and here it was the mortgagee, and not the mortgagor, who had the legal estate. To constitute a right of action at law for a conversion the possession or right to the possession must be in him who complains of the conversion; and moreover the breaking and entering the close and felling the trees were the actionable wrongs here, and the removal was but aggravation of that wrong, an incident to it and not the substantive cause of action. If plaintiffs were only entitled

in remainder it would perhaps be otherwise, as there would in that case be no direct trespass against them; but in this case they are either entitled to recover for the whole wrong or not at all.

GALT and ROSE, JJ., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

CULVERWELL V. BIRNEY ET AL.

Land agents—Commission from both sides—Notice and assent—Incumbrances.

Land agents have no right to accept commission from parties with whom they deal without the fullest notice to their employers that they hold themselves at liberty to do so, and assent on the latter's part to such right; but neither express notice or assent is necessary. It is sufficient if from the nature of the circumstances the principal must have been aware of the fact, and by making no active objection must be deemed to intend to make none; and in the absence of specific agreement to the contrary commission must be estimated on the whole value of the property without regard to incumbrances.

In this case, where the defendants agreed to pay plaintiff, a land agent, one-and-a-half per cent commission on the sale of his land; and it appeared that without notice to or knowledge by defendants, the plaintiff obtained one per cent commission from the purchaser, he was held only entitled to charge the defendants the difference or a half per per cent. commission; and there being no agreement to the contrary such commission was computed on the whole of the property without regard to incumbrances.

THIS was action brought by the plaintiff, a land agent, to recover from the defendants commission on the sale of certain property belonging to the latter, situated in the city of Toronto and elsewhere, valued at $97,000.

The action was tried, at Toronto, before Armour, J., without a jury, at the Summer Assizes of 1885.

The evidence, so far as material, is set out in the judgment.

The learned Judge found that the plaintiff was, throughout the transaction in respect of which commission was

claimed, acting as the paid agent for and on behalf of Isaac H. Radford, and that he was so acting as such paid agent without the consent or knowledge of the defendants, or either of them; and held that the plaintiff could not, therefore, recover from the defendants the commission claimed or any commission upon the said transaction; and he directed judgment to be entered for the defendants, dismissing the action.

During Michaelmas Sittings, *J. K. Kerr*, Q. C., moved on notice to set aside this judgment, and to enter judgment for the plaintiff for the amount of his commission; or for a new trial.

During same sittings, December 3, 1885, *J. K. Kerr*, Q.C. supported the motion. The plaintiff is entitled to recover from the defendants the commission claimed. The evidence shews that the defendants were informed that the plaintiff was to get a commission from Radford. This is sworn to by both the plaintiff and Radford. The defendants clearly assented to the plaintiff getting a commission from Radford. In *Culverwell* v. *Campton*, 31 C. P. 343, Osler, J.A., while discountenancing the obtaining of commission from both sides, indicates that where there is notice to the employer that the broker holds himself at liberty to charge the other side with a commission, and an assent on the part of the employer to such a right, the commission may be charged. He also referred to *Wycott* v. *Campbell*, 31 U. C. R. 584; *Adamson* v. *Yeager*, 10 A. R. 496; *Mansell* v. *Clements*, L. R. 9 C. P. 139.

Fullerton, contra. It is clearly laid down that an agent shall make no profit out of his employment except what he receives from his employer; and thus on a sale of land the agent can only recover commission from the principal employing him. The evidence clearly shews, and the learned Judge has found, that throughout the transaction the plaintiff was acting as the paid agent of Radford, and without the consent or knowledge of the defendants. Under these circumstances the defendants are not liable. He referred to *Farnsworth* v. *Hemmer*, 1 Allen N. B. 494.

Mansell v. *Clements*, L. R. 9 C. P. 139; *Walker* v. *Osgood*, 98 Mass. 348; *White* v. *Curry*, 39 U. C. R. 569; *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394; *Jervis* v. *Burridge*, L. R. 8 Ch. 351; *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.*, L. R. 10 Ch. 515; *DeBusche* v. *Alt*, 8 Ch. D. 286; *Dunne* v. *English*, L. R. 18 Eq. 524; *Tribe* v. *Taylor*, 1 C. P. D. 505; *Antrobus* v. *Wickens*, 4 F. & F. 291.

J. K. Kerr, Q.C., in reply referred to *Green* v. *Bartlett*, 14 C. B. N. S. 681.

January 2, 1886. CAMERON, C. J.—From the evidence, it appeared that on the 28th August, 1884, the defendants signed the following memorandum:

"On a sale or exchange made to your customer of our property we will pay a commission of one and a half per cent. on property," &c.

The property to be sold or exchanged of the defendants consists of certain houses on Queen street valued at $60,000, with encumbrances thereon $32,000; a property called the Nelson property, valued at $12,000, with encumbrance thereon $6,000; and the Bronte property, valued at $23,000, with encumbrance thereon $12,000; and a further encumbrance by way of mortgage of $5,000, covering all the above properties.

The plaintiff had, before the signing of the above memorandum, been speaking to one Isaac H. Radford, with whom he had some business transactions; and after getting the memorandum he obtained from Radford an offer to exchange certain properties of his, or which he had an interest in, for the defendants' properties. This was submitted to the defendants, who accepted the proposition with a modification as to the cash payment to be made by Radford. Radford offered $700 cash; and the defendants proposed he should pay $3,000 in money, $1,000 cash down and $2,000 when the titles were completed. This modification of Radford's original offer, he being out of town when it was proposed, the plaintiff agreed to by memoran-

dum in writing, authorized thereto by Mr. Shaw, Radford's solicitor. Radford afterwards ratified what the plaintiff had done.

Thus there was a completed agreement in writing signed by both Radford and the defendants.

Proceedings were taken by the holder of the $5,000 mortgage, which bore interest at the rate of two and a half per cent. per month, to sell the property under power of sale in the mortgage; and the defendants had a difficulty to raise sufficient to induce the holder of the mortgage to stay proceedings till the transaction with Radford could be completed. While Radford was absent, negotiations took place between the defendants and Shaw, Radford's solicitor, by which the defendants entered into an agreement with Shaw to transfer to him the Queen street property for $52,000, the defendants taking certain lands at Moose-jaw in the North West, forming part of the land offered by Radford but which Shaw held in his own name or had a lien on, as part of the purchase. To this arrangement the plaintiff objected, and insisted, if carried out, he should be paid his commission as on the original transaction; and he got the defendant John L. Birney to sign a memorandum to that effect. This the defendant John L. Birney admitted signing, but said it was not to have any effect unless his brother, the other defendant, assented to it; and there was a conflict of evidence as to whether he did assent or not. The plaintiff claims his commission on $97,000, the estimated value of defendants property with incumbrances included. After this, Radford made a private arrangement with Shaw to take $1800 to refrain from disputing this arrangement; and Shaw, or a Mr. Corsett for him, took a conveyance of the Queen street property at $52,000, and Radford got, by subsequent arrangement with defendants, the Nelson and Bronte properties at the original price, the whole realizing to the defendants $89,000 instead of $97,000.

The plaintiff in his evidence swore that he told defendants that he was getting a commission from Radford on his

lands; and Radford swore that he also told the defendants the same thing. This the defendants deny, swearing that they did not know that the plaintiff was to be paid anything by Radford.

There would seem to be no doubt on the facts that the plaintiff is entitled to commission at the agreed rate, or on a *quantum meruit*, unless he has forfeited such right, on the ground on which the learned judge bases his disallowance of it, namely, the receipt by the plaintiff of a commission from Radford without the consent or knowledge of the defendants.

Though the bargain between Shaw and the defendants was one made by themselves, he was a purchaser in fact found through the plaintiff's instrumentality; and, apart from the agreement signed by John L. Birney, the defendants might well be held liable to pay the plaintiff's commission, He would certainly for the services rendered be entitled to a *quantum meruit*.

It does not appear very clearly upon the evidence what amount of commission Radford paid, whether it was one per cent or one and a quarter per cent., but if it did not equal what the defendants agreed to pay the plaintiff would be entitled to the deficiency. That being so, and assuming the fact to be established by the evidence that the defendants did not assent to and did not know that the plaintiff was to be compensated by Radford, that would not disentitle the plaintiff to be paid something. I do not understand that an agent by receiving a fee or commission from the opposite party thereby loses all claim to be paid by his principal if the amount received by him does not equal the agreed commission, if one be agreed on, or the fair value of his services, if there has been no reward expressly fixed. He would seem to be entitled to the stipulated sum, or a *quantum meruit*, less the amount received by him from the other party.

The principle at law and in equity being, that a servant or agent shall make no profit to himself out of his employment other than the amount payable to him by his

employer. The principle is an exceedingly just one, calculated to secure the observance of good faith between principal and agent, and to prevent the latter sacrificing the interests of the former to promote gain and advantage to himself. But all rules must be subject to exceptions, and must be applied and construed with regard to the facts and circumstances of each case, the principle contained in the general rule being always kept steadily in view, and not departed from.

That principle, in a case like the present, is, that, in the absence of something to shew a contrary intention existing, the agent must not receive any, benefit or advantage to himself that may in the slightest degree interfere with or weaken his sense of the obligation upon him to do his best for the interest of his principal; and, if he does that, benefit shall not enure to himself, but shall become and belong to the principal, or, if it is such a benefit that the principal cannot, from its nature, directly obtain, the agent shall be bound to make him compensation equivalent thereto, or to an amount that may be deemed reasonable according to the circumstances.

If I say to an agent, "Sell that house for me at $5,000, and I will pay you a commission of $100, and you may get a commission from the purchaser also if you can," it would be absurd to say that I should pay no commission to the agent if he succeeded in getting from the purchaser a hundred dollars. He would not in such a case sacrifice my interests though he might be induced to delay accepting offers till he got one from a person willing to pay him a commission. In like manner, if the principal knows that the agent is seeking and intends to obtain such commission and does not object to it, it appears to me the principal, having got all he stipulated for, ought not to be allowed to complain.

In cases like *Morison* v. *Thompson*, L. R. 9 Q. B. 480, the agent acted in a manner directly opposed to the interests of his employer. He was employed to purchase the ship as cheaply as he could and was to negotiate there-

fore on the basis of an offer of £9000. The vendor of the ship had employed a broker to sell upon the understanding that the broker should have all he made over £8,500. An arrangement was made between the two brokers, that the purchaser's agent should receive a portion of the excess The ship was purchased for £9,250, and the purchaser's agent received £225 of the excess over £8,500. The purchaser sued the agent to recover the sum so received by the agent; and it was held that he was entitled to recover, the purchaser being wholly ignorant of the arrangement between the brokers.

The judgment of the Court was delivered by Chief Justice Cockburn, who, at p. 485, said: "The law on the subject is well and compendiously stated in *Story* on Agency, sec. 211 in the following terms: 'Indeed, it may be laid down as a general principle, that, in all cases where a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers.'"

The case of *Barry* v. *Stanton*, 3 Ch. D. 502, shews how knowledge, or means of knowledge on the part of the principal of the manner of the agent's dealing with the other principal, will prevent the principal from obtaining the gains of the agent outside of his usual and ordinary commission.

I am of opinion, therefore, if the assent of the principal is given to the agents obtaining any benefit or commission from the other principal, he cannot afterwards complain of the agent on that ground or obtain the benefit the agent has derived therefrom.

I am also of opinion if the principal is told by the agent that he is receiving commission from the other side and does not object thereto, he is not in a better position than if he assented; and it is not unreasonable, where what is negotiated for is a sale by way of exchange of lands, that both parties should be allowed to pay commission, if no concealment is made by the agent that he is claiming or

intends to claim from both. Otherwise it might work unfairly for the agent.

Assume that in the present case Radford had put his lands in the plaintiff's hands for sale or exchange for a specified commission, and then the defendants had given to the plaintiff their lands to sell or exchange on a like commission, and thereupon the plaintiff brought Radford and the defendants together, and the communication resulted in a sale or exchange of their properties, why should he not be paid by both; and if not by both under these circumstances, by which ought he to be paid? Should the burden fall on Radford because his lands were in the plaintiff's hands first? I can see no justice in so holding. If the agent were not in such a case to be allowed to get a double commission, it would be clearly against his own interests to bring the parties whose lands he had in hand together, as he would thereby be depriving himself of one half of the earnings he might lawfully make. In such cases the law would not prohibit a double commission, if it appeared the agent acted in good faith and honestly with both principals. I say this without intending to appear to disapprove of the language of my learned brother Osler, J. A., in *Culverwell* v. *Campton*, 31 C. P. 343, wherein he says, at p. 347: "I do not intend to give any countenance to the notion which from the evidence in this case seems to be entertained by some land agents or brokers, that such agents occupy a position towards their employers different from any other agents, or that they have any right to accept commission from the parties with whom they deal, without the fullest notice to their employers that they hold themselves at liberty to do so and assent on the part of the latter to such a right."

This is a proper exposition of the general law relating to land as well as other agents. But it does not appear to me that the agent is bound to give express notice to the principal, nor that the principal's assent must be made in express terms. It is sufficient if from the nature of the circumstances it appears that the principal must have been

aware of the fact, and that by making no active objection at the time he intended not to raise any objection.

In the present case there is evidence both ways. The evidence of the plaintiff and of Radford, an apparently disinterested witness, is to the effect, that the defendants seemed to understand perfectly that Radford was paying a commission, and, if the learned judge had credited their testimony, he could not have found as he did, that the plaintiff acted throughout as the paid agent of Radford without the knowledge or consent of the defendants or either of them.

It is manifest, I think, upon the evidence, that the defendants specifically employed the plaintiff at a specified commission to sell or exchange their property: that at the time of that employment there was not an employment of the plaintiff by Radford to buy these specific lands; but there is the fact that the plaintiff had been negotiating with Radford about them before he got from the defendants their terms. And so the learned judge's finding is not altogether unsupported as to the agency; and as the question of the defendants' knowledge of the fact that plaintiff was to receive a commission from Bradford depends upon the credit given to the witnesses, the learned judge was in a better position to form an opinion than this court can be as he had the advantage of seeing the witnesses and observing their demeanour. I am not in a position to say he came to an absolutely wrong conclusion. But adopting that conclusion as right, it still appears that the plaintiff has not received from any one the amount of commission the defendants agreed to pay him. Radford, in his evidence, says, as to the amount of commission, when asked the amount by the learned judge: "I always paid one and a quarter per cent. on equities. Culverwell claimed that it should be on the whole amount. He wanted to get it on the whole amount. I forget what he charged me. I think it was one per cent. on the whole amount. I don't know that it was on the full amount. I claimed my right to pay him one and a quarter per cent.

on equities; and I think we kind of split the difference up in some way between what he was claiming and what I thought I was entitled to pay."

This was the most distinct evidence that was given as to the commission paid by Radford. And, it appears to me, substantial justice will be done to the defendants by giving them credit for one per cent. and making them responsible for the balance of one-half per cent. I understand Radford's contention as to his obligation to pay one and a quarter per cent. on the equities to be one and a quarter per cent. on the value of the property over incumbrances. But in the absence of a specific agreement to the contrary, I should say the commission must be estimated on the whole value of the property without regard to the incumbrances; and on this basis, the plaintiff would be entitled to a half per cent. on $97,000, or $485, for which sum, in my opinion, he is entitled to judgment.

The judgment, therefore, dismissing the action must be set aside, and judgment entered for the plaintiff for $485.00, with full costs of suit.

GALT and ROSE, JJ., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

PARDEE V. GLASS ET AL.

Trespass—Seizure—Interference with—Bailiff—Sheriff—Notice of Action—Goods in custody of law.

A bank placed an execution against M. the plaintiff's son and one C., in the hands of B., a Division Court bailiff, under which B. seized a stallion as belonging to M., which plaintiff claimed as her property, and which pending interpleader proceedings instituted by her, was placed with an innkeeper. Subsequently an execution by P. against the same parties was placed in the sheriff's hands, P.'s solicitor informed the sheriff of all the circumstances, and he, on the 3rd October, obtained from the innkeeper a written undertaking to keep the horse—stated to be under seizure by the sheriff—until further orders from the sheriff. On 14th October the sheriff on notice of plaintiff's claim interpleaded. On 31st October, the Division Court interpleader was decided in the plaintiff's favour. Whereupon the sheriff at once notified the innkeeper that he did not claim any further right to hold the horse. Before being so notified, the plaintiff demanded the horse, but the innkeeper refused to deliver it up until his charges for keeping it were paid, but did not assert any right to hold for the sheriff. On 18th November, part of the charges were paid, but it did not appear whether by the bank or P.; and the balance was subsequently paid by B. On the 3rd November an order was made barring P.'s claim and directing the sheriff to forthwith deliver the horse to plaintiff. On 14th November this action was commenced against the bank, P., the sheriff and bailiff, for conversion, and disobedience of the order of the Court directing redelivery, claiming the value of the horse, loss of earnings, &c. About 3rd December, after the commencement of the action, the horse was tendered to plaintiff who refused to accept it unless damages and costs were paid. No notice of action was given.

Held, that there could be no recovery against any of the parties for the reason (1) that the bailiff should have had notice of action; (2) that there was nothing to connect the bank or P. with the seizure; (3) that though there was what constituted a seizure by the sheriff, so as to entitle him to interplead and make the innkeeper liable if he had not kept the horse for him, the sheriff in no way interfered with the bailiff's possession or control over it, or in any way converted it to his own use, it being at the time in the custody of the law.

THIS was an action brought on for trial before the Chief Justice of this Division, and a jury, at the London Spring Sittings, when judgment as of nonsuit was entered for the defendants dismissing the action with costs.

The facts may be briefly stated as follows: The defendants, the Bank of British North America, had an execution in the hands of the defendant Burns, bailiff, of the 1st Division Court of Middlesex, against Mathew Pardee, son of the plaintiff, and one Mrs. Cobleigh. Under this execu-

tion a stallion was seized as belonging to the plaintiff's son, and placed by the bailiff in the hands of one Gustin, an innkeeper in London, to be kept at an agreed charge of $1,00 a day pending interpleader proceedings instituted on the plaintiff claiming the horse as her property.

The defendant Petty had also an execution against the same parties in the hands of the sheriff of Middlesex, one of the above defendants. Petty's solicitor informed the sheriff of the facts above stated; and under his oral instructions or on his oral information, wrote to Gustin who gave him an undertaking in the following words:

"I hereby agree to keep the horse called the 'French Hero,' (now under seizure by the sheriff of Middlesex, under execution of Petty v. Cobleigh), in my charge, until I get further orders from Wm. Glass, the said sheriff. E. H. GUSTIN."

This was on the 3rd of October.

On the 14th, the plaintiff's solicitors notified the sheriff that the plaintiff claimed the horse, whereupon the sheriff made an affidavit stating that he had seized the horse under instructions from Petty's solicitors, and that the plaintiff had notified him of her claim; and thereupon an interpleader order was granted.

On the 31st of October, the issue in the Division Court was decided in favour of the plaintiff, whereupon the sheriff at once, probably the next morning, notified Gustin that he did not claim any further right to hold the horse.

Before receiving this word from the sheriff, the horse was demanded from Gustin for the plaintiff, and delivery was refused on the sole ground that he held it until his charges for keeping it should be paid. He asserted no right or claim to possession as acting for on behalf of the sheriff. The plaintiff did not then pay the charges, which were subsequently paid, part on the 17th of November, for the time up to the decision in the Division Court, and the balance on the 13th of December.

It is not quite clear whether the solicitor for the bank, or Petty, paid the first sum. The second was paid by the defendant Burns.

On the 3rd of November, an order was made in the County Court action barring the plaintiff Petty's claim,

and directing the sheriff to "forthwith deliver up the said stallion to the claimant."

This action was commenced on the 24th of November.

Sometime after the 5th of December the horse was tendered to the plaintiff, who declined to receive it until she had consulted her solicitors; and they subsequently declined to advise her to take it back, except on terms of Burns paying damages and costs.

This action was for the value of the horse, damages for loss of earnings during the season; and was founded upon a claim for conversion, and disobedience of the order of the Court directing re-delivery.

The jury found for the defendants.

In Michaelmas sittings, *Osler*, Q. C., obtained an order *nisi* to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

During the same sittings, November 26, 1885, *Osler*, Q. C., supported the order. The sheriff is the responsible person for the seizure. When he seized he ignored the bailiff's execution, and by his act the plaintiff was prevented from redeeming the goods for the bailiff's charges. In the interpleader proceedings to which the plaintiff was a party, the sheriff swore that he did seize, and is now estopped from denying that he did seize. It was a question for the jury, and they have found for the plaintiff. Then as to the bailiff Burns. There is no question but that he took possession; and the only question is, whether he is protected by section 227 of the Division Courts Act, R. S. O. ch. 47. The burden of proof was on the bailiff, and he has failed to establish his authority to seize. He should have proved not only the warrant but the judgment on which it was founded. Then as to Petty. The evidence shews that the solicitors for Petty gave instructions to seize, and they accepted service of the interpleader issue and appeared thereon, and the client is responsible for the solicitors' act: *Kennedy* v. *Patterson*, 22 U. C. R. 554, 559, 601; *Harmer* v. *Gouin-*

lock, 21 U. C. R. 260; *Slaght* v. *West*, 25 U. C. R. 391; *McClevertie* v. *Massie*, 21 C. P. 516. Against these cases is the case decided in England of *Smith* v. *Keal*, 9 Q. B. D. 340; but the court in deciding this case said it was a matter of practice, and that if the practice had been to hold the client liable, they would not have interfered. Here we have decisions of our courts holding that the practice in this country has been to make the client liable, and this court will follow our own decisions. The Bank of British North America are liable. The execution was their execution, acting through Burns their bailiff. The solicitors of the bank gave instructions to seize, and acted for the bank on the interpleader proceedings, and they also paid part of the account due to the innkeeper after the interpleader decision.

Hardy, Q. C., contra, for the Bank of British North America. There was no evidence to connect the bank with the seizure. It does not clearly appear that Fraser & Fraser, the solicitors who put the execution in the bailiff's hands, were the bank's solicitors; but even if they were, the bank would not be bound by their act in directing the seizure, and there was no ratification of their act. The fact of their accepting the interpleader order and acting in the interpleader proceedings, would be no ratification; and as to the alleged payment through Fraser & Fraser, this was not proved. It is not within the scope of the implied authority of a solicitor's duty to direct the sheriff to seize any particular property, but the sheriff must use his own discretion. Moreover, there is no evidence of any direction to seize any particular property. The case of *Smith* v. *Keal*, 9 Q. B. D. 340, clearly shews that there is no such implied authority, and this being the latest decision on the subject, the courts are bound by it. See also *Henry* v. *Mitchell*, 37 U. C. R. 217; *McLeod* v. *Fortune*, 19 U. C. R. 98.

Falconbridge, Q. C., for the sheriff. The evidence fails to show that there was any seizure by the sheriff. The application for the interpleader order does not estop him

from denying that there was a seizure unless actual damage is proved: *Stimson* v. *Farnham*, L. R. 7 Q. B. 175; but even if there was a seizure by the sheriff, it does not render him a trespasser. The horse at the time was in the custody of the law, and the sheriff in no way interfered with the plaintiff's possession or control over it: *King* v. *Macdonald*, 15 C. P. 397; *Keene* v. *Dilke*, 4 Ex. 388; *Henderson* v. *Moodie*, 3 U. C. R. 348; *England* v. *Cowley*, L. R. 8 Ex. 126; *Burroughes* v. *Bayne*, 5 H. & N. 296.

Fitzgerald, for the defendant Petty, relied on the same grounds and arguments as set up by the bank.

Aylesworth, for the bailiff Burns. The authority of Burns to seize was sufficiently proved. In fact the plaintiff made it part of his case, and the objection raised as to proving the judgment, is now raised for the first time. If this is necessary than there must be a new trial.

Osler, Q. C., in reply. The action is two-fold—namely, 1st, for the alleged seizure; and 2nd, for not obeying the judgment in the interpleader by delivering up the goods. When goods are not in the possession of the debtor himself but of a third person, then the person assuming to act under a warrant must prove not only the warrant but the judgment on which it is founded: *White* v. *Morris*, 11 Q. B. 1015; *Bessey* v. *Windham*, 6 Q. B. 166.

January 2, 1886. ROSE, J.—No notice of action was given to the defendant Burns; and it was conceded on the argument that he was entitled to it, unless the evidence technically failed to shew that when he seized the horse he was acting under the judgment and execution.

Mr. Osler contended that he must prove both judgment and execution, citing *White* v. *Morris*, 11 C. B. 1015, and *Bessey* v. *Windham*, 6 Q. B. 166.

If this were a simple action of trespass according to the old forms of pleadings the point might be well taken, but here although the plaintiff apparently with careful intent avoids stating in the statement of claim that a judgment was recovered; yet by demurring to the 5th and 6th sec-

tions of the amended statement of defence of Burns he admits all that is required to entitle Burns to notice of action.

It was hardly urged that we should send the case down again on this point if on the others we should be against the plaintiff. If it became necessary so to do, we should consider whether the formal proof might not now be supplied.

I think the action was properly dismissed as against Burns.

As against the bank there is no evidence connecting them with the seizure. Evidence was given by one Macaffrey that he offered to give security to have the horse released from custody, and that "Fraser & Fraser, acting for the bank, or Mr. Glass, or some one of the parties that had the horse seized" would not accept it; and further, that after the determination of the interpleader proceedings "either Fraser or Fitzgerald; I think it would be Fraser; I would not be positive; it was one of the two paid the charges up to the time of the decision in the Division Court interpleader issue."

It was contended that under *Slaght* v. *West*, 25 U. C. R. 391, this bound the bank and made them liable for the seizure.

The case of *Smith* v. *Keal*, 9 Q. B. D. 340 (in appeal) is in conflict with *Slaght* v. *West;* and I think we ought to follow it. It was there held that it is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods; and that the client would not be bound by the solicitor's oral directions to the sheriff.

In this case had it been shewn that the solicitors of the bank had given oral instructions to seize the horse, and no evidence had been given that the client expressly authorized such act, the bank would not have been bound.

Then can we say that the above evidence as to the refusal to accept security for the horse seized by the bailiff is evidence of any act which would make the bank liable

for an illegal seizure, or that the uncertain statement that either Fraser or Fitzgerald paid a portion of the charges, furnished evidence that ought to have gone to the jury upon which they could be asked to find definitely that Fraser and not Fitzgerald paid the money; 2nd, paid it for the bank, and under instructions; and, 3rd, that therefore the bank authorized or ratified the seizure? I do not think so.

In *Wright* v. *Midland R. W. Co.*, 51, L. T. N. S. 539, the Court went much farther, it seems to me, in laying down the powers and duties of a Judge as to submitting facts to the jury than is necessary to support the action of the learned Chief Justice in refusing to submit such evidence to the jury.

I may possibly, without presumption, suggest that some of the language of Field, J., in that case, must be considered with reference, and confined to the facts of that case.

As to how far subsequent ratification would make the client responsible, see the judgment of Jones, Co. J., in *Slaght* v. *West*, 25 U. C. R. 391, at p. 394, and cases there cited; also the cases referred to in *Kennedy* v. *Patterson*, 22 U. C. R. 556.

Was there any evidence to go to the jury to show that the sheriff by any act of his interfered with the plaintiff's possession of the horse, or deprived her of its control, or in any way converted it to his own use?

It may, I think, be admitted that there was such action on the part of the sheriff as constituted a seizure so as to entitle him to interplead, and to make Gustin liable if he had not kept the horse for the sheriff. But would that be sufficient?

In *England* v. *Cowley*, L. R. 8 Ex. 126, it was held that preventing a party removing his own goods from his house was not a conversion, such party otherwise remaining in undisturbed possession. Many interesting illustrations are suggested shewing the absurdity of holding otherwise, one by Bramwell, B., "a man is going to fight a duel, and goes to a drawer to get one of his pistols. I

say to him 'you shall not take that pistol of yours out of the drawer,' and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not."

Pollock, B., said that to constitute conversion where the wrongdoer is not in actual possession he must use "such force and contrivance as to interfere entirely with the dominion of the true owner." And Bramwell, B., that "the gist of the action is the conversion, as for example, by consuming the goods or by refusing the true owner possession, the wrongdoer having himself at the time a physical control over the goods."

If, in the present case, when the horse was demanded from Gustin he had refused to give it up, on the ground that he was holding it for the sheriff, it might have been that the sheriff would have been liable, the horse being in the physical control of his agent, who refused the true owner possession. There was nothing of that sort here. The horse was placed in Gustin's hands to be kept for Burns under an agreement that Gustin should be paid $1 a day for its keep. The horse was demanded, and Gustin refused to give it up saying he held it for his charges which the person demanding refused to pay. How can it be said that the act of the sheriff in any way prevented the true owner obtaining possession?

If the sheriff was not guilty of any trespass, it follows that Petty is not liable.

It was urged that the order made in the County Court and above referred to, rendered it obligatory on the sheriff to pay the charges for keeping the horse, and to return it to the plaintiff; and that an action lay for disobedience of the order.

I do not think that was intended by the order. But so assuming, I do not think an action lies, certainly not on the facts now disclosed. It would seem anomalous to hold, as we have done, that no action lay against the sheriff for conversion, and yet to say that an action lies for disobedience of the order on practically the same facts. It is, I think, peculiarly a case in which the plaintiff should be left to move for an attachment, if she is so advised.

I considered this question in *Maclean* v. *Anthony*, 6 O. R. 330 where I reviewed some of the authorities. I refer especially to *Dent* v. *Basham*, 9 Ex. 469, where it was held that no action lay for the disobedience of a Judge's order made under the Imperial Act 6 & 7 Vic. ch. 73, sec. 37, for the delivery by the attorney to his client of his bill of costs. In that case counsel for the plaintiff admitted that an action would not lie upon an order simply; but contended that in that case a duty was cast upon the defendant by statute, and that a breach of such duty rendered the defendant liable to an action. The Court gave judgment for the defendant.

The motion must, in my opinion, be dismissed, with costs.

CAMERON, C. J.—In addition to consultation with my learned brothers, I had the opportunity of reading the judgment of my learned brother Rose just delivered, and fully concur in the result at which they have arrived and the reasons given therefor by my learned brother Rose. I would only add to what he has said in reference to the liability of the defendant Glass, that nothing that he did changed the effect of what had already been done, by the defendant Burns, in depriving the plaintiff of dominion and control over the horse. It was under seizure by Burns at that time, and was in the custody of the law awaiting the result of proceedings instituted to test the ownership thereof. If the plaintiff had done anything after that seizure by Burns, by which Burns's right to detain the horse had been determined in favour of the plaintiff, and Gustin, the innkeeper, had refused to give the animal up because the sheriff had authorized him to detain it, I have no doubt the sheriff would have been responsible for the detention, as Gustin would, under the circumstances, have been his agent to detain, and the detainer would have been his and not Gustin's, though Gustin would, acting on the sheriff's authority, have been equally liable with his principal the sheriff.

But that is not the present case. The horse was placed in Gustin's custody by Burns upon the terms that Gustin

should be paid for his keeping at the rate of a dollar a day, and Gustin claimed the right to detain the horse till he was paid for his charges for so keeping it, which certainly does not connect the sheriff with the detention after the interpleader was determined.

Before that, as has been pointed out, there was no act that amounted to a trespass or a conversion. As to the plaintiffs in the Division and County Court suits, the defendants, the Bank of British North America, and Petty, there is no pretence that they interfered otherwise than through their respective attorneys, and their interference, if it could be so called, was not until after the seizure had been effected by Burns, the bailiff, and whether the law as laid down in *Slaght* v. *West*, 25 U. C. R. 390, or in *Smith* v. *Keal*, 9 Q. B. D. 340, is to be regarded as the law in Ontario in relation to the liability of clients for the acts of their solicitors, there was no evidence I think which ought to have been left to the jury to connect the clients in this case with the alleged trespass or wrong. The refusal to take a particular person as security for the delivery up of the horse, even if it had been shewn to have been by the authorized attorney of one of the parties, would not have been evidence of a ratification of the seizure that could affect the client. It certainly would not be stronger evidence of ratification than accepting an interpleader issue, which the execution creditor could not be called on to do in the absence of seizure on his behalf; and in *Kennedy* v. *Patterson*, 22 U. C. R. 556, it was held not to be evidence of a ratification of the original seizure. Of course if there was any reasonable evidence, that is, evidence from which any man of ordinary intelligence could fairly draw the inference that the seizure had been authorized by the defendants, or any of them, it ought to have been left to the jury to say whether they would draw such inference or not, as against the defendant to whom it applied.

GALT, J., concurred.

Order discharged.

[COMMON PLEAS DIVISION.]

ARSCOTT V. LILLEY ET AL.

Magistrate—Action against—Conviction not quashed—R. S. O. ch. 73, secs. 4, 17—41 Vic. ch. 8 (O.), O. J. Act, sec. 90, sub-sec. 2—Rule 428.

Held, that the 4th section of R. S. O. ch. 73, as amended by 41 Vic. ch. 8 (O), prevents an action being brought for anything done under a conviction, whether there was jurisdiction to make the conviction or not, so long as the conviction remains unquashed and in force.

Held, also, though doubting, that the 17th section of said Act, which entitles the magistrate to full costs as between solicitor and client where in such action he obtains a verdict in his favour, has been repealed by the O. J. Act, sec. 90, sub-sec. 2, and Rule 428; and that such costs are now in the discretion of the Court or Judge.

THE statement of claim was for damages against the defendants, Lilley a magistrate, and Hutchinson the county attorney, for an illegal arrest on the 24th of September, 1884, the plaintiff claiming both for trespass and malicious arrest; for a similar wrong on the 18th of December, 1884; and for two several trespasses on the 6th of February: the one resulting in two and the other in six hours imprisonment.

The action was tried before the learned Chief Justice of this Division, and a jury, at London, at the Spring Assizes of 1885, when judgment was given for the defendants, without costs.

In Easter sittings, *Osler*, Q.C., obtained an order *nisi* to set aside the judgment for the defendants, and to enter judgment for the plaintiff, or for a new trial; and Aylesworth obtained a cross order to shew cause why defendant Lilley should not have his costs of the action.

During Michaelmas sittings, November 30, 1885, *Osler*, Q.C., supported the plaintiff's order *nisi*, and showed cause to the defendants'. The magistrate clearly acted without jurisdiction, and *Regina* v. *Arscott*, 9 O. R. 541, so decides. Where the magistrate acts without jurisdiction he does not come within the protection of R. S. O. ch. 73, secs. 2, 4. The defendants contend that whether there is jurisdiction

or not no action lies until the conviction is set aside. This is not the effect of the statute. Section 2 leaves trespass actions outside of the protection of the Act. Section 4 only applies to the actions referred to by sec. 1, namely, cases within the jurisdiction of the magistrate. *Hunter* v. *Gilkison*, 7 O. R. 735, does not apply, as it was decided under sec. 1. The defendants do not come within the protection of sec. 17, as there was no evidence offered and no finding of guilt. Then as to costs. The defendants are not entitled to costs. Section 19 does not apply to trespass actions. Moreover, sec. 19 is repealed by sec. 90, subsec. 2, of the O. J. Act as being inconsistent with rule 428. This was clearly a case for the exercise of a discretion, and there is no necessity for a special application to have such discretion exercised: *Jones* v. *Curling*, 13 Q. B. D. 262; *Walmsley* v. *Mitchell*, 5 O. R. 427.

Hutchinson, County Attorney, in person, contra. The magistrate acted within his jurisdiction, but merely made a mistake in thinking that the evidence disclosed an offence: *Regina* v. *Clancy*, 7 P. R. 35. But whether there is jurisdiction or not, the defendants are protected under sec. 2 of R. S. O. ch. 73. That section clearly includes cases of trespass, where the magistrate has no jurisdiction, or has exceeded his jurisdiction, as well as cases within his jurisdiction; and in no case can an action be brought until the conviction has been set aside. By referring to Consol. Stat. U. C. ch. 126, from which R. S. O. ch. 73, is taken, it clearly appears that the Act was to apply to all cases. When the R. S. O. ch. 73, was passed the position of the sections was changed, which gives room for the argument raised by the other side; but the doubt, if any, has been removed by the amending Act, 41 Vic. ch. 8, sec. 10 (O.) Then as to costs. The magistrate acted on advice, and should have his costs.

Aylesworth, for the magistrate. The plaintiff was a vagrant within the meaning of the Vagrant Act, and, although the case of *Regina* v. *Arscott*, 9 O. R. 541, decides otherwise, the full court have power to review that

decision, being only the judgment of a single judge. The magistrate, therefore, acted within his jurisdiction. The magistrate should have his costs: he acted under the instruction of his co-defendant, the county attorney. Sec. 19 is not repealed by the O. J. Act. The O. J. Act does not apply where costs are specially given by statute, as here. Moreover, under rule 428 the costs follow the event; and it is only on special application made, on good cause shewn, that the exercise of the discretion of the judge can be invoked. *Jones* v. *Curling*, 13 Q. B. D. 262, is clear on the point.

Osler, Q. C., in reply. The R. S. O. ch. 73, must be construed as it is; and the prior acts cannot be looked at to make it bear a different meaning.

January 2, 1886. ROSE, J.—The plaintiff was, on the 24th of September, 1884, convicted before the defendant Lilley for unlawfully keeping a house of ill-fame, and sentenced to six months imprisonment; was imprisoned; gave bail to the sessions; discharged from custody under a warrant of deliverance, dated the 25th of September, 1884; was tried at the sessions and found guilty. A new warrant was issued by Lilley on the 18th of December, on which she was rearrested and committed to gaol; discharged on a writ of *habeas corpus* by my learned brother Galt on the 6th of February, 1885.

On the 4th of February, in anticipation of the order of discharge, a new warrant was drawn up attempting to remedy the error in the warrant of the 18th of December, and when the order of discharge was handed to the sheriff's officer on the 6th of February, he, acting under instructions from the defendant Hutchinson, the county crown attorney, held her under the warrant of the 4th of February, for a couple of hours, when he let her go. As she was leaving the gaol she was re-arrested on a fresh warrant signed by the defendant Lilley, and held thereunder for about six hours, when she was again set free by the sheriff.

These arrests are the grievances complained of.

She was re-arrested on the 18th of March on a fresh warrant.

On the 29th of May, on return to a writ of *habeas corpus*, she was again discharged by an order made by myself, I holding that the warrant of commitment disclosed no offence against any law or statute. See *Regina* v. *Arscott*, 9 O. R. 541.

The plaintiff also brought an action against the above defendants for issuing the fresh warrant, and detaining her after she had been discharged under the writ of *habeas corpus* by my learned brother Galt.

That action was tried before the learned Chief Justice at the same sittings as this, and resulted in a judgment for £500 sterling in favour of the plaintiff. That judgment is now in review in the Queen's Bench Division.

The original conviction was not moved against, and was, as I have said, confirmed on appeal to the Quarter Sessions; and the various warrants of commitment were issued under the conviction.

At the trial the learned Chief Justice was of the opinion that the arrest under the first warrant could not give any right of action while the commitment stood; but, doubting as to the others, left it to the jury to say whether the plaintiff sustained any damage by her imprisonment; and they found she had sustained no damage. Whereupon he directed judgment to be entered for the defendants, without costs, thinking the action of the defendants not quite becoming, and not tending to promote respect for the administration of justice.

It is now contended on the part of the defendants that the 4th section of R. S. O. ch. 73, applied to prevent any action being brought for any of the arrests under the warrants, the conviction remaining in force: that the 17th section applied to prevent any more damages and costs than three cents in any event; and that section 19 applied to entitle the defendant Lilley to costs; and that the learned judge had no discretion to deprive him of costs.

On the other hand, it was contended that section 4 only applies to things done within the jurisdiction of the magistrate for which provision is made by sec. 1 of ch. 73; and that, as here, there was no jurisdiction, sec. 4 did not apply; and that, for various reasons, if that section does not apply to protect, the defendants are liable. 2. That there was no evidence offered, and no finding of guilt to bring the defendants within the protection of section 17. 3. That the Judicature Act does away with the provisions of section 19, as to costs.

Reference to the statute C. S. U. C. ch. 26, will show the order of the sections was reversed in revising the statutes, and the meaning obscured. As the sections originally stood no such question as here raised could have been seriously urged.

I am of opinion that when section 4 was amended by 41 Vic. ch. 8, sec. 10, (O.), so as to read: "No such action *as mentioned in this Act* shall be brought for anything done under *a* conviction or order * * until the conviction or order has been quashed," &c., (I have italicised the amendments), the meaning and intent of the original enactment were restored; and that while the conviction stands no action lies for arrests upon warrants issued in an endeavour to compel the plaintiff to undergo the full term of imprisonment awarded.

While I agree that the defendants probably exhibited an unwise zeal, it must be a matter of regret when technical difficulties prevent the enforcement of the law.

In the present case, as has been held in *Regina* v. *Arscott*, 9 O. R. 541, the plaintiff has been illegally proceeded against; but, according to the finding of a jury, if the proceedings had been well advised she should not have escaped due punishment for the offence of which she was found guilty.

It makes no matter under ch. 73, sec. 4, whether the magistrate acted within or without his jurisdiction while the conviction stands. The effect of a discharge under a writ of *habeas corpus*, and the right to bring an action

while the conviction stands, have been recently discussed in *Hunter* v. *Gilkison*, 7 O. R. 735.

It does not become necessary to consider the second question raised, as to whether the guilt must be proved in the action of trespass, or whether the finding at the Quarter Sessions would be sufficient. My impression, subject to further consideration, is, that it should be proved in the action. The other matters which may be proved are for proof at the trial. If so, the finding of the jury would be requisite to entitle the defendant to the benefit of the section. It may be that reading the charge of the learned Judge with their finding the fair inference is, that they found the plaintiff was actually guilty. If it were necessary to determine this question, one would be obliged to consider whether the section would apply where, as here, it has been held that the conviction disclosed no offence.

As to the third ground, I am unable to say that the learned Chief Justice was in error in holding, as he in effect did, that the Judicature Act repealed the provision as to costs in this statute, and placed the discretionary power in the Judge's hands. After consultation I am not at all free from doubt. There is no decision that I am aware of in point.

In *Copeland* v. *Corporation of Blenheim*, 11 P. R. 54, I had occasion to consider the effect of *Parsons* v. *Tinling*, 2 C. P. D. 119, and 2 Ex. D. 349; *Garnett* v. *Bradley*, 3 App. Cas. 944, but they do not decide the question raised here.

In the Exchequer Division] the majority of the Court thought that the appropriate canon of construction of statutes prevented the repeal, save by express terms, of special statutory provisions as to costs. In the House of Lords the Judges, while holding that the Judicature Act and rule as to costs—similar to our rule 428—repealed all statutes as to costs generally, declined to say what would be the effect upon statutes giving privileges to particular persons or classes. Lord Blackburn, indeed, seemed to be of the opinion that such statutes would not be repealed; but no decision was given, or was necessary.

By rule 428, it is enacted that, "Subject to the provisions of the act, the costs of and incident to all proceedings in the high court shall be in the discretion of the court. * * Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the judge before whom such action or issue is tried or the court shall otherwise order."

The opening words place all costs in the discretion of the court. The proviso limits that discretion in certain cases.

Sec. 90, O. J. Act, sub-sec. 2, repeals "any enactment inconsistent with this Act."

The rules have the force of an enactment.

The Act for the protection of justices of the peace, R. S. O. ch. 73, sec. 19, that "in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtains judgment upon verdict or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client."

It is clear that this action is a proceeding in the high court. The rule provides for the exercise of a discretion by the judge at the trial—the statute gives no discretion. Is not the rule inconsistent with the act? If so, then is it not repealed?

The observations of so eminent a judge as Lord Blackburn prevent our coming to a conclusion unmixed with doubt; but as my mind inclines in favour of the ruling at the trial, I cannot say it was not right.

The judgment must be affirmed, and the plaintiff's motion dismissed, with costs.

The defendant's motion to vary the judgment as to costs, must also be dismissed, with costs. The costs will be set off, and the balance payable to the party entitled.

CAMERON, C. J.—I am of the same opinion; and will only add to what has fallen from my brother Rose, that it seems

to me clear under the Act, R. S. O. ch. 73, without the amendment made in section 4 by section 10 of 41 Vic. ch. 8, (O.,) the conviction standing the action fails.

The words imported into the clause by the amendment leave no room for doubt or ambiguity; and as the Act was in force when the conviction of the plaintiff was made, there can now be no question, if doubt existed before, that while the conviction remained unquashed it protects the magistrate from liability for anything done under it.

The defendants order *nisi* must therefore be discharged, with costs.

As to the order *nisi* obtained by the plaintiff, I am not by any means free from doubt, in view of the language of the Judges giving judgment in *Garnett* v. *Bradley*, 3 App. Cas. 944, where the leaning of the judicial mind was clearly in favour of the view that the Judicature Act did not deprive any class of persons entitled to costs of such costs, and only made provision in respect to costs where the rights of the general public as litigants were affected; that is, such costs as might fairly have been within the scope of an enactment such as the Judicature Act.

The scope of the act was merely to make a change in relation to the practice and pleadings and constitution of the courts for the determination of rights, but was not intended to take from any class of persons any right or privilege conferred upon such class of persons by special statute. The defendants, or at least the defendant Lilley, belongs to such a special class, that is to say, he is a justice of the peace for whose special protection R. S. O. ch. 73 was passed.

By section 19 of that act it is expressly enacted that "In every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtains judgment upon verdict or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client."

There are on the other hand the authorities refered to in the judgment of my learned brother Rose, wherein the

language used by the judges would seem to indicate beyond question that all acts relating to costs have been abrogated by the Judicature Act, and costs are to be awarded and regulated solely under the provisions of that act.

I think by the course pursued by the defendants they invited this action, and gave abundance of ground for it; and, doubtless, were it not for the protection afforded by R. S. O. ch. 73, they would have been held responsible to the plaintiff in perhaps heavy damages.

It is therefore eminently a case in which a judge might properly exercise a discretion to deprive them of costs; and so, as my learned brothers entertain the view that the Judicature Act provides now the sole rule, guide and right to costs, I do not dissent from their view, though I am not, as I have said, free from great doubt as to its applicability to a case of this kind. It will be for the Court of Appeal to settle the conflicting decisions upon the question.

GALT, J., concurred.

Orders nisi discharged.

[CHANCERY DIVISION.]

COTTINGHAM v. COTTINGHAM.

Funds in court—Assignment—Notice to accountant—Stop order—Priorities—Notice to the court.

H. M. C. being entitled to certain moneys in court, obtained certain advances from A. H. and gave him a power of attorney to endorse any cheques issued to him by the court and repay himself. Subsequently H. M. C. obtained another advance from W. H. and assigned all his interest in the funds in court to H., which assignment was duly filed in the accountant's office and entered in the accountant's books and acted on for three years. W. H. had no notice of A. H.'s power of attorney. A. H. recovered a judgment against H. M. C. for the amount due him in December, 1883, and obtained a stop order in October, 1885. On a motion for payment out to A. H., which was resisted by W. H. who claimed all the moneys under his assignment. It was

Held, that the court is the custodian of the fund and not the accountant, and that notice to the accountant of an assignment of funds in court is not tantamount to notice of the assignment of a trust fund to a private trustee, and that a stop order is the proper way of perfecting such a security.

Per BOYD, C.—It was not necessary for A. H. to recover a judgment in order to entitle him to a stop order. Payments already made to W. H. under the assignment should not be interfered with, as the lodging of the assignment with the accountant was sufficient under the practice to justify payments out in the absence of any claim by A. H. under the first assignment.

Per FERGUSON, J.—A. H. having the earlier assignment was first in point of time, and *primâ facie* would be preferred in law, and having obtained a stop order which has been held to be the proper way of giving notice to the court, he thereby perfected his assignment.

THIS was an appeal from a judgment of Boyd, C., to the Divisional Court.

The matter originally came on by way of motion in chambers made on behalf of one Adam Hudspeth for the payment out of court to him of certain moneys standing to the credit of Herbert Maurice Cottingham in this action.

The facts appeared to be that Herbert Maurice Cottingham, being one of the parties entitled to certain moneys in court obtained certain advances in August and September, 1879, from Hudspeth, and to secure the payment of the same gave Hudspeth the power of attorney, dated September 15th, 1879, set out in the judgment of Ferguson, J.

Subsequently to that date, and in or about the beginning of the month of October, 1879, Cottingham applied to one Hargreaves, in England, for a loan on the security of his share of the funds. Hargreaves caused searches to be made in the accountant's office of the Court of Chancery in Canada, the result of which was to satisfy him that Cottingham's share amounted to about $5,500, and that there was no lien on it there.

An assignment of his interest was prepared and executed, and the assignment, approved of by the Referee and accountant, was deposited and filed in the Accountant's office on October 3rd, 1879, and an entry made in the accountant's books in these words: "Assignment from Herbert Maurice Cottingham to William Hargreaves of his full share in this suit, filed 23rd October, 1879."

On the 26th May, 1880, a power of attorney from William Hargreaves was produced, and a copy filed in the Accountant's office, under which Hargreaves attorney received all the moneys coming to Cottingham during the years 1880, 1881, and 1882.

Hudspeth on December 7th, 1883, recovered a judgment against Cottingham for the amount of his advances, and obtained a stop order on the moneys in court on October 31st, 1885, and then applied on notice for the payment out of the funds in court to him of sufficient to pay this amount due him.

The motion came up in chambers and was argued on January 11, 1886, before Boyd, C.

G. H. Watson, appeared for the motion.
J. T. Small, contra.

January 13th, 1886. BOYD, C.—The views of V. C. Page Wood with reference to the rights and priorities of parties claiming a fund in Court as enunciated in *Warburton* v. *Hill*, Kay 470, have been practically adopted in all the later decisions. His view was that when moneys or funds were in the hands of the accountant-general to the credit

of any person or party that did not constitute the officer of the court a trustee for such party, but that the court is itself the trustee. The accountant is but the agent of the Court, and notice of an assignment of the fund to him is not tantamount to notice of the assignment of a trust fund or a chose in action in the case of a private trustee. He held in that case that notice to the accountant-general of an assignment of funds in his hands was of no avail as against a stop order afterwards obtained by a subsequent purchaser without notice.

The proper practice when money in court has been assigned is to get an order to pay to the assignee only, or not to pay to the assignor without notice to the assignee: *Anonymous*, 1 Moll. 500; *Salmon* v. ———, Taml. 74. See G. O. Chy. 286 and 578.

As said in *Pinnock* v. *Bailey*, 23 Ch. D. 497, when by payment into court the office of the trustee was suspended, and the court took upon itself the trusteeship of the fund, a stop order was the most effectual way of perfecting the security, and in that case Bailey, whose security was first in point of date, and who, by obtaining a stop order, had been the first to perfect his security, was held entitled to rank in priority over Dobson, who had not obtained a stop order, but had merely given notice to the trustees. Such appears to be the position of the claimant Hargreaves in this case. His assignment is subsequent in point of time, and his notice of the assignment to the Accountant was of no higher value than the notice given in *Pinnock* v. *Bailey* after the fund had come into court. The same view of the law is acted upon by Pearson, J., in *Mutual, &c., Society* v. *Langley*, 26 Ch. D. 686.

It was not necessary for Hudspeth to recover a judgment in order to entitle him to a stop order. As assignee he had a right to apply therefor to the court. It seems to me, therefore, that his costs of action cannot properly be added to his security, and rank in priority to Hargreaves. As a judgment and execution creditor simply he would take subject to the rights of the second assignee of the fund

and as the costs incurred in suing at law were not necessary to enable him to perfect his security or to get payment of this fund, he should rank first only as to the amount of the debt, the costs of the stop order, and of this application.

So far as payments have been already made out of the fund upon faith of the assignment and power of attorney to Hargreaves, they should not be interfered with. The lodging of these instruments with the accountant was sufficient under the practice to justify the payments out in the absence of any claim by Hudspeth under the first assignment. If any balance is in court to the credit of the assignor after satisfying the claim of Hudspeth as I have limited it, that may be paid out to Hargreaves.

From this judgment Hargreaves appealed to the Divisional Court, and the appeal came on to be heard on February 18, 1886, before Boyd, C., and Proudfoot, and Ferguson, JJ.

Small, for the appeal. The case below was decided by the learned Chancellor upon a point not mentioned in the notice of motion, and not taken on the argument. The evidence shews that all possible precautions were taken by Hargreaves to make his security a good one, even to having his assignment approved of by the accountant, and the referee in chambers, which latter official had the power to make a stop order under which the fund is now claimed by Hudspeth. General Orders, 617, 619, and 627, shew that these officials had jurisdiction. The entry made by the Accountant in his book was notice to the court, and he was the proper officer to make the entry, and any entry made by him should bind the court. [BOYD, C.—When was the money paid into court? *Watson*—Before the stop order.] Hudspeth's claim was on two notes, and the power of attorney he took was not an assignment of the fund, but a mere power to endorse Cottingham's name on any cheques issued in his name. Under the circumstances in

this case the court will not enlarge the power. Hudspeth took no proceedings for nearly six years. His first security was the notes and power, and when he recovered the judgment the notes were merged, and as he now claims under the judgment he should be postponed. The stop order in this case is not regular because no notice was given to Cottingham. It is true that Order 287 provides that no notice is necessary in certain cases, but it does not cover this case. It provides for no notice to parties to a cause, or to parties interested in parts of a fund not sought to be affected. Here Cottingham should have been served as his share was sought to be affected: *Parsons* v. *Groome*, 4 Beav. 521; *Glasebrook* v. *Gillatt*, 9 Beav. 611. There was no necessity for a stop order, and Hargreaves notice was quite sufficient to attach the fund. It makes no difference how a trustee receives notice: *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, *ib.* 58 and 59; *Warburton* v. *Hill*, Kay. 470; *Lloyd* v. *Banks*, L. R. 3 Ch. 488; *Haly* v. *Barry*, L. R. 3 Ch. 452; *Greening* v. *Beckford*, 5 Sim. 195. Hudspeth claiming as a judgment creditor must be postponed to the assignment under *Scott* v. *Lord Hastings*, 4 K. & J. 633.

Watson, contra. Hudspeth does not claim as a judgment creditor. The evidence shews that the advance was made on the security of the money in court which could not be got out at the time because it was during vacation. The reason notes were taken was to have them discounted in a bank, and the power of attorney was taken as the most effectual assignment of the fund, as no notice of an assignment will be taken in the accountant's office. The judgment merely ascertained the amount due Hudspeth. No suit was brought on the assignment. The assignment itself was quite sufficient: *Lambe* v. *Orton*, 29 L. J. Ch. 319; *Chowne* v. *Bailis*, 31 L. J. Ch. 757; *Saunderson* v. *Perrim*, 22 L. T. N. S. 419; *Re Edward Thornton*, 13 L. T. N. S. 568. The stop order was properly obtained *ex parte*. There is nothing in order 287 to prevent it. The order was duly issued and recognized and must stand now.

Even if it could be attacked the only party who could attack it is the party who should have been served and that is not attempted: *Mutual &c., Society* v. *Langley*, 26 Ch. D. 690; *Pinnock* v. *Bailey*, 23 Ch. D. 497; *Palmer* v. *Locke*, 18 Ch. D. 381. The first stop order gives priority and that is the proper mode of perfecting the security. Hudspeth's assignment was first in point of time, so the merits are more with him than with Hargreaves.

Small in reply. The evidence shews that Hargreaves's advance was made at the time of the execution of the assignment. Hudspeth is a solicitor and he was guilty of laches or Hargreaves would have had notice and so saved his money.

March 6, 1886. FERGUSON, J.—The power of attorney from Cottingham to Hudspeth is as follows:

"Know all men by these presents that I, Herbert Maurice Cottingham (now on a visit to the Province of Ontario) of the town of Liverpool, England, clerk, do hereby authorize and empower Adam Hudspeth, of the Town of Lindsay, esquire, as my attorney for me and in my name to endorse any check or checks issued to me or in my name by the Court of Chancery in a suit of *Cottingham* v. *Cottingham*, for my share of the moneys in said suit, and to apply said moneys in payment of the amount advanced to me by my mother, and then to repay himself the moneys he has advanced to me thereon, rendering the balance to me."

This was given for moneys actually advanced by Mr. Hudspeth, who in his affidavit states the reason why this kind of document was adopted instead of the ordinary form of assignment to him, and I think the document has the effect of an assignment of the fund. It bears date the 15th day of September, 1879, and it is not doubted that it was executed on that day. The assignment from Cottingham to Hargreaves was of a subsequent date. It was, as appears by the evidence, for good consideration. Mr. Hargreaves, through his agents, deposited

his assignment (or a duplicate of it) in the office of the Accountant of the Court. This was done sometime late in October, 1879. Some payments were made to his attorney out of the fund. Mr. Hudspeth has obtained a stop order in respect of the fund. Mr. Hargreaves has not obtained any stop order. Mr. Hudspeth having the earlier assignment is first in point of time and *primâ facie* would be preferred in law. He has also obtained the first stop order, and a stop order has been held to be the appropriate way of giving notice to the court of the assignment of the fund, and therefore perfecting the assignment, on a principle similar to or the same as that on which an assignment is perfected by the assignee's giving notice of it to trustees when they are the custodians of the fund.

Mr. Hudspeth having the earlier assignment and having the stop order, seems to me to be entitled to succeed in this contention, unless the fact that the assignment to Mr. Hargreaves was deposited in the office of the accountant of the court has the effect of defeating his priority, and I do not know that the position of Mr. Hudspeth would be materially different if he had not obtained the stop order; for, by reason of the earlier assignment he would be entitled to be preferred, unless his right is defeated by the deposit of the document in the accountant's office, as before stated.

If this fact had the effect of a stop order obtained by Mr. Hargreaves, or can, under the practice, be considered a good and sufficient notice to the court of the assignment to Mr. Hargreaves, he would be entitled to succeed, for in such case the priority of Mr. Hudspeth would be defeated by Mr. Hargreaves having first perfected his assignment, the deposit of the deed in the accountant's office being long prior to the obtaining of the stop order by Mr. Hudspeth.

Counsel for Mr. Hargreaves sought to make available the reasoning in the cases *Dearle* v. *Hall*, 3 Russ. 1 and *Loveridge* v. *Cooper*, 3 Russ. at p. 58, 59, referred to by V. C. Sir P. Wood in *Scott* v. *Lord Hastings*, 4 K. & J. at p. 637, which is to the effect that where the assignee of

the fund, &c., by giving no notice of the transaction to the trustee, enables the assignor to make a fresh assignment to a third person who, upon the faith of the assignor's being entitled to the fund, &c., advances his money and obtains a charge, then the first assignee shall be postponed. But in order that this argument should succeed it must, I think, be shewn that the second assignee or chargee perfected his assignment or charge by the giving of the notice in the case of the fund being in the hands of trustees, or the equivalent of such notice when the fund is in the custody of the Court. And as to whether or not this was done by Mr. Hargreaves, I am, after having examined all the cases that were referred to on his behalf, of the opinion that the conclusion of the Chancellor is correct. I think the case *Warburton* v. *Hill*, 1 Kay 470, an authority in point; and I can perceive no sufficient reason for dissenting from the view stated by the Chancellor upon this branch of the case.

I am of the opinion that the arguments against the validity of the stop order cannot prevail. It was contended that there should have been notice of the application for the order for the payment out of the moneys to Mr. Hudspeth served upon Mr. Cottingham. The answer to this objection seems to be that Mr. Hudspeth has the assignment from Cottingham containing a power of attorney also and so represented Mr, Cottingham. As I understand it has been the constant practice under such circumstances to make the order for the payment of the money as was done in this case, without the service of the notice referred to.

The judgment should, I think, be affirmed, with costs.

The costs of the appeal to be added to the claim of Mr. Hudspeth.

PROUDFOOT, J.—I concur in the judgment just read by my brother Ferguson.

G. A. B.

[CHANCERY DIVISION.]

MURPHY v. THE KINGSTON AND PEMBROKE RAILWAY COMPANY.

Consolidated Railway Act of 1879, 42 Vic. c. 9 (D.)—Expropriation of land—Plans and book of reference—Limits of deviation.

The defendants having, in 1872, filed their plan and book of reference under the railway act, shewing their terminus at a certain point, and having built and used their line up to that point desired in 1885 to extend their line about one-third of a mile further on, and took proceedings to expropriate certain land required for that purpose, and possession having been refused applied to a county judge for an order for immediate possession. On an application for an injunction to restrain the company from proceeding before the Judge on the ground that no new plan and book of reference shewing the land required had been filed and in which the company contended that none were necessary, as they were within the limits of the deviation of one mile provided for by the statute. It was

Held, that "deviation" is a term not to be restricted to a lateral variance on either side of the line, but may mean a change *de viâ* in any direction within the prescribed limits, whether at right angles to or deflecting from or extending beyond the line.

THIS was an application by Catharine Baker Murphy and John Baker Murphy, her husband, for an injunction to restrain the Kingston and Pembroke Railway Company from proceeding before the judge of the County Court of the county of Frontenac for an order for immediate possession of certain land belonging to the plaintiff Catharine Baker Murphy, and which the company claimed to expropriate as necessary for the working of their line.

It appeared from the affidavits filed that the company had in the year 1872 filed a plan and book of reference showing their line up to a certain point in the city of Kingstone, and had built their line up to and erected their station at that point.

The company in the year 1885 desired to extend their line about one third of a mile further into the said city of Kingston, and to build a new station at the end of such extension, and for such purposes required a part of the plaintiff's land; and as possession was refused they took proceedings to expropriate the said land under "The Consolidated Rail-

way Act of 1879," 42 Vic. c. 9 (D.), and applied to the county judge for an order for immediate possession without filing a plan covering the proposed extension or the plaintiff's lands.

The plaintiffs then applied for an injunction restraining the company from proceeding before the county judge and the motion was argued on the 12th day of January, 1886, before Boyd, C.

Britton, Q. C., for the plaintiffs. The company has no power to expropriate this land without filing a further plan. The company's powers of extension are exhausted by completing its line to the terminal point in Kingston shewn on the old plan filed. [BOYD, C.—I do not think the affidavits shew the facts sufficiently to consider those questions fully; the argument had better be confined to the point as to whether the extension of the railway can be considered a "deviation" under the statute, so as to allow of the expropriation without the filing of a further plan.] The term "deviation" cannot be applied to an extension of the line, and must be restricted to lateral variations. The phraseology of the statute 42 Vic. c. 9 (D.), as well as the etymology of the word shews that: *Doe d. Armistead* v. *North Staffordshire R. W. Co.*, 16 Q. B. 527; *Parker* v. *Great Western R. W. Co.*, 7 M. & G. 253.

Cattanach, for the defendants. "Deviation" is not necessarily lateral. Sub-sec. 11 of sec. 8 of the statute permits deviations to be made "into" as well as "from," and not only "from the line of railway," but also "from the places assigned thereto in the said map or plan," one of which places is certainly the terminal point shewn on the plan, although the line cannot be extended beyond the limits assigned to it by parliament. See also sub-sec. 12, and others. There is no reason for restricting the meaning to lateral departure. What should the angle of departure be, and why should it be from the side instead of the end of the railway so long as the limit is not exceeded? The only limit the railway act puts on extension is the furthest

point to which the line can go. See sub-sec. 19 of sec. 7. In some of the English cases the powers of deviation have been held to be lateral, but that was owing to the wording of statutes which are different from ours. See *Hodges* on Railways, 6th ed., p. 341, where it says "deviation" shall shall not include extension "*into*." Our statute expressly permits deviations "into," and thus gives larger powers. Sec. 8, sub-sec 11. Even in England where deviation is not restricted by particular enactments, it is held that it implies extension: *Sadd* v. *Maldon, &c., R. W. Co.*, 6 Ex. 143; *In re The Yorkshire and Doncaster, &c., R. W. Co.*, 1 Jur. N. S. 975; *Wood* v. *The Epsom and Leatherhead R. W. Co.*, 8 C. B. N. S. 731; *Simpsone* v. *Lancaster and Carlisle R. W. Co.*, 11 Jur. at p. 881; *Grimshawe* v. *Grand Trunk R. W. Co.*, 19 U. C. R. 493.

January 20th, 1886. BOYD, C.—In *Redfield* on Railways, vol. i., p. 360, 4th ed., it is said: "The company having opened their main line for travel but not completed the stations and works, are at liberty to take any lands within the limits of deviation for a branch railway;" and it is thus repeated at p. 389: "The company may take lands within the line of deviation for a branch railway." The authority cited for these statements in the text, is *Sadd* v. *Maldon, &c., R. W. Co.*, 6 Ex. 143. It is cited for the same purpose in *Hodges* on Railways, 6th ed., pp. 344-5. The decision itself appears to bear out the gloss of the text writers. The defendants had fixed the site of their station and works at the Maldon terminus, and had proceeded to complete them at that location. Afterwards they sought to expropriate the plaintiff's land which lay between their terminal station and the river Blackwater, in order to lay down a line of rails whereby they might obtain communication with the river, and more conveniently use and work the railway. This last mentioned line of rails was within the limits of deviation shewn on the plans. In argument, Bramwell for the plaintiff, objected that the company were only empowered to make the

line, and having once fixed its course, they were not authorized to alter it, as that in effect would be to construct another line. But the court held that the company was entitled to make compulsory communication between the terminus of their line and the river within the limits of deviation as marked on the plans. The 16th section of the English General Act, 8 & 9 Vic. ch. 20, referred to in that case, does not appear to me to be more comprehensive than the language to be found in the Canadian Consol. R. W. Act of 1879, sec. 7, sub-sec. 10, (D.) by which the company has power and authority to construct and make all other matters and things necessary and convenient for the making, extending, and using of the railway.

There is another decision of Wood, V.C., not referred to in the text book which makes in the same direction, I refer to *In Re The Yorkshire D. & G. R. W. Co.*, 1 Jur. N. S. 975, in which he held that land within the limits of deviation in the deposited plans, not taken in the first instance by the company, may be subsequently taken for the purposes of making a siding so as to give local traffic or ingress to the main line. These cases indicate that the definition of "*deviation*" as used in railway law, given by *Sweet*, in his Law Dictionary, is too narrow. He defines it as "a lateral alteration of the line of a railway." It is that, no doubt, but it embraces more than that. His is a more restricted definition than is warranted by the language of Patteson, J., in the case cited by Mr. *Britton* of *Doe d. Armistead* v. *North Staffordshire R. W. Co.*, 16 Q. B. 527. That judgment says the expression "deviation" in the Act of Parliament is to be taken with reference to the line of railway only; that is, that the line of railway actually laid down shall not deviate more than [one hundred yards] from the line laid down and delineated in the Parliamentary plans, the *medium filum viæ* of each being the commencement and termination in measuring those [100 yards.] By the Dominion Act, 42 Vict. cap. 9, sub-sec. 11, the limit of deviation is not more than, or within, one mile from the line of railway, or from the

places assigned thereto in the map or plan or book of reference.

In effect, therefore, "deviation" is a term not to be restricted to a lateral variance on either side of such line, but may mean a change *de via* in any direction within the prescribed limits, whether at right angles to, or deflecting from, or extending beyond that line. Thus, at the terminus of the railway: Can you say that the limits of deviation are only to the right and left of that point at right angles from the line? Must you not continue the imaginary or delineated line of deviation in a semi-circular sweep at a uniform distance of one mile from each terminal point of the line? If so, this contemplated extension of the track is within the limit of deviation. By this construction of "*deviation*" you can give proper effect to all the words used in sub-sec. 11, which refer to deviation: "*into*, through, across, under, or over." The cases I have referred to (with the one exception noted) were not cited to me, and my impression during the argument was more favourable to the plaintiff on this main matter than it is at present. My view now is that the company may have jurisdiction to take the land in question without the consent of the owner, if the proper preliminaries have been observed, as to which the evidence is so unsatisfactorily placed before me that I am not able to come to a conclusion. This being so, I think the better course is to restrain proceedings before the county judge till the plans can be produced and the evidence can be properly given on all points. If the defendants desire a speedy hearing that term should be imposed on the plaintiff, and I am willing to try the action as soon as the parties can get ready.

G. A. B.

NOTE.—This matter was spoken to at a subsequent day, and the injunction was granted on the ground that the County Court Judge had no jurisdiction under 47 Vic. c. 11, s. 12 (D.), (1884).—REP.

[COMMON PLEAS DIVISION.]

McGIBBON v. THE NORTHERN AND NORTH-WESTERN RAILWAY COMPANY.

Railways—Fire caused from engine—Negligence—Evidence—Withdrawing case from jury.

Action for negligence against the defendants in the conduct of their engine, whereby as alleged fire escaped therefrom and destroyed the plaintiff's property. The only evidence to connect the defendants therewith was that the fire occurred immediately after the engine had passed the plaintiff's barn and combustible manure heap: that as it passed steam was put on which might have caused a larger quantity of of sparks to escape from the smoke-stack; or, if the ash-pan were full, which there was no evidence to shew, would cause cinders to be forced therefrom: that there was a strong wind blowing across the track in the direction of the plaintiff's premises: that a cinder too large to come from the smoke-stack was picked up on the manure heap while it was on fire; but it did not clearly appear whether the cinder was from coal or wood, the engine burning coal: that this fire was put out, and five minutes afterwards a fire broke out in a barn adjoining the plaintiff's, and both were consumed. There was a steam saw-mill close by, but in a direction opposite from that in which the wind was blowing, and there was evidence that fire therefrom had ignited the saw-dust in the mill-yard on two occasions. No evidence was given of any faulty construction in the engine, but there was evidence that it was of approved make, with proper appliances to prevent, as far as possible, the escape of fire.

Held, ROSE, J., dissenting, that there was no evidence of negligence to go to the jury, and that the case was properly withdrawn from them.

Per ROSE, J., that there should be a new trial, to ascertain, if possible, the cause of the fire, whether from the smoke-stack or the ash-pan, or how otherwise; and, if from either the smoke-stack or ash-pan, whether there was negligence on the part of the defendants.

Per CAMERON, C. J. The putting on of steam when the engine was near the plaintiff's premises did not of itself constitute negligence, it being done in the ordinary course of traffic, the engine having the ordinary and proper appliances for protection against the escape of fire, which it was lawful for the defendants to use.

THIS was an action tried before Galt, J., and a jury, at Toronto at the Fall Assizes of 1885.

The claim was for damages arising from the burning of a barn through, as it was alleged, the defendants' negligence in the management of an engine in their service.

The only defence was "not guilty."

At the close of the whole case the learned Judge dismissed the action, with costs, as in his opinion there was no evidence of negligence to go to the jury.

In Michaelmas sittings, November 19, 1885, *Lash*, Q.C., obtained an order *nisi* to set aside the nonsuit or

judgment dismissing the action herein, and for a new trial.

During Hilary sittings, February 5, 1886, *Lash*, Q.C. supported the motion. In running railroad trains regard must be had to the kind of country that is passed through, and what would constitute negligence in passing through a certain kind of country, for instance where the track is surrounded by inflammable matter, would not do so when passing through a different kind of country, where property is not liable to be set on fire, namely, a swamp. In this case steam was put on unnecessarily while the engine was passing the plaintiff's property, where there was matter of a most inflammable character, and the effect was to cause sparks to escape from the smoke-stack, or cinders and ashes from the ash-pan, which were carried by the wind, which was blowing in the direction of the plaintiff's property, and set fire to it and destroyed it. Care should have been taken not to do anything which would under such circumstances cause damage. It was clearly proved that the putting on steam was not necessary. He referred to *Fero* v. *Buffalo and State Line R. W. Co.*, 22 N. Y. 209; *Hilliard* v. *Thurston*, 9 A. R. 517; *McLaren* v. *Canada Central R. W. Co.*, 32 C. P. 324, 342-3; *Jaffrey* v. *Toronto, Grey and Bruce R. W. Co.*, 23 C. P. 553; *Hill* v. *Ontario, Simcoe, &c., R. W. Co.*, 13 U. C. R. 503.

G. D. Boulton, Q.C., contra. The evidence shews that steam was put on to get up a grade; and that it was necessary to do so to get up the grade. There is no such obligation as is set up here by the plaintiff, namely, that as to a different kind of care being exercised when passing inflammable and non-inflammable matter. If such were the case it would be necessary to keep a constant watch, and also it would interfere most materially with the speed of trains. There was clearly no evidence to go to the jury, and the nonsuit was properly entered.

March 6, 1886. ROSE, J.—The alleged negligence herein, consisted in putting on steam unnecessarily while the engine was passing the premises of the plaintiff, where

there was exposed a heap of manure mixed with long straw used for bedding purposes, and where there was a barn or stable with the end not boarded up, so that the contents were exposed.

The plaintiff contends that the defendants were bound to use care and exercise judgment to a higher degree when passing by property easily ignitible than would be required when passing other property not liable to be set on fire.

In the present case it is alleged that in order to shunt or make what some called a running shunt, the defendants, when their engine was opposite the plaintiff's barn and manure heap, which was within about 20 feet of the track, and while there was a strong wind blowing across the track towards the plaintiff's premises, put on steam, it being unnecessary to do so at that place, with the result that either sparks were forced in large quantities from the smoke stack, or that cinders and ashes were thrown out of the ash pan, and were carried by the wind on the plaintiff's premises, causing the damage.

It was admitted that no negligence was shewn in the construction of either engine or ash pan. It was however argued as a result of the evidence that the ash pan was full, thereby being unsafe.

On this motion we must, I think, on the evidence assume that the defendants did put on steam opposite the plaintiff's premises: that it was not necessary to put it on at that place: that the wind was blowing across the track towards the plaintiff's premises; and that by reason of putting on the steam, sparks or cinders were thrown by the engine causing the damage complained of.

The fact that the fire broke out shortly after the engine had passed, would be some evidence that it was occasioned by sparks from the engine or cinders from the ash pan. See observations of Burton, J. A., in *McLaren* v. *Canada Central R. W. Co.*, 8 A. R. 564, at p. 583, although not necessarily evidence of negligence.

Assuming such facts the question remains: was it the defendants' duty to have refrained from putting on steam

at the place in question, having regard to the inflammable material on the plaintiff's premises near the track? Unless we can say, as a matter of law, that having an engine properly constructed, using all reasonable precautions which mechanical skill could suggest to prevent the escape of sparks from the engine, and permitted by statutory authority to use fire for the purpose of creating steam, no duty remains to use care and judgment as to when and where the extra steam is to be put on, and extra quantity of sparks omitted, must not the question be one for the jury? Again, even if we conclude that no question should have been submitted to the jury as to negligence with respect to the emission of sparks from the smoke stack, should not the question as to whether there was negligence in permitting the ash pan to become full have been submitted?

Since the case of *Vaughan* v. *Taff Vale R. W. Co.*, 5 H. & N. 679, it is clear that a railway company authorized by law to use locomotive engines could not, *in the absence of negligence*, be held liable for injuries occasioned by sparks escaping from the engine. Before that decision it was held in the same case, 3 H. & N. 743, that the use of an instrument likely to produce damage and producing it, made the company liable to bear the consequences.

The question, however, remains: were the defendants negligent?

Mr. Justice Patterson, in an exhaustive review of the law in *Furlong* v. *Carrol*, 7 A. R. 145, at p. 164, says: "I understand this rule to place the liability, in a case where there is express legislative authority for the use of fire, upon the same footing as in the case of fire used for the necessary purposes of husbandry." Reference to *Furlong* v. *Carrol* will furnish a digest to nearly all, if not all, the leading cases on fire used for husbandry determined in our own courts to that date.

I understand the result to be that either for the purposes of a railway, or for husbandry, a person may lawfully use fire; but if he is negligent in its use and another suffers hurt the party guilty of negligence must bear the conse-

quences. It may also be put thus: that prior to the rule the person using fire was liable for damage resulting whether negligent or not; since the rule liability only attaches in cases of negligence.

For purposes of husbandry while the use of fire has become lawful, the party using it must observe time and circumstances, state of wind and weather, condition of ground, *proximity of combustible matter, or of crops or buildings*, and the likelihood of whatever breeze there may be carrying fire in a direction where damage must ensue from it, and other matters. See *Furlong* v. *Carrol*, p. 162.

So, also, for the purposes of the railway the company, while they may lawfully use fire, must keep their track reasonably clear from combustible matter, &c., likely to be set on fire: *Jaffrey* v. *Toronto, Grey and Bruce R. W. Co.*, 23 C. P. 553.

The case of *Fero* v. *Buffalo State Line R. W. Co.*, 22 N. Y. 209, cited by Mr. Lash, and referred to in *Jaffrey* v. *Toronto, Grey, and Bruce R. W. Co.*, p. 557, is a strong case in favor of the plaintiff's contention. I think the reasoning as to this point sound, and am content to adopt it. I extract the following passage, at p. 212: "But a much higher degree of care, both in respect to the rate of speed and the watchfulness to prevent casualties, should manifestly be required where trains are passing through, or remaining stationary in the streets of a city, or densely populated village; and I think it is not stretching the rule unduly in such a case to say that, under such circumstances, the railroad company is bound to use the utmost care to guard against the dangers which obviously attend such a condition. The substance of the charge, without criticising its terms with too great nicety, is that care must be proportioned to the danger of accident, and that where there is great danger, there must be a corresponding degree of care."

In that case, as here, no complaint was made as to the condition of the engine; but in that case "It stopped upon the track opposite to the plaintiff's house, towards which the wind was blowing and sparks from the smoke

pipe or cinders from the ash pan of the locomotive were driven by wind through the open door of a room in the unfinished building, which was then temporarily used as a shop by the joiners employed in the building. * * The smoke pipe, ash pan, &c., of the defendants' locomotive, were of the most approved construction then in use with respect to precaution against the escape of fire and sparks."

While the use of the best known and approved mechanical contrivances will prevent the successful charge of negligence as to the use of such contrivances, neglect in other respects would clearly render the neglectful company liable. If, for instance, the ash pan were properly constructed but allowed to remain full so as to become no longer a receptacle for cinders, but a distributor of fire along the track, it is beyond argument that the proper construction would be no answer to a charge of negligent user.

In the case before us, the evidence for the plaintiff discloses that the fire occurred very shortly after the train passed: that there was no other cause of fire: that an ignited cinder as large as the end of a mans thumb was found at the manure heap; and it clearly appeared that it could not have escaped through the bonnet nor from the ash pan unless it was full: that if it was full the starting of the engine when steam was put on, would cause the cinders to fall out. As said by one of the witnesses: "when you have got a long run and the ashes are shaken down until the ash pan is full, if another blast is put on, the consequence is some of the ashes will fall out."

It appeared the run had been from Toronto to Penetanguishene, a distance, I believe, of some ninety miles. It did not appear that the pan had been cleaned out during the run. The wind was blowing towards the plaintiff's property. When the same engine started on her return trip, another fire was discovered along side of the track shortly after she passed; and no other cause was known to the witnesses than the fire from the engine.

As to the question of contributory negligence in the use

of the plaintiff's property for the deposit of inflammable material near the track, which was somewhat discussed before us, reference may be had to *McLaren* v. *Canada Central, R. W. Co.*, 32 C. P. 324, 342.

It may be observed that the only defence raised by the record is "not guilty."

In my opinion the case should be sent down for a new trial to ascertain if possible the cause of the fire—whether by sparks from the smoke stack, cinders from the ash pan, or how otherwise? If from either the sparks or cinders, whether there was negligence on the part of the defendants? It may be, it will be considered, that if the fire was caused by sparks emitted from the smoke stack a less degree of care was required than if by cinders tossed from a full ash pan.

The judgment should, in my opinion, be set aside, and a new trial ordered, the costs to be costs in the cause to the plaintiff in any event of the cause, that is, whether he succeeds or fails.

CAMERON, C. J.—I am of opinion the non-suit in this case was right, and there was no evidence to be submitted to the jury from which they might have inferred the fire that burnt the plaintiff's stable was the result of negligence on the part of the defendants or their servants.

The only evidence that has the remotest tendency to do so, are the facts, that the fire arose just after the defendants' locomotive passed the plaintiff's stable and combustible manure heap, and that as it passed steam was put on, which might have caused a larger quantity of sparks to pass through the netting of the smoke stack than were passing just before the steam was put on. For the purpose of determining whether the plaintiff should be non-suited it must be assumed the plaintiff's witnesses truly represent the facts, though the defendants' witnesses deny them as to this point. Secondly, that when the ash pan of an engine is full of ashes fire may escape from it when steam is put on. But there is no evidence whatever that the fire, assum-

ing it to have been caused by the engine, came from the ash pan.

The evidence shews that fire will escape from the most perfect engine.

It was sought to draw the inference that the fire came from the ash pan, because a cinder too large to come from the smoke stack had been picked up on the manure heap while that was on fire, which a witness said he thought was coal. Christopher Columbus, the witness who picked it up, said he could not say whether it was coal or wood. James McNamara, a school teacher, said the cinder was coal, but he only saw it in Columbus's hand. He did not think it was on the manure heap, (that is before it took fire). He would not say positively; his impression was it was coal. The engine burned coal. The fire that began in the manure heap, was put out. About five minutes afterwards the fire again broke out in a barn adjoining the plaintiff's, and consumed both. The locomotive could not have caused the fire unless a cinder from it when it passed five minutes before, had got into the barn, and had smouldered there. No smoke was observed where the second fire broke out at the time the first fire was extinguished. The evidence further showed that a steam saw mill was near by, but that owning to the direction of the wind it was improbable that the fire could have come from that; fire from it had set fire to saw dust in the mill yard, on at least two occasions. On the day of the fire the wind was very strong.

On the part of the plaintiff no evidence was given of any defective or faulty construction of the engine in any respect; and on behalf of the defendants it was shewn to be of approved make, with proper appliances to prevent as far as possible the escape of fire. As to the ash pan, a witness for the plaintiff said that when full fire would escape, and it depended upon the amount of work that the engine did how far it could run without its getting full: that he had had to clean out the ash pan in going to Cobourg, 88 miles, when burning wood; and the only other

evidence on this point was that given by the defendants' locomotive foreman on cross-examination, that an engine would run 120 miles without the ash pan getting full.

If it had been proved that the ash pan had been allowed to get full, then I think there would have been evidence to go to the jury of negligent management of the engine; but in the absence of this there was no affirmative evidence of neglect, and the onus of shewing that rested with the plaintiff.

I cannot agree to the contention that it was an act of negligence to put on steam when the engine was near the plaintiff's stable, it being done in the ordinary course of traffic, and the engine having the ordinary and proper appliances to furnish protection against the escape of fire, it being lawful for the defendants to use fire. It is not to be inferred from the plaintiff's evidence both that the fire came from the ash pan and that the ash pan was at the time in an improper condition, especially when there was another source from which the fire could have come, though it might have been unlikely that it did come from that source. The burden of shewing the source rested upon the plaintiff, and I am of opinion he offered no evidence from which it might reasonably be inferred by the jury that the defendants were guilty of an act of negligence that resulted in injury to the plaintiff.

I adopt the rule laid down by Lord Cairns, in *Metropolitan R. W. Co.* v. *Jackson*, 3 App. Cas. 193, 197, in determining in such cases the duty of the Judge and the jury. It is: "The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought* to be inferred." And I fully concur in the expression of opinion which he added: "It is * * of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would

be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

I quite admit that in adopting this rule it may be very difficult to define the line between where the inference may and ought to be drawn. But it seems to me before negligence may be inferred, something more than facts from which there is a bare possibility there was negligence, must be established, and I think none such have been established by the evidence in this case.

GALT, J., concurred with Cameron, C.J.

Order discharged.

[COMMON PLEAS DIVISION.]

GRAY V. THE CORPORATION OF THE TOWN OF DUNDAS.

Municipal corporations—Sewer connecting with creek—Fouling stream—Riparian proprietor.

A drain of the defendants for carrying off the surface waters of a street ran along the street and across it, and then through private property until it reached a creek. On the street there was a screw factory, the proprietors of which, by defendants' permission, connected a drain from their works with the defendant's drain, which had the effect of carrying noxious matter from the factory into the creek; but on complaint thereat, the proprietors used an old cellar as a reservoir for the noxious matter; but, which, it was alleged, filtered through from the cellar into the drain and so into the creek. The drain, without the infiltration into it from the cellar from which it was twenty-six feet distant, conveyed nothing injurious into the creek. The plaintiff, a riparian proprietor on the creek, having a factory there, claimed that by reason of such fouling he was prevented from using the water of the creek for domestic purposes or for his factory; and brought this action against the defendants therefor.

Held, that defendants were not liable; but that the liability, if any, was on the screw factory.

[*Van Egmond* v. *Corporation of Seaforth*, 6 O. R. 599 distinguished.]

ACTION by the plaintiff, a riparian proprietor on what was called Riley's Creek, in the town of Dundas, alleging that the waters of the said stream were fouled and rendered unfit for use for domestic purposes and for the purposes of his knitting factory, by the defendants bringing to the creek noxious matter through a drain under the jurisdiction and control of the defendants.

The cause was tried before Galt, J., and a jury, at Hamilton, at the Fall Assizes of 1885.

The evidence shewed that the defendants had a drain on Main street in the said town for the carrying the surface water of the street along and across the said street and then through private property until it reached the creek. Certain screw works were carried on on Main street near where the said drain was constructed, and the proprietors of these works asked permission to connect with the defendants' drain a drain from the said works. After this complaints were made to the corporation of the water being fouled by noisome matter from the screw-works, whereupon the proprietors of the screw-works utilized an old

cellar as a reservoir to contain the noxious matter from the works that had been formerly carried off by this drain. The water in this reservoir was alleged to have filtered through the soil and so got into the drain, and was so still carried by the drain to the creek. The drain without the infiltration into it from the reservoir, from which it was at least twenty-six feet distant, would not convey anything injurious into the creek.

These facts appearing at the close of the plaintiff's case the learned Judge, upon motion of the defendants' counsel dismissed the action, on the ground that the defendants were not responsible, but the screw company were the only parties liable, if the water was injuriously affected to the damage of the plaintiff through the percolations from their reservoir, whether the deleterious matter reached the creek through the defendants' drain or not.

In Michaelmas sittings *Lount*, Q.C., moved on notice to set aside the judgment of nonsuit, and for a new trial.

During Hilary sittings, February 17, 1886, *Lount*, Q.C., supported the motion, and referred to *Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Ballard* v. *Tomlinson*, 29 Ch. D. 115; *Northwood* v. *Corporation of Raleigh*, 3 O. R. 347, 350, 359; *Law* v. *Corporation of Niagara*, 6 O. R. 407; *VanEgmond* v. *Corporation of Seaforth*, 6 O. R. 599. 602; R. S. O. ch. 174, sec 454, sub-sec. 10; sec. 466, sub-secs. 49, 52; *Charles* v. *Finchley Local Board*, 23 Ch. D. 767; *Coghlan* v. *Corporation of Ottawa*, 1 A. R. 54.

Osler, Q. C., contra, referred to *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch. D. 102; *Attorney-General* v. *Guardians, &c., of Dorking*, 20 Ch. D. 595; *Ballard* v. *Tomlinson*, 26 Ch. D. 194; *Snow* v. *Whitehead*, 27 Ch. D. 588; *Noble* v. *Corporation of Toronto*, 46 U. C. R. 529; *Patterson* v. *Corporation of Peterborough*, 28 U. C. R. 505.

March 6, 1886. CAMERON, C. J.—I am of opinion the judgment of my learned brother fully accords with the law and the facts.

There is no doubt, I think, that the screw company who permit the noxious water to escape from the premises are solely responsible for the alleged fouling of the waters of the creek. The defendants, assuming them to have control of the drain passing from the street through Mrs. Blackwell's and the plaintiff's premises to the creek, are not to be answerable for any improper use that may be made of the drain by others permitting noisome matter to flow or percolate into it.

Mr. Lount relied very strongly upon the decisions of the Chancery Division in *VanEgmond* v. *Corporation of Seaforth*, 6 O. R. 599.

That case upon first impression would seem to warrant the plaintiff's action; but, as was contended by Mr. Osler, it is distinguishable, if well decided, from the present case. Here the injury is the result of the act of one individual or company in using the otherwise harmless and beneficial work of the defendants. The more recent interference with the drain by the defendants in putting in a box drain at the request of Mrs. Blackwell and others not being more hurtful to the plaintiff than the drain that formerly existed and was out of repair. It tapped or interfered with no noxious or hurtful matter, and conveyed none to the creek that would not have reached it without the repairs if that would make any difference, while in *VanEgmond* v. *Corporation of Seaforth*, 6 O. R. 599, the defendants cut their drains through soil containing the injurious matter and carried it to the creek, thus being the direct and active agent in the mischief. Without the action of the corporation much of the matter that was set in motion would have remained latent, so to speak, and never would have reached the stream. If the drain had been in existence before the salt works were established, it would have come nearer to the present case and might have made it more difficult to distinguish. But I venture to think had that been the fact the same conclusion would not have been come to by the Divisional Court.

The cases of *Glossop* v. *Heston and Isleworth Local*

Board, 12 Ch. D. 102, and *Attorney-General* v. *Guardians, &c., of Dorking*, 20 Ch. D. 595, are more against the plaintiff than in his favour though, as Mr. Lount contended, the decisions turned upon the want of power in the defendants to prevent their sewers being used by the public; and it was suggested by the Master of the Rolls in the latter case, that they were in a different position from the owner of property through which a drain ran, who would be in a position to restrain persons from fouling it. But these cases do not decide that the owner of land through which a drain or water-course runs would be liable for any injury caused by other persons putting hurtful matter into such drain, and which was thereby carried on to the injury of some one below, because he could restrain by injunction the fouling of the drain or stop it up. The person injured might himself obtain an injunction to restrain the wrong-doer, though he might not be able to stop the drain up above his own land. And no one can be made responsible because he will not bring an action to prevent a third person doing a wrong to another that he might by such action prevent.

Glossop v. *Heston and Isleworth Local Board*, 12 Ch. D. 102, and the case of *Attorney-General* v. *Guardians, &c., of Dorking*, 20 Ch. D. 595, were considered by Pearson, J., in *Charles* v. *Finchley Local Board*, 23 Ch. D. 767, in which relief was granted to the plaintiff in circumstances that would be like the present if the foul matter from the Screw Company's reservoir reached the creek through a connection between the reservoir and drain, permitted by the defendants, in terms which the screw company had violated, and were using the connection to commit the nuisance, which the defendants were in a position to physically prevent by stopping the connection. Here that is not so; and the opinion of Pearson, J., fully accords with the previous decisions, that if the defendants can only stop the nuisance by an action, they cannot be compelled to bring such action. They are not bound to stop or change their own drainage system simply

because some one of the public using that system does so in a way to create a nuisance or actionable injury to some one else. If a fire is improperly originated on the land of A and spreads therefrom across the land of B, and thence on to the land of C to his injury, C's remedy is against A and not against B, though of course there may be circumstances in which the remedy would be against B and not against A; but in such case there must be some actionable neglect or want of care on B's part without which the fire would not have extended to C. Or to state the proposition in another way, the neglect of B must be equivalent to a negligent originating of the fire on his own land or accidental origination, and then a negligent allowing of the fire to spread to C's land.

I am therefore of opinion the nonsuit was right, and the plaintiff's motion must be dismissed, with costs.

GALT and ROSE, J.J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

McConkey et al. v. The Corporation of the Town of Brockville.

Municipal corporations—Private drain connecting with street drain—Obstruction in street drain—Flooding of cellar—Notice—Liability.

The plaintiff's house was drained by a private drain into the street drain, which was near to but did not extend as far as his house. L., who also had a house drain connected with the street drain, put a grating across it near the connection with the private drain, which obstructed the street drain, and dammed back the water and sewage through plaintiff's private drain into his cellar and damaged the plaintiff's premises. The nature of the obstruction was known to the plaintiff but not to the defendants, and the plaintiff did not notify them thereof. There was no by-law compelling property-owners to drain their premises into the street drain, and their use of it was entirely voluntary. There was no complaint as to the insufficiency or construction of the street drain. In an action by the plaintiff against the defendants for the injury sustained by him.

Held, that the defendants were not liable.

THIS was an action brought by the plaintiffs against the defendants for flooding of the male plaintiff's cellar by the stoppage of a drain in the town of Brockville, which caused water and filth from the sewers of private houses and the surface water of the street passing down the drain, to be damned back through the male plaintiff's drain upon his premises, whereby the walls of the cellar of the male plaintiff's house were injured and the female plaintiff's health was, it was alleged, impaired.

The cause was tried before Armour, J., and a jury, at Brockville, at the Fall Assizes of 1884.

The obstruction to the drain was caused by a private individual named Stagg, who had a drain connecting with the street drain, putting a sheet of perforated zinc across the street drain near the connection of his drain therewith. The existence of this obstruction was not known to the defendants, but it was known to the male plaintiff, who, though he complained to some members of the corporation of the water backing into his premises, gave no intimation of the obstruction which had been placed in the drain. The drain was a covered drain running under the sidewalk for

a considerable distance, the end of the drain nearest to the plaintiff's premises not extending as far as these premises, and he connected his private drain therewith. There was no by-law of the corporation requiring the owners of property to drain their premises into it, so the use of the drain was entirely voluntary on the part of those who did use it.

There was no complaint as to the insufficiency of the drain, or the manner of its construction, no injury having resulted to the plaintiffs until after the insertion of the perforated sheet of zinc.

Questions were submitted in writing by the learned judge to the jury, which questions and the answers thereto were as follows:

1. Was the extension of the street drain from Stagg's to the plaintiffs made by the authority of the defendants? Answer—Yes.

2. Was the connecting drain from the male plaintiff's cellar to the street drain made by the authority of the defendants? Answer—No.

3. Was the obstruction placed by Stagg at the end of the drain from his property to the male plaintiff's the cause of the damage to the plaintiffs? Answer—Yes.

4. Was the obstruction placed by Stagg so placed by the authority of the defendants, or was it so placed for his own private benefit? Answer—For his own personal benefit.

5. Had the defendants notice of the existence of this obstruction, and, if so, when and by whom? Answer—Had no notice.

6. Did the male plaintiff know while he was being injured that the obstruction had been placed in the drain by Stagg? Answer—He had heard of it.

7. Did he notify the defendants that he had heard that the obstruction had been so placed by Stagg? Answer—No.

8. If the damage to the plaintiffs was not caused by the obstruction placed by Stagg by what was it caused? Answer—Was caused by the obstruction placed by Stagg.

9. Was such cause the result of any want of reasonable care on the the part of the defendants? Answer.—We think the council should have attended to it when notified.

10. If so, in what did such want of reasonable care consist? Answer.—In not examining it sooner.

11. What damage has the male plaintiff sustained that he ought to recover from the defendants? Answer.—We think the plaintiff should have $165 damages.

On these findings the learned judge dismissed the action by the female plaintiff; and directed judgment to be entered for the male plaintiff for the damages found by the jury.

He gave the following judgment:

ARMOUR, J.—The action of the female plaintiff must be dismissed, it not being shown that she sustained any damage legally recoverable.

I have considerable difficulty in determining whether the male plaintiff is entitled to recover; but the conclusion I have arrived at, after such consideration as my limited time and legal resources would permit, has been arrived at with much hesitation, and I still doubt its correctness.

I do not think the answer to the second question stands in the way of the plaintiff's recovery; because I think that, having regard to the purpose for which and the manner in which the street drain was constructed, the plaintiff's predecessor in title was entitled as a matter of law to make the connecting drain from his cellar to it.

As to the residue of the questions, the finding of the jury is to the effect that, although the obstruction causing the injury was the work of a wrong-doer, and although the male plaintiff knew of it and did not notify the defendants of it, yet that the defendants having been notified of the injury that was being done to the plaintiff, were guilty of negligence in not examining into the cause of the injury and removing it.

I have great difficulty in holding that a person who so acts as the plaintiff has done, is entitled to recover upon such a finding—that he is entitled to withhold the knowledge he possesses and put the parties to the expense of acquiring that knowledge by their own investigation and discovery, and obtain damages from them for neglecting

to make such investigation and discovery. The defendants' negligence was in effect according to the finding, their not finding out what he could and ought to have told them, and in not removing it. I think the plaintiff stands in such a case in the position of a person substantially contributing to his own injury.

I have much doubt, however, whether this is a defence to this action.

I give judgment for the male plaintiff, leaving it to the defendants to take the opinion of the Court upon the question.

There is some ground for inferring that what the plaintiff was aiming at was to get the defendants to put in a new tile drain along the street from his property easterly, instead of the then existing drain; and that he told the defendants that if they did so he would make no claim against them. But I lay no great stress upon this.

I have also difficulty in holding that, having regard to the manner in which the drain was constructed, and the purpose it was intended to serve, one of those for whose benefit it was constructed, should recover against the defendants for such negligence as is here charged.

During Michaelmas sittings, *Moss*, Q.C., moved on notice to set aside the verdict and judgment entered for the male plaintiff, and to enter judgment for the defendants.

Moss, Q.C., and *Reynolds* (of Brockville), supported the motion. The evidence shews that the street drain was not built by the defendants but by the property owners fronting on the street. The male plaintiff also built his drain connecting with the street drain without any authority from the defendants. There was no by-law of the corporation requiring the property-owners to use it, and their user of it was a purely voluntary act. There was no evidence to shew any defective construction in the drain, and no notice to the defendants of the obstruction. The evidence shews that the obstruction was caused by Stagg, one of the property-owners, and although the male plaintiff knew of the cause of the obstruction he never notified defendants. The male plaintiff should have pointed out the cause of the damage: *Noble* v. *Corporation of*

Toronto, 46 U. C. R. 519. Even if the corporation had known of the obstruction there was no obligation on them to remove it. The liability would be upon Stagg who caused the obstruction.

Arnoldi, contra. The effect of what took place was to constitute the street drain a corporation work. The corporation furnished the lumber to build it. The drain has been built for a number of years, and the corporation have repaired it from time to time. The plaintiff could not have opened up the street to have removed the obstruction. The corporation had undoubtedly notice of the damage sustained by the plaintiff, and it was quite evident to them that it was caused by an obstruction in the street drain. It was the duty of the corporation to have investigated the matter and have caused the obstruction to be removed. He referred to *Scroggie* v. *Corporation of Guelph*, 36 U. C. R. 534; *Foster* v. *Cameron*, 19 U. C. R. 224; *Reeves* v. *Corporation of Toronto*, 21 U. C. R. 157; *Coghlan* v. *Corporation of Ottawa*, 1 A. R. 54; *Duck* v. *Corporation of Toronto*, 5 O. R. 295.

March 6, 1886. CAMERON, C. J.—I am unable to concur in the conclusion arrived at by the learned Judge at the trial that on the findings of the jury the male plaintiff was entitled to judgment.

It may be conceded that property owners along a public street may drain their premises into a drain under such street made either by the corporate authorities of the place, or by private individuals, by the permission of such authorities. But it does not follow as a conclusion therefrom that the existence of such right merely permissive in its character, makes the defendants liable in this case for the injury sustained. In the absence of proof of some positive neglect, or clear breach of duty leading to the injury, I think no such liability attaches to a municipal corporation.

In the present case the obstruction was caused by a private individual. The place of the obstruction was unknown to the defendants, and they had no notice of its

existence except that from the backing of water it was probable an obstruction existed somewhere which might be temporary or permanent in character; and I do not think when there was no by-law authorizing the construction of the drain or requiring it to be made use of by the plaintiff or others, that they could be held responsible for the wilful and unauthorized act of one of those who did make use of it.

The principles that should govern in such a case are more like those applicable to the rights and obligations upon parties who avail themselves of a drain dug upon private property. In which case I take the law to be, there is no obligation to keep the drain free from obstruction on the part of the owners of the soil through which it passes. He who enjoys the easement or privilege is bound to repair the drain and remove the obstruction, and the owner of the soil would only be liable for some act of misfeasance injuring those above or below him. Nonfeasance carries with it no responsiblity.

The evidence discloses that the drain was constructed by the owners of the property in front of which it ran, the corporation furnishing merely the boxes or conduits and the parties doing the excavation, and connecting their private drains with it; Mr. Stagg, the person who made the obstruction, being one of the most active promoters of the work.

The street may, under the circumstances in evidence, be regarded as a servient tenement, and the several properties drained into the street drain the dominant, and, subject to the rules of law applicable to such relationship, in the absence of a positive duty being cast upon the defendants to keep the drain in the street free from obstruction.

The rule then applicable would require any obstruction in the drain to be removed by landowners using it, and if any detriment resulted to the defendants from the omission so to do those whose duty it was to keep the drain free would be responsible to the defendants.

Mr. *Addison* in his work on Torts, at p. 156 of the 3rd ed., thus states the law: "Every grantee also of an artificial drain or watercourse constructed for the passage of water through the land of the grantor, for the use and benefit of the grantee, is bound to maintain and repair the watercourse and keep it in proper order; and if he neglects so to do and the water course becomes obstructed so that the grantee's surplus water floods the land of the grantor, the latter is entitled to compensation in damages for the nuisance."

In *Pomfret* v. *Ricroft*, 1 Saund. 320, at p. 322*a*, Twysden, J., said: "Where I grant a way over my land, I shall not be bound to repair it."

Lord Mansfield in *Taylor* v. *Whitehead*, 2 Doug. 745, at p. 749, said that by the common law of England, he that has the use of a thing ought to repair it. The grantee of a way is not bound to repair it if be out of repair: 1 Saund. 322*c*.

Reference is made by Mr. *Gale* in his work on Easements, 5th ed., at p. 528, to these authorities under the declaration of the rule with respect to the obligation to repair, which he states as follows: "As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything—the burden of repair falls upon the owner of the dominant tenement."

I have not overlooked the fact that the streets of municipal corporations are vested in them for the use of the public, and no one of the public can of his own motion open them up so as to impede or interrupt the ordinary traffic thereon. But that circumstance does not impose upon them an obligation to repair the drains as drains that may with their permission be laid down upon the streets. The moment they assume to compel the use of the drains and impose a rate upon the property owners for the privilege of draining into them, they assume the obligation of keeping them in repair; and if they get out of repair and thereby occasion damage to a property owner, and they have reasonable notice of the want of repair, or negligently

or improperly construct their drains whereby injury results, or if by means of their drains they bring water to and pour it pure or filthy upon the property of any person, that would not have reached that property without such drain to the injury thereof, a liability will attach. Here it was not the street drain that conveyed the water to the plaintiff's land but the drain constructed by himself connecting with the street drain.

The case of *Hammond* v. *Vestry of St. Pancras*, L. R. 9 C. P. 316, may be referred to in connection with the obligation and liability of the defendants under the circumstances presented in this case, if a positive and clear statutory obligation were imposed on the defendants to keep their drains free from injurious obstructions.

Brett, J., at p. 322, presents their liability thus: "It would seem to me to be contrary to natural justice to say that parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute, but, if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used, and the subject matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of sec. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed, at all events, and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed."

Applying that language to this case, if there was a direct duty and obligation cast upon these defendants, the only want of care manifested by the defendants was in not taking up their drain to find where the obstruction was. Would that, under the circumstances, have been reasonable,

and the omission subject them to damages in favour of a person who knew of the obstruction and did not inform the defendants of its situation.

It seems to me, if there were no other ground on which the action should fail, it must fail in consequence of the plaintiff's own misconduct in being reticent, where, if he had been communicative his injury would have been greatly lessened if not absolutely prevented. For the first overflow of water the defendants clearly would not have been responsible, for until that event happened there was no reason to suppose the drain was out of order, and the case from which I have just made an extract from the judgment of Brett, J., is an authority against the liability of the defendants from any injury resulting from that overflow.

The case cited on the argument of *Reeves* v. *Corporation of Toronto*, 21 U. C. R. 157, is distinguishable, and in no manner supports the plaintiff's claim.

The judgment entered for the male plaintiff must be set aside, and judgment in favour of the defendants be entered, dismissing the action with costs.

GALT and ROSE, JJ., concurred.

[COMMON PLEAS DIVISION.]

CARTER v. GRASETT.

Easement—Light and air—Implied grant—Equity of redemption.

P., the owner of lots 8 and 9, by his will devised the same to trustees in trust to sell. In 1869 the plaintiff purchased from the trustees lot 8, on which there was a house with windows overlooking lot 9, immediately adjoining it, the said lot 9 being then open, and not built upon. In 1873 the trustees sold lot 9 to Mrs. Priestman, who sold to T., who erected a house thereon. T. sold to G., under whom defendant claimed. At the time P. acquired lot 9 he did so subject to a mortgage thereon, and the trustees sold to Mrs. Priestman subject to such mortgage, which was subsequently discharged by G., who obtained the usual statutory discharge, which was duly registered by him. The plaintiff claimed that he was entitled by implied grant to the right of both light and air to the said windows, and that the same had been infringed upon by the erection of T.'s house. In an action therefor the jury found that the light had been infringed, but not injuriously.

Held, that by reason of P.'s trustees, at the time they sold to the plaintiff, having merely an equity of redemption in lot 9, which in them never became converted into a legal estate, their equity, transmitted to G., through whom defendant claimed, was not burdened with an easement appurtenant to lot 8, and that no implied grant to light and air could arise.

By the discharge of the mortgage on lot 9 G. acquired the legal estate of the mortgagee, and the equity of redemption becoming merged therein, lot 9 never was in fact or in law a servient tenement to lot 8 in respect of the right to light claimed by the plaintiff.

THIS was an action tried before Galt, J., and a jury, at Toronto, at the Fall Assizes of 1885.

The plaintiff's alleged causes of action were the preventing of light and air coming to the plaintiff's house.

The plaintiff was the owner in fee and in possession of lot No. 8 on the west side of Simcoe street in the city of Toronto, and the defendant, Sarah Maria Grasett, was at the time of bringing the action and thereafter owner of and in possession of lot No. 9, on the said west side of Simcoe street adjoining the said lot 8 of the plaintiff: that the title of the plaintiff and the defendant to the said lots respectively was derived through one William H. Pim, who died in possession of the same, having first made his last will and testament, and thereby devised both lots to certain trustees in the said will named in trust to sell and apply the proceeds as in his said will directed. Under the

power of sale given to the trustees they conveyed lot 8 by deed, bearing date the 12th March, 1869, to the plaintiff. At the time of the said conveyance there was a dwelling house on the said lot with six windows looking towards lot 9, and under the said power of sale, the said trustees conveyed lot 9 to one Sallie A. Priestman, her heirs and assigns, by deed, bearing date the 29th October, 1873, and the said Sallie A. Priestman and Joseph Priestman, her husband, conveyed lot 9 to James A. Temple, his heirs and assigns, who by deed, bearing date the 17th November, 1877, conveyed lot 9 to the late Reverend Henry J. Grasett, his heirs and assigns. The Reverend Henry J. Grasett died on the 20th day of March, 1882, having first made his last will and testament sufficient to pass real estate, and thereby devised lot 9 to the defendant Sarah Maria Grasett and her heirs. On or about the 5th November, 1884, after the commencement of this action, Sarah Maria Grasett conveyed lot 9 to the defendant Frederick LeMaitre Grassett. While J. A. Temple was the owner and in possession of lot 9, in or about the month of June, 1875, with knowledge of the plaintiff's rights, and notwithstanding his remonstrances, he erected upon lot 9, close to the southerly boundary thereof, a brick dwelling house, which interfered with the free access of light and air through the six windows of the plaintiff's house; the roof of Temple's house, and of the porch thereto, inclined towards the plaintiff's lot, so that the rain and snow which fell and the ice that formed thereon were conducted and thrown upon the plaintiff's lot. In 1878, after the conveyance of the said lot to him by Temple, the Rev. Henry J. Grasett, with notice and knowlege of the plaintiff's rights and against his remonstrance, raised the porch and constructed a platform for a verandah upon lot 9, which further interfered with the free access of light and air through the plaintiff's windows, and the floor of the platform for the verandah and the down pipes and water spouts were constructed on an incline towards plaintiff's land and caused the rain and

snow to be conducted thereto. The defendant Frederick LeMaitre Grasett took the said conveyance to him with notice of the plaintiff's rights and of the action. The statement of claim further averred that the defendants had neglected to abate the nuisance, and threatened, unless restrained, to build or construct additions to the said house upon lot 9, that would further interfere with the free access of light and air through the said windows; and the plaintiff claimed damages from the 20th March, 1882, to the commencement of the action against the defendant Sarah Maria Grasett, and an injunction restraining the defendant from continuing the nuisance, and from building or constructing other additions to the said dwelling house, which would further interfere with the free access of light and air through the said windows.

The defendants in their statement of defence averred in substance, that at the time of the death of William H. Pim, the lots of the plaintiff and defendant were mortgaged to various persons; and that Pim acquired the said lands at different times and from different persons; and on or about the 21st day of November, 1855, and before Pim acquired lot 9, the said lot was mortgaged by Cameron, the then owner in fee, to Caroline Jarvis, and such mortgage was duly registered and Pim took the lot subject to the mortgage, and the mortgage continued unsatisfied until about the 5th November, 1878, when the late Rev. H. J. Grasett, who was then the assignee of the said Cameron in respect of said lot No. 9, paid and satisfied the mortgage; and Caroline Jarvis thereupon executed a certificate of discharge of the mortgage, bearing date the 5th November, 1878, in the form provided by the registry act, and the certificate was duly proven as required by said act, and was duly registered; and by virtue of the said certificate and the registration thereof the legal estate in fee simple of the said lot, which since the said mortgage had been outstanding in Caroline Jarvis, became then vested in the said late Rev. H. J. Grasett.

At the trial evidence was given shewing that Pim at the

time of his death had only an equity of redemption in lot 9 under the conveyance to him of the said lot by the mortgagor Cameron, and only an equity of redemption in lot 8: that the mortgage to Caroline Jarvis was paid off by the said Rev. H. J. Grasett, and the certificate of discharge thereof executed under the statute as in the statement of defence alleged.

Evidence was given also as to the interference by the erections mentioned of the free access of light and air through the plaintiff's windows, the making of these erections not being denied but admitted by the defendants.

Questions were submitted to the jury which with their findings thereon were as follows:

1. Did F. L. Grasett's house interfere injuriously with the light of plaintiff's house? Answer. Yes, but not injuriously.

2. Did the construction of the platform bring water injuriously on to the plaintiffs land? Answer. Yes, but not injuriously.

Two other questions were submitted which the jury did not answer.

Upon this finding, the learned judge directed judgment to be entered for the defendants, with costs.

In Michaelmas Sittings *McCarthy*, Q. C., obtained an order *nisi* to set aside these findings and the judgment entered thereon, and to enter judgment for the plaintiff; or for a new trial, upon the grounds that upon the findings of the jury judgment should have been entered for the plaintiff; and because the findings were against law and evidence and the weight of evidence; and because the learned judge misdirected the jury in telling them that the plaintiff could not recover notwithstanding the defendant's house obstructed the windows in plaintiff's house unless the obstruction was injurious to the plaintiff; and because the plaintiff, being the grantee of the right to the free access of air and light from the defendant's vendor, the question was not whether the light to which the plaintiff was entitled was substantially or

injuriously obstructed, but whether as a fact it was obstructed; and because the evidence clearly established that the defendant collected and precipitated water on the plaintiff's land greater in quantity and in a manner different from that which in a state of nature it would have been subjected to; and because the learned judge did not define to the jury what the right of the plaintiff was as to light and air, and what would be a substantial or injurious affecting thereof.

During Hilary Sittings, February 9, 1886, *McCarthy*, Q.C., supported the order and referred to *Kelk* v. *Pearson*, L. R. 6 Ch. 809, 813; *Goddard* on Easements, 3rd ed., 337; *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282; *Manning* v. *Gresham Hotel Co.*, 1 Ir. C. L. R. (1867) 115; *Newson* v. *Pender*, 27 Ch. D. 43; *Herz* v. *Union Bank of London*, 2 Giff. 686; *Allen* v. *Seckham*, 11 Ch. D. 790; *Swansborough* v. *Coventry*, 9 Bing. 305; *Yates* v. *Jack*, L. R. 1 Ch. 295, 298; *Dent* v. *Auction Mart Co.*, L. R. 2 Eq. 239, 250; *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. 212; *Ecclesiastical Commissioners for England* v. *Keno*, 14 Ch. D. 213.

Robinson, Q.C., contra, referred to *Washburn* on Easements, 2nd ed., pp. 15, 16, 244, 442, 582 *et seq*; *Clarke* v. *Clark*, L. R. 1 Ch. 16; *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. 212; *Holland* v. *Worley*, 26 Ch. D. 578; *Goddard* on Easements, 3rd ed. 424; *Blanchard* v. *Bridges*, 4 A. & E. 176, 190-1; *Russell* v. *Watts*, 25 Ch. D. 559; *Lawlor* v. *Lawlor*, 10 S. C. R. 194.

McCarthy, Q.C., in reply, referred to *Davies* v. *Marshall*, 7 Jur. N. S. 720.

March 6, 1886. CAMERON. C. J.—The law seems to be clear, assuming the trustees of Pim were the owners in fee of the defendant's and plaintiff's lots unencumbered by the mortgage when they conveyed to the plaintiff his lot with the house upon it, they could not, nor could their grantee, use lot 9, then vacant, so as to diminish substantially the light that found entrance to the plaintiff's house

by the windows then existing. Neither of the learned gentlemen in their very able and exhaustive argument disputed this. They differed as to what would amount to a substantial or actionable interference, but not in the law relating to the question when once the fact of actionable injury is made out.

Certainly the opinions of judges delivered in different cases are puzzling, and render it difficult to define what is the minimum interference with light that will give the owner of the tenement deprived of it a right either to restrain the interference by injunction or to damages. The jury have found in the present case that the defendant's house does interfere with the light in the plaintiff's house; but they added that such interference is not injurious.

If it be true that the obstruction to light caused by the defendant's house, or any part of it, renders it necessary to light the gas an hour earlier in the day, I should unhesitatingly say, that would amount to a direct, substantial and pecuniary damage that would constitute actionable interference; and, unless the jury's finding is to be regarded as a finding on this point against the credit of the plaintiff's evidence, the verdict could not be allowed to stand as it would be directly contrary to evidence. The frame of the question and answer leaves it open to this construction; but where the right invaded, if it be a right, will be lost by the verdict being allowed to stand, it ought not to stand where the matter is left in doubt as to what is really meant by the answer. Mr. McCarthy's contention is, that if the right has been actually invaded the extent of the invasion is not to be regarded, but the fact that the right has been infringed, and the infringement if permitted to continue will work an absolute bar of the right, will give a cause of action, and the finding of the jury that the light has been interferred with makes out the plaintiff's case; and that the addition of the words "but not injuriously," cannot deprive the plaintiff of his action, is one that would require to be more fully considered before denying the correctness of such contention, if the plaintiff appears otherwise entitled to succeed.

The objection presented by the fact that the plaintiff's vendors were not in law, but only in equity, owners of the fee, is it seems to me exceedingly formidable.

The principle, that no one should be allowed to derogate from his own grant, is no doubt under some circumstances a most just and beneficial one. But it ought not to prevail unless the circumstances connected with the direct grant are such as would indicate that the thing, right or easement assumed to be included by implication in the grant, was something in the contemplation of the parties, and not extraneous thereto. Where A. has under one title a house and vacant land adjoining, so that on an examination of the title to the house the ownership of the vacant land will also be made to appear, it may well be that a grant of the house will carry with it the right to the light enjoyed by the house through windows looking upon the vacant land. But where the house is not on the boundary of the vacant land, and there is a vacant space between the house on the side where the windows are, and the boundary of the land conveyed with the house, through which a certain amount of light may come, it is going very far against what would seem just, to hold that the vendor of the house could be deprived of the right to use the vacant land in the same way that a stranger could, without its being made to appear that the purchaser of the house knew the vacant land belonged to the vendor, and it was in the contemplation of both buyer and seller that the light should be allowed to come to the windows over such vacant land in larger volume than it could come if the vacant land should be built upon to the boundary, as a stranger owner would have the right to build. The effect of so holding is to grant to the purchaser an advantage or benefit he did not expect to obtain, and was not paying for, and to deprive the seller of that which he did not think he was selling, and for which he was receiving no compensation. For preventing a man building upon a small vacant town lot is equivalent to depriving him of it. It may be impossible to utilize it for any useful purpose; and if it be in a part of the town where

land is valuable, a very considerable burden is imposed by the obligation to pay a considerable amount of taxes for property that will make no return.

It seems to me, therefore, that the principle of implied grant should have no place where the dominant and servient tenements are not held under the same title unless the ownership of the servient tenement was known to be in the vendor, and the grant obtained by the purchaser is made in reference to such knowledge.

The doctrine of implied grant is one, it seems to me, that ought not to be extended beyond the point to which the authorities have carried it. These seem to go the full length of shewing that where there is unity of title and possession, the grant of a house adjoining which there is vacant land owned or leased by the grantor, will carry with it the right to the free access of light and air over such vacant land to the windows of the house looking towards it, and will prevent the grantor obstructing the light by anything that will cause it to strike the windows at a less angle than forty-five degrees—this being the angle usually adopted by the Courts, though it may not be a positive and definite rule of law: *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282.

The recognition of the general right by implied grant comes from a remote period, and is not, as I have said, questioned by either of the litigants in this case; and it has recently been held to operate upon the interest of the grantor in the servient tenement at the time of the grant, where his interest has been less than freehold, but not to an extent to affect a greater interest after acquired by him by purchase from the owner of the fee in such servient or adjacent tenement: *Booth* v. *Alcock*, L. R. 8 Ch. 663.

The head note to that case supported by the text is as follows: "A lessor granted a lease for twenty-one years of a house with its appurtenances, amongst which lights were specified. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the

adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, those lights not being ancient lights;" and it was held by the Court of Appeal, reversing the judgment of Malins, V.C., who had decided otherwise, "that the lessor was not by his grant prevented from so building."

Lord Justice Mellish said: "There is no difficulty in ascertaining the meaning of the grant at law. No doubt it would be a grant of the right to all the lights, so far as they were liable to be affected by alterations in the house * * for so long as the defendant's then interest in it continued. That would have been the construction of the grant even if the word 'lights' had not been inserted, though the insertion of that word makes the matter clearer. The right, would, however, cease when the defendant's then interest came to an end. Now, has the plaintiff any greater right in equity? That would depend upon whether there was any bargain or contract that the plaintiff should enjoy the lights during the whole of the twenty-one years. I am of opinion that there was no such bargain or contract. As to this, there is a great difference between a grant in general words and an express grant of such a right. There may, perhaps, in this case, be no great difference between a general grant of lights and an express grant of lights to continue during the existence of the grantor's then interest; but there is a very material difference between such grants with regard to the question whether the grantee is in equity entitled to any right after the determination of the estate which the grantor had in the other property at the date of the grant. General words in a grant must be restricted to that which the grantor had then power to grant, and will not extend to anything which he might subsequently acquire."

Apply that language to the circumstances of this case and it militates strongly against the plaintiff. At the time of the grant by the trustees of Pim of lot 8 to the plaintiff they had nothing in themselves enabling them to grant expressly or by implication the right to light coming over lot 9. The title to that in law was in Caroline Jarvis, and Pim could not by any act of his diminish in any respect her rights or control her power over the land,

without exercising the right which the law as administered in equity gives to the mortgagor and those in privity of estate under him to redeem and require the reconveyance of the property. This would not give to the plaintiff a right to redeem. By the grant to him of lot 8 he acquired no interest in the soil of lot 9; and, reasoning from analogy, it would seem clear the plaintiff was not in a position to compel the trustees of Pim to redeem to prevent Caroline Jarvis, or any one claiming under her, from building on lot 9 so as to obstruct the light thereby from coming to the windows of the house on lot 8 as it did at the time of the grant to the plaintiff.

I use the expression reasoning from analogy, having regard to the law as laid down in *Master* v. *Hansard*, 4 Ch. D. 718, where it was said, quoting from the language of Lord Justice James, at page 721: "The plaintiff contends, that though the grantor when he made the grant under which the plaintiff claims had ceased to be the owner of the defendant's tenement, he had a right which he could have used in such a way as to prevent the plaintiff's enjoyment of his property being interfered with in any way in which the grantor would not have been allowed to interfere with it if he had retained the defendant's property, and that this interest brings the case within the rule as to the owner of two tenements. It would be a novel extension of that doctrine to hold that not only a grantor cannot do anything to derogate from his own grant, but that he is obliged to take active steps to prevent other persons from doing that which he might not himself do."

The power existed in the defendant to prevent the interference complained of with the easement of the plaintiff if he had chosen to exercise it.

Then, having regard to the decision of the Supreme Court of the Dominion in *Lawlor* v. *Lawlor*, 10 S. C. R. 194, it appears to me the defendants are owners of lot 9 by virtue of the certificate of discharge of mortgage granted by Caroline Jarvis, and thereby acquired the legal title

which was in her by force of the mortgage to her and the equity of redemption, which up to the time of the payment of the mortgage money and the execution of the discharge was vested in the Rev. H. J. Grasett, became merged in the legal title he acquired by the discharge, and so lot 9 never was in fact or law a servient tenement to lot 8 in respect of the right to light claimed by the plaintiff. The legal estate in lot 9 never was in the plaintiff's grantors of lot 8; they had but a bare equity of redemption which in them never became converted into a legal estate, and their equity was not burdened with an easement appurtenant to lot 8 transmitted by them to J. A. Temple on assignment of the equity of redemption to him.

I do not overlook the fact that the decision in *Lawlor* v. *Lawlor*, turned largely upon the effect of our disentailing statute, but it clearly recognizes the effect of the certificate of discharge of mortgage as being in all respects equivalent to a conveyance by the mortgagee of the estate held by him under the mortgage, and as vesting in the person having the equity of redemption the title of the mortgagee. Lot 9 was not, as against the mortgagee, burdened by anything done by the owner of lot 8 in respect to that lot. This doctrine of implied grant, founded no doubt upon most just and equitable ground in relation to some circumstances, may do most grevious wrong in very many instances. The purchaser of property in this country expects to find all the encumbrances upon the title registered, and he looks to the records of the office to ascertain what they are, and as far as the land he is buying is concerned he is not affected by any of which he has not express notice unless registered. When he looks at the property itself, and finds it surrounded by houses with windows looking upon it, he is not bound to enquire, the houses being upon separate and distinct lots from the one he is buying, whether the owners of such houses have acquired any right to use the windows so as to prevent his building on the land he contemplates purchasing, except as to the length of time the windows have been there to ascertain

whether they possess the character of ancient lights. I do not think it can be said he must ascertain whether the properties were at one time in the possession or ownership of his vendor, and sold by him with the buildings and windows as he sees them. To so hold would make it necessary in the examination of the title to one piece of land to investigate the title to several others. It would be much more reasonable to require, that the purchaser of a property, which depends upon the continuance of another property in the condition it was when he bought for its full enjoyment, and the servient property is owned by his vendor, not to rest upon a grant by implication, but to obtain and register the right he is acquiring over such servient property against it, to prevent others being deceived. The Courts ought not to extend the doctrine beyond the point where ancient authority last left it.

To enable the plaintiff to recover in the present case would, I think, be carrying it beyond any adjudged cases, certainly beyond any case cited in the argument or any I have been able to find since, though I have searched with considerable diligence for a case where the implied grant was held to exist where at the time of the grant of the dominant tenement the grantor had only an equity of redemption in the servient one.

I think, then, upon the ground that the plaintiff's vendor was not the owner of such an estate in the defendant's land at the time he granted lot 8 to the plaintiff as would enable him against the mortgagee to burden the mortgaged land with the right claimed, the plaintiff's action must fail and the adverse verdict remains, though on the facts, assuming the grant and the right to grant existed, it was wrong.

As to the injury to the plaintiff's land from the alleged flowing of the water from the defendant's roof and platform, that, assuming it to be injurious, is not necessarily a continuing injury, and when hereafter injury may be done to the plaintiff from that cause, the finding in this action will not interfere with an action; and I cannot say that

the jury has come to a clearly erroneous decision with respect to that claim; and so there is no ground for disturbing the verdict on that branch of the case either.

GALT and ROSE, JJ., concurred.

Order nisi discharged.

[COMMON PLEAS DIVISION.]

DYMENT v. THE NORTHERN AND NORTH-WESTERN RAILWAY COMPANY.

Parol evidence—Admissibility of to explain ambiguity—Consignor and consignee—Costs.

The plaintiff's agent at Gravenhurst shipped two car loads of shingles on defendants' cars. The shipping bill was in the usual form, and requested defendants to receive the undermentioned property, &c., addressed to N. Dyment (the plaintiff), Wyoming, to be sent subject to their tariff, &c. Then, in the appropriate columns, followed the description of a car load of shingles, giving the number of the car, &c. Then under this were the words, "To Henry James, Mitchell, and then another car load of shingles was described. Parol evidence was admitted at the trial to shew that the meaning of the shipping bill was that the first-named car load was to go to the plaintiff at Wyoming, and the other to Henry James, at Mitchell, and that the agent so told the defendants' station agent when shipping the goods.

Held that the evidence was properly admitted.

An objection was taken in the Divisional Court, that the action should have been brought by the consignee James, because, as was alleged, the evidence shewed that the property had passed to him. The objection was not taken at the trial or in the pleadings, otherwise it would have been shewn that the property was still in the plaintiff; and in any event the consignee James consented to be added as a co-plaintiff.

Held that the objection could not now be raised; and, even if there were anything in it, the court would allow James to be added as a co-plaintiff.

At the trial the learned judge only allowed County Court costs. On shewing cause to the defendants' motion, the plaintiff, who had not moved, asked to have the direction as to costs varied, and full costs allowed; but the court, in the absence of a substantive motion therefor, refused to interfere.

THIS was an action to recover the value of a car load of shingles shipped by the plaintiff on the defendant's line as he alleged for Mitchell, and sent by the negligence or mis-

take of the defendants to Wyoming, and thence to Mitchell, where the defendants refused to deliver it unless the extra freight was paid. This the plaintiff refused to do, and treating the demand of the defendants as a wrongful refusal to deliver brought his action.

The cause was tried before Galt J., and a jury, at Barrie, at the Fall Assizes of 1885.

The facts, so far as material, are set out in the judgment.

The jury found for the plaintiff, the amount of damages to be settled between the parties, and County Court costs were allowed.

In Michaelmas sittings, November, 19, 1885, *G. D. Boulton*, Q.C., obtained an order *nisi* to set aside the verdict and judgment entered for the plaintiff, and to enter judgment for the defendants.

During Hilary sittings, February 12, 1886, *G. D. Boulton*, Q.C., supported the motion. The statement of claim was for the carriage of the goods by the defendants for the plaintiff, and the alleged wrongful refusal to deliver to the plaintiff, while the plaintiff's own evidence shews that the goods were to be carried for Henry James, and therefore the action has been improperly brought, and must fail. By the shipping bill the goods were to be delivered to N. Dyment; and parol evidence was clearly inadmissible to shew that part of the goods were to be delivered to Henry James. The case of *Malpas* v. *London and South-Western R. W. Co.*, L. R. 1 C. P. 326, relied on by the learned Judge, is clearly distinguishable. The shipping bill in that case was written out by the defendants' agent, and it was through his mistake the parol evidence became necessary. Here the whole difficulty was caused by the carelessness of the plaintiff's agent in filling in the bill, and he must suffer for it. The property in the goods passed to the consignee, and the action therefore should have been maintained by him: *Friendly* v. *Canada Transit Co.*, 10 O. R. 756.

McCarthy, Q. C., and *Pepler*, of Barrie, contra. The

objection taken that the evidence disclosed a different cause of action from that set out in the statement of claim, should not be allowed. It was not taken at the trial, and if it had been, it could easily have been explained and shewn that James was merely the plaintiff's agent at Mitchell. Then as to the property passing On the evidence it is quite clear that the property never passed to the consignee, James, and, therefore, the action was properly brought by the consignor: *Steele* v. *Grand Trunk R. W. Co.*, 31 C. P. 260; *Kyle* v. *Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76; but in any event this is of no importance, as the plaintiff has the consent of James to be added as a party. The parol evidence was clearly admissible. It is only necessary to look at the document to see that it is ambiguous on its face, and parol evidence clearly must be admitted to clear up the ambiguity. The case of *Malpas* v. *London and South Western R. W. Co.*, L. R. 1 C. P. 336, to which the learned Judge was referred, and on which he acted, is clear on the point. See also *Fitzgerald* v. *Grand Trunk R. W. Co.*, 28 C. P. 586, 5 S. C. R. 204. Then as to the costs. The learned judge gave County Court costs; but at the same time the question of costs was to be open on appeal. [GALT, J. I made no reservation as to appeal.] [CAMERON, C. J. You have not moved to set aside the judgment as to costs, and it is not open to you now to do so.] On the defendant's motion, the whole case is open, and, therefore, the question as to costs. [CAMERON, C. J. I consider the practice to be the other way.] If the question is open, then the plaintiff is entitled to full costs. The plaintiff, when he obtains a verdict, must have full costs, unless a special application is made for the judge to exercise his discretion; and good cause must be shewn upon which to base the application. To deprive the plaintiff of costs, must be by way of punishment for misconduct or oppression by which the costs have been unnecessarily increased, and there was clearly no misconduct or oppression here: *Jones* v. *Curling*, 13 Q. B. D. 262.

March 6, 1886. ROSE, J.—At the trial only one question was left to the jury, and on their answer to that judgment was entered for the plaintiff, with County Court costs, amount of damages to be settled between the parties.

Against this finding and judgment the defendants move, on the ground (1) of improper reception of evidence; (2) that no contract was proven to deliver to the plaintiff, and therefore that he had no right of action which was in the consignee.

The plaintiff on the motion asked to have the judgment varied so as to give the plaintiff full costs, alleging that the property was worth more than $200, *i. e.*, about $230, and that the refusal to give full costs was by reason of a misapprehension as to that fact.

To this the defendants object, that the plaintiff not having moved against the judgment was precluded from objecting to its terms.

It seems to me the learned judge was quite right in receiving the evidence objected to.

It appears that the plaintiff shipped two car-loads of shingles from Gravenhurst on the cars of the defendants.

Mr. Brown gave evidence as to what occurred at the time of shipment. He said: "I went into the office and told him (the station agent) I wanted to ship a couple of car loads of shingles." * * "He passed me over a shipping bill and I wrote it."

The shipping bill was in the usual form, and requested the defendants to receive the undermentioned property in apparent good order, addressed to N. Dyment, Wyoming, to be sent subject to their tariff, &c. Then in the appropriate columns followed the description of the shingles, &c.

3873. Shingles, 80 thousand.

Grand Trunk Railway.

To Henry James Mitchell.

8208. Shingles, 80 thousand.

(Signed) CHARLES BROWN,

Consignor.

Q. Did you say anything as you handed it back? A.

I wrote it out and I turned to him, and he said, "What does this mean," and I said, "It is two cars, one goes to Wyoming and one to Mitchell," and he took it and tore it in two and handed to me."

The receipt referred to and which was then handed to the witness was in form similar to the request above in part set out, save that it stated that the shingles were received from J. W. Miller, who was Brown's employer, and who was manufacturing the shingles for the plaintiff. The plaintiff lived in Barrie.

The witness proceeded: "When I handed it to him he asked me, 'What does this mean, this Henry James, Mitchell,' and I said, 'One car went to Wyoming and the other car went to Mitchell to Henry James.' I said, 'One went to Wyoming and the other to Mitchell;' and he said, 'Oh, that is all right;' and he signed his name to it, and tore it in two."

It does not appear from the reporter's notes that any objection was raised to the reception of this evidence when tendered.

At the close of the plaintiff's case, the defendant's counsel submitted that it was "not evidence to contradict what appears on the face of the writing itself * * The document governs;" and added, "I submit the evidence is inadmissible to contradict what appears on the face of the writing itself."

Effect was not given to the motion for non-suit, and contradictory evidence was given as to what took place when the shingles were shipped.

At the close of the defence Mr. McCarthy said: "I think we can agree as to the value."

The learned judge thereupon said: "Then the only question I will leave to the jury is as to whether they accept the statement of the witness Brown."

To this counsel did not except, and the learned judge submitted the following question to the jury:

"Q. The jury will please say whether at the time Brown signed the shipping bill he told Bell that the one car was

to go to Wyoming and the other Mitchell?" To this the jury answered "yes."

It seems to me beyond question that the evidence was admissible. Apart from authority I cannot see room for doubt.

A shipping request or bill is presented; the defendants are asked to receive the undermentioned property addressed to "N. Dyment, Wyoming;" and a car load of shingles is described. Then is written, "To Henry James Mitchell," and another car load is described. What does that mean, naturally asked the agent, this "Henry James Mitchell?" Could any one without enquiry determine the meaning of the bill? If one reads the first address as applying to the first car and Mitchell as part of the second name, then to what place was the car addressed to Henry James Mitchell to be sent? Either "Mitchell" must be taken as the address or the name of the consignee appears without address. Surely such evidence as was here given could not in any sense be contradictory, but must be merely explanatory of an ambiguity in the written document.

But if authority was required for admitting the evidence the case of *Malpas* v. *London and South Western R. W. Co.*, L. R. 1 C. P. 336, cited to the learned judge, and on which he acted, as also *Fitzgerald* v. *Grand Trunk R. W. Co.*, 28 C. P. 586, and 5 S. C. R. 204, afford abundant support to the ruling.

This seems to have been the only question really in dispute at the trial.

The question now raised as to the right of the plaintiff as consignor to recover the shingles shipped to Henry James was not raised by the pleadings, or at the trial.

The statement of defence treats the plaintiff as owner of the shingles, and stated that they were ready to be delivered to him on payment of the freight demanded.

Mr. McCarthy stated on the argument that if the question had been raised at the trial he would have been prepared to show that the property never passed out of the

plaintiff, and to have brought the case within *Friendly* v. *Canada Transit Co.*, decided in this Court at the December Sittings for delivery of judgment, (a) and offered to have the consignee now joined as a co-plaintiff, he having given his consent for that purpose.

In my opinion the defendants ought not now to be heard to urge this objection; and if there is anything in it, which I have not considered, the consignee should be added as a party plaintiff as the question was not one which the parties went down to try. In *Friendly* v. *Canada Transit Co.*, the plaintiff at the trial declined to accept the offer of the learned Judge to amend by adding the consignee as a party, and therefore we could not afford him that relief.

As to the question of costs, Mr. McCarthy urged that it was open to the court when a judgment was moved against to deal with the whole matter as open, that is, as if it were being heard in the first instance on motion for judgment, and stated that in the Chancery Division the court felt free to deal with the question of costs as open on motion to set aside or vary the judgment. I have conferred with the learned judges of that division and they are unable to recall any case in which they have varied the order for costs in favour of the party answering or shewing cause to a motion, and who had not moved against the judgment. That would be to give a party the benefit of an appeal without his incurring the ordinary risks. It is not necessary to determine whether the court has or has not the power. If it has it should be sparingly exercised.

Reference to marginal rule 406, O. J. A., will shew that, saving certain exceptions which do not apply here: "No motion shall be made without previous notice to the parties affected thereby. But the court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte*, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as

(a). Since reported in 10 O. R. 756.

the court or Judge may think just; and any party affected by such order may move to set aside or vary the same."

The fact that the counsel who probably would shew cause to such a motion, happened to be in court may make no difference. It may be he might well refuse to answer the motion without notice. In such a case the court no doubt could permit notice of motion to be given, even though the time had expired, and shorten the time required by the rules to elapse between the service and return. See rules 407-9 and 462.

This is not a case where an *ex parte* order would be granted, and we were not asked to allow notice to be served. I do not say we should grant leave if it were asked.

In my opinion we cannot hear the motion to vary the order as to the costs.

Under the old practice it is stated that "the opposite party cannot shew cause against it" (*i. e.*, rule *nisi*) "in the first instance, even though he has given notice that he will do so:" *Chitty's* Archbold, 12th ed., p. 1538, citing *Doe d. Wright* v. *Smith*, 8 A. & E. 255, shewing that even to the party moving, the court preserved the right to have the full time provided by the ordinary practice of the court to enable counsel to be instructed and the motion prepared.

The defendants' motion fails on both grounds, and must be dismissed with costs, which will be according to the high court scale.

CAMERON, C. J.—I am of the same opinion, and do not think it necessary in support of the judgment for the plaintiff to say the case is within the authority of *Malpas* v. *London and South Western R. W. Co.*, L. R. 1 C. P. 336, or *Fitzgerald* v. *Grand Trunk R. W. Co.*, 28 C. P. 586.

The contention on behalf of the defendants is that the address of the plaintiff at the head of the bill of lading or shipping note is to govern all that follows. But that cannot be so in reason, as the words after the description of the goods to go to the plaintiff's address at Wyoming, "To

Henry James Mitchell," would have no meaning. Whether "Mitchell" was part of the name of the consignee, or the name of the place where the consignee lived was clearly a matter that could be made clear by parol evidence; such evidence does not alter or vary the contract. If there had been a comma after the name Henry James and before the word Mitchell, it would have been manifest that Mitchell was not part of the consignee's name. But Mitchell without extrinsic evidence would mean nothing. To make it intelligible the "village" or "town of" has to be supplied, and to adopt the defendants' line of reasoning, there was no authority to carry the goods to Wyoming, as Wyoming would be part of the consignee's name.

I am, therefore, of opinion that the intention of the consignor and carrier can be clearly ascertained by reading the shipping bill or request note as directing that the first parcel of shingles is to go to N. Dyment, Wyoming, and the second parcel to James Henry, Mitchell, and every writing must be read so as to give effect to the intention of the parties to it doing no violence to the proper and reasonable purport of the language used. If the word "and" had been inserted before the "to" before the name of Henry James, there would have been no ambiguity whatever. The shipping bill would then read: "Received from J. W. Miller the undermentioned property in apparent good order, addressed to N. Dyment, Wyoming, to be sent by the Northern and North-Western Railway Companies, subject to their tariff, and under the conditions stated above, and on the other side agreed to 3873—shingles—80 m. G. T. R., "and to Henry James Mitchell, 8208—shingles—80 m. G. T. R." This reading would effectuate the intention of the parties, and I think will do no violence to the natural construction and effect of the writing. By being informed of what the circumstances were surrounding the signing of the request and receipt notes all ambiguity vanishes from the writing, and it is not in any manner contradicted by the parol evidence given in explanation.

I think the defendants' motion must be dismissed; and I

quite agree in the opinion of my learned brother Rose, that it is not open to the plaintiff on the defendants' motion to ask to have the judgment of the learned Judge at the trial as to costs varied, and that could only be done, if done at all, upon a substantive motion against the judgment in that respect.

GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

ROBERTSON v. DALEY.

Statute of Limitations—Possession—Evidence—Squatter—Estoppel.

In 1811 P, the owner of certain land, sold it to D, who went into possession and occupied till 1827 or 1828, when he was turned out by the sheriff under legal proceedings, the nature of which did not appear, taken by Dufait, who was put in possession, and remained in possession until 1864, when he conveyed to O, through whom the plaintiff claimed. D's actual possession had been only of about ten acres.

Held, that D's possession was of the whole land; and that he could not be treated as a squatter so as to enable him only to acquire a title to the ten acres actually occupied.

It was objected by the plaintiff that the evidence of the recovery by legal proceedings was inadmissible, because no judgment was proved; and not being proved was no evidence against the plaintiff; but *Held*, that though this might be so if the plaintiff's title were being inquired into, it was admissible for the defendant in respect of his possessory title.

T, to whom the patent of the land in question subsequently issued, by deed poll made prior thereto, bargained, sold, aliened, and confirmed the land in question to L. *habendum* to L and his heirs; with a covenant of warranty.

Held, that on obtaining the patent T was estopped by the deed from setting up title in himself under the patent.

THIS was an action of ejectment brought to recover possession of a portion of the west half of lot 4, in concession 1 of Tilbury east, in the county of Kent, being the whole of the west half except ten acres fronting on the river Thames, and occupied by the defendant at the time of the commencement of this action.

The case was tried before Armour, J., without a jury, at Chatham, at the Fall Assizes of 1885.

The land in question was marsh land subject to the overflow of the river Thames.

The facts, so far as material, are set out in the judgment.

The learned Judge found that the plaintiff shewed a good paper title; but that the defendant had proved a title under the Statute of Limitations; and he entered judgment for the defendant.

In Michaelmas sittings *J. T. Small* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During the same sittings, December 1, 1885, *Small* supported the motion. The Judge at the trial found that the plaintiff had shewn a good title, and the plaintiff's title is in fact indisputable. The defendant's title, if he has one, is possessory only, and this is admitted on the face of the deed from Dufette to Ouelette under which the defendant claims. The conveyance states that the said Dufette only conveyed his right in the property, whatever that may be, and the covenant for quiet enjoyment in the form (which is a printed form) is struck out. The defendant relied on the judgment under which Dufette is said have ousted Dauphin about the year 1827. There was no proper evidence given of the existence of such a judgment, and no such judgment in fact exists on the records of the Court. A judgment can only be proved by the production of the original judgment roll or an exemplification: *Taylor* on Evidence, 8th ed., p. 1310-1314. Even if this judgment had been proved it would not have been evidence against the plaintiff, as such evidence is only admissible between the parties and their privies in title. The plaintiff was not a privy to any of the parties to that action. He referred to *Adams* on Ejectment, 4th ed., pp. 70-1; *Doe d. Harding* v. *Cooke*, 7 Bing. 346; *Taylor* on Evidence, 8th ed., pp. 7, 113; *Doe* v. *Huddart*, 2 C. M. & R. 316; *Matthew* v. *Osborne*, 13 C. B. 919. It is not denied that the defendant

has had a good title to, and the plaintiff does not claim that part of the lot (containing about ten acres) which has been under cultivation and fenced off from the rest of the lot, as there has been actual possession for a considerable period, but claims only the remainder of the lot which consists of marsh land subject to the overflow of the river Thames, and which could not, and has not been, in the possession of the defendant or any person; and no acts of ownership have been exercised thereon. Under the case of *Harris* v. *Mudie*, 7 A. R. 414, the defendant and his predecessors in title had no colour of title to this lot, and therefore, although their conveyances purported to convey the whole of the west half of the lot, they do not operate to give the defendant a right to possession to more than was actually enjoyed by himself and his predecessors in title for the requisite statutory period. Dufait only claimed a possessory title, and the defendant knew that the registered title was in the plaintiff.

Scane, contra. The conveyance in the plaintiff's chain of title, namely, that from Trudelle to Lecerf was executed before the patent was issued to Trudelle, and the plaintiff has not therefore a good legal title. Dauphin, who was in possession under the agreement from Pattinson, through whom the plaintiff claims, was ousted by Dufette, through whom the defendant claims, and this operates as an ouster of the plaintiff's title; besides Dufette, through whom the defendant's claims, showed that he was claiming this land as far back as 1855 by conveying the right of way through a portion of it to the Great Western Railway Company. The evidence given by the witnesses as to the judgment obtained by Dufette against Dauphin is admissible to shew the character in which Dufette acquired possession. Under these circumstances Dufette had colour of title; and possession of part of the lot enures to the whole.

Small, in reply. The legal estate duly passed from Trudelle to Lecerf by estoppel, and Trudelle gave a covenant of warranty. Neither Trudelle or his representatives

have ever raised this question, and the defendant cannot be now heard to raise it: *McLean* v. *Laidlaw*, 2 U. C. R. 222.

January 2, 1886. GALT, J.—The plaintiff claims title under the will of the late Arthur John Robertson, who was devisee of one Richard Pattinson, who died in 1818.

The defendant denies that the said Richard Pattinson was ever entitled to the said land; and also claimed title by length of possession.

Pattinson claimed title under a deed from one Le Cerf, dated 11th March, 1809. In 1811 he agreed to sell it to one John Dauphin, who went into possession. This is the last trace of any dealing with the land by Pattinson or any person claiming under him. Dauphin and his family occupied the land until 1827 or 1828, when they were ejected by the sheriff, not at the suit of Pattinson or his heirs, but at the suit of one Dufait, under whom the defendant claims; Dufait and his assigns having been in possession ever since, paying the taxes, and treating the land as their own, and selling a portion of the land to the Great Western Railway Company.

An old man named Jacques Dufette, aged 82, under whom the defendant claims, was examined before a special examiner. He swore he was born on the lot, and lived on it for some years with his father, who died on the lot. He stated they were turned off by Pattinson, who made the agreement with Dauphin to which I have referred. After the lapse of several years his brother instructed a lawyer named Elliott to bring an action against Dauphin to recover possession; and he (Jacques) was put in possession by the sheriff, and remained in possession until July, 1861, a period of upwards of thirty years, when he sold to Francois Ouelette, under whom defendant claims.

A witness named Marcus Dauphin, son of the before mentioned John Dauphin, was examined. He stated his father bought the land from Pattinson in the year 1811. They remained in possession until 1827 or 1828, when they were turned out of possession. "Q. Were you pres-

ent when you were turned out? A. Yes. Q. Who was the person? A. Thomas Lewis was the deputy sheriff; Hands was the sheriff. Q. Who did he put in possession? A. He put James Dufait (the person above mentioned)." In answer to a question by his lordship, "who turned you out? A. The heirs of Dufait—they call themselves the heirs of Dufait—and they turned us out by the sheriff."

On the argument Mr. Small objected this evidence was inadmissible, as I understand, as the judgment was not properly proved; and, even if proved, was not evidence against the plaintiff. This might be so if we were enquiring into the plaintiff's title; but it was clearly admissible and important to show that whatever title the plaintiff or his testator had was gone under the statute of limitations. We find then from the evidence of the person who was put out of possession and of the person who was put into possession, that in the year 1828, upwards of sixty-five years ago, the sheriff placed the latter in possession of the land now in question, who by himself, or those claiming under him has occupied it ever since.

It is manifest this is not the case of a squatter taking possession of land to which he has no right, but of a person purchasing after a lapse of thirty two years from a person who had been placed in possession by the sheriff under a process of law. If the statute of limitations does not afford protection in such a case, I cannot conceive one in which it would be applicable.

CAMERON, C. J.—Two questions arise in this case. First, did the plaintiff shew a clear paper title to the land in question; and secondly, if he did, has such title not become barred by the statute of limitations?

The only objection to the paper title raised at the trial and upon the argument is, that the plaintiff traces his title through a conveyance purporting to convey the fee made by Louis Trudelle to one Jean Marie La Douceur by the name of John Marie Le Cerf, on the 13th day of October, 1795, which was about 11 years before the patent from the Crown issued to the said Louis Trudelle.

This deed ran, "Know all men by these presents that I Louis Trudelle, of the River Thames, yeoman, in consideration of £60, New York currency, to me in hand paid, the receipt whereof I do hereby acknowledge, have bargained, sold, aliened and confirmed unto John Marie Le Cerf, his heirs, executors, administrators, and assigns forever, a certain tract or piece of land." Then follows a description of the lot of land in question; and then the *habendum* as follows: "To have and to hold the said bargained (*sic*) unto the said John Marie LeCerf and to his heirs, executors, administrators and assigns forever. And I the said Louis Trudelle against myself, heirs, executors, administrators and assigns, shall forever warrant and defend by these presents."

The defendant contended that this deed did not estop Louis Trudelle, the grantee of the Crown, from setting up title under the patent subsequently issued to him; and therefore the title was shown never to have been in La Douceur or LeCerf through whom the title is traced.

I am of opinion this objection to the plaintiff's title cannot be allowed to prevail.

The cases cited on the argument are clear authorities, not distinguishable in principle from the present case, that the patent when issued made good the title Trudelle assumed to have when he executed the conveyance to LaDouceur, and he could not, as against his own deed, be permitted to say that he then had no title; and if he could not do so a stranger is in no better position, and cannot be permitted to dispute that which Trudelle himself never thought of disputing, the validity of his conveyance, and its sufficiency to pass his after acquired title in the land.

The statute of limitations may present a more formidable obstacle in the way of the plaintiff's recovery. If it were not for the decision of the Court of Appeal in *Harris* v. *Mudie*, 7 A. R. 414, I should not entertain the least doubt that the plaintiff's title has been barred.

If I understand the effect of that decision correctly, the statute of limitations only destroys or renders inopera-

tive the owner's title to such land as there has been a visible occupation of by some other person, or succession of persons, for the required period to effect a bar. But the language of Burton, J. A., at p. 427, still leaves it in doubt, I think, as to whether a person entering under a defective title does not acquire title to the whole lot of land named in his instrument of title, though it may be nearly all wood land and in a state of nature, by entering upon and occupying a part for the statutable period.

This language, at p. 428, is as follows: "When a person so enters under a mere mistake as to his rights, purchasing or intending to purchase under what he believes to be a good title as from one whom he believes to be the heir at law or devisee under a will or deed, or under a deed from a married woman defectively executed, or a forged deed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with the supposed title, and comes within the class of cases intended, in my opinion, to be protected by the statute; but it must in every case be a *bonâ fide* claim, and ought not lightly to be extended to a purchaser from a squatter or other person having no title, where the party has neglected to ascertain from the registry office, as he can always do in this country, whether the land has been patented, and who is the registered owner."

This language would seem to be clearly in favour of the view, that an unintentional trespasser or person entering under a supposed right, is in a better position than a mere trespasser, and the occupation would be treated as entirely different. In this respect, that by entering on an acre of a hundred acre lot, and cultivating it, and occasionally cutting wood or pasturing cattle in the wild or wooded portion of the land, he would acquire thereby title to the whole hundred, while a squatter or person entering without title, who cleared and cultivated fifty acres of the hundred, and over the other fifty exercised the same acts of ownership as those above suggested, exercised by the person entering under a supposed right, would only be able to invoke the

statute's aid to protect him in the possession of the cultivated fifty acres. Notwithstanding in the latter case the true owner would be more likely to have notice of the trespass upon him through the squatter's occupation than he would through the occupation of the claimant under the supposed right, though as to the owner this claimant would be equally a trespasser with the squatter, and his occupation less likely to be noticed by or known to such owner.

The decision, however, in *Harris* v. *Mudie*, 7 A. R. 414, confined the recovery to the cleared land though certainly the persons through whose possession the statutory bar was sought to be established had held under lease from one claiming to have the right to the land, such lease covering the wood and cleared land also. If by this lease they once had a possession of the whole land, did that possession cease of the wood land when the lease expired though the manner of occupation remained unchanged, and become confined to the cultivated land merely? That it did is, I think, the judgment in *Harris* v. *Mudie*. Then applying the law as therein found, having regard to the judgment of Burton, J. A., to the present case, what is the position of the parties The plaintiff has the paper title. The present defendant is in actual visible possession of about ten acres of the land covered by the plaintiff's paper title, but to which ten acres the plaintiff makes no claim, admitting as to that part that he is barred by the statute. The defendant went in under a deed from one Thomas Brady purporting to grant and convey to him the westerly part of the lot containing ninety acres, being the land in dispute. This deed was dated in 1875. Brady claimed by mesne conveyance under one Francis Ouelette, who claimed by deed from one Jacques Dufait by deed dated the 15th July, 1861, while this deed purported to grant the most westerly part of the lot containing ninety acres, it was expressly declared that the sale was made by way of quit claim of all the right title and interest of the said Dufait in the land and no more.

The evidence shewed that one Augustine Dufait or Dufette lived on the lot previous to the birth of Jacques Dufait who made the deed to Ouelette. After the death of Augustine Dufait, Richard Pattinson, who died in 1818, and under whom the plaintiff claims, entered into possession of the land and turned the children of Dufait out. At that time there was a log house and store on the land, and it was fenced as now—that is about ten acres were enclosed: that after this expulsion Jacques Dufait entered into possession of the land when about 24 or 25 years old, at the time of the trial he was 82 years old, which would make the time of his entering about 1827. He remained in possession for 35 years. He swore that he was put in possession by the sheriff through his brother Augustine, who was his elder brother. At that time one John Dauphin was in possession, and Augustine obtained the right to possession against him by some legal proceedings, but what these were was not made to appear. Jacques Dufait went out of possession when he sold to Ouelette.

A witness called by the defendants, Narcisse Dauphin or Dauvin, said his father bought the land in question, and went to live on it in 1811, and lived on it till 1828, when they were turned out by Dufait through the sheriff. Thomas Lewis was the deputy sheriff who turned them out, and put the witness Jacques or James Dufait in possession, who remained in possession till he sold to Ouelette, who occupied for fifteen or sixteen years. The defendant was the next person who actually occupied the land.

It also appeared that Augustine Dufait by indenture, dated the 25th day of July, 1806, conveyed the land in question, described as the lowermost half of the lot, by way of mortgage to Richard Pattinson, to secure payment of £600 by two instalments, the last of which, £400, was payable on the 25th July, 1809. It is probable it was under this mortgage Pattinson claimed the right to the possession when he turned the Dufaits out.

I think under the circumstances, though there is no legal evidence of a judgment or execution in favor of

Augustine Dufait, that when Jacques Dufait entered he entered claiming the whole land, and not merely the part under cultivation. On proof that Augustine Dufait the elder died in possession, and that Augustine Dufait the younger was his eldest son and heir at law, the latter would have made out a title sufficient to entitle him to recover unless Dauphin was in a position to shew title out of Dufait, which, though his father had bought from Pattinson, he might not have been able to do. If his father did in fact buy from Pattinson and entered under the agreement to purchase, Pattinson, or those claiming under him, could not now recover, as once having been in the actual possession, he must be held after the lapse of time that has occurred to have discontinued the possession, and although Ouelette, by the form of the deed he accepted, knew that Dufait was not claiming to be the absolute owner of the land, still he was at all events transferring what he then claimed to have the possession of to Ouelette. So there has been some one in the constant occupation of a portion of the lot claiming the whole for over sixty years.

The plaintiffs title must, therefore, if the Statute of Limitations is to have any operation at all, be held to be clearly barred.

The plaintiff's motion must, therefore, be dismissed, with costs.

ROSE, J.—I agree that by the operation of the statute of limitations the plaintiff's claim has been extinguished and that the defendant, the person in possession at the date of the commencement of the action, is entitled to judgment.

Motion dismissed.

[COMMON PLEAS DIVISION.]

MASSIE v. THE TORONTO PRINTING COMPANY.

Libel—Privilege—Judge's charge—Excessive damages—Reduction of by consent of plaintiff, or new trial.

In an action of libel the libel consisted of letters of a very gross character published in the defendants' newspaper reflecting on the plaintiff as warden of the Central Prison. The defendants refused to give the name of the writer of the letters, and assumed responsibility therefor. The learned judge told the jury that "every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose * * such comments are not libellous however severe in their terms unless they are written intemperately and maliciously." The jury found for the plaintiff with $8000 damages.

Held, that the libel was not privileged or published on a privileged occasion: that no exception could be taken to the judge's charge: nor could it be said that the libel was a fair comment upon a public matter in which the public had an interest: but *Held*, per CAMERON, C.J., and GALT, J., that the damages were excessive, and they were directed to be reduced to $1000, provided such sum was paid by a named date and plaintiff elected to take such sum, otherwise a new trial was directed.

Per ROSE, J., that under the circumstances the damages were not excessive; but as plaintiff's counsel had intimated that a smaller amount would be accepted if paid within a reasonable time, he would accede to the reduction, on plaintiff accepting such amount, otherwise the motion for a new trial should be dismissed.

THIS was an action for libel, tried before Rose, J., and a jury, at Toronto, at the Winter Assizes of 1886, in which a verdict was rendered for the plaintiff, with $8,000 damages.

The facts, so far as material, are set out in the judgments.

In Hilary sittings, *O'Donohoe*, Q. C., for the defendant, obtained an order calling on the plaintiff to shew cause why the verdict should not be set aside, and a non-suit entered; or for a new trial, on the ground that the verdict was contrary to law and evidence: that the publication was privileged; and for misdirection; and also for rejection of evidence; and for excessive damages.

During the same sittings, February 19, 1886, *O'Donohoe*, Q. C., supported the order.

W. Nesbitt, contra.

March 6, 1886. GALT, J.—This action was brought for certain letters published in a newspaper called the *Irish Canadian*, reflecting on the plaintiff as warden of the Central Prison. Comments on the management of the prison, and the conduct of the plaintiff as warden, were subjects, which the learned counsel for the plaintiff admitted at the trial, formed a matter of limited privilege; and the learned Judge in his charge told the jury that "every one has a right to comment on matters of public interest and general concern—(It is admitted that the management of the Central Prison is a matter of public interest and general concern.)—provided he does so fairly and with an honest purpose, not only fairly but with an honest purpose—not only with an honest purpose but fairly,—such comments are not libellous, however severe in their terms, unless they are written intemperately and maliciously."

In one of the letters complained of, the following passages occur, which form the 3rd, 7th and 9th paragraphs of the statement of claim: 3rd. "On Tuesday morning last, (March 31) occurred one of the most inhuman and brutal outrages at the Central Prison that has ever been perpetrated within its walls. I believe an act so unjust and cruel cannot be found in the history of modern prison cruelty." 7th. "It is high time this inhuman monster was removed from so important a charge as the management of a prison population is. The man has, by a persistent oppression of the prisoners, rendered himself obnoxious and detested by them. No man respects him. Instead of his brutality inspiring dread and respect, it only engenders hate and defiance." 9th. "How long will a just God allow the poor wretches sent to the Central to be reformed (not debased and brutalized), to suffer the tortures of the damned at the hands of this fiend? Is it possible that in this enlightened age men are to be driven insane by the tortures of this modern Nero?"

After the perusal of the above statements, it would be a waste of time to say more than that there is no case to be found in the books that would even remotely tend to

show there could be any privilege, particularly on the part of a defendant who had no personal knowledge of their truth or falsehood.

The question of damages remains to be considered. There is no doubt they are large, and had the articles complained of appeared as the remarks of the editor himself, I can see no ground on which we could interfere; but as this is not the case, but they were admitted to the columns of the paper on a representation of their truth, I think we may do so. I have no doubt the jury were guided to a considerable extent by the fact that the editor at the time refused to give up the names of the writers and assumed the responsibility.

Upon the defendants paying the sum of $1,000, with costs on or before the first day of April, the verdict will be reduced to that amount; but if not, this rule will be discharged with costs. If the plaintiff does not accept these terms, there must be a new trial upon payment of costs by the defendants.

CAMERON, C. J.—I quite agree there is no possible ground for disturbing the verdict of the jury in this case except for excess in the damages awarded. There is no pretence for saying that the libel was privileged or published on a privileged occasion. Nor could exception justly be taken to the charge of the learned judge. Nor can it be said that the libel was a fair comment upon a public matter in which the public had an interest. The language was entirely too strong and opprobrious to be sheltered and protected on this ground. The damages are, however, more than I think in reason should have been awarded. I quite understand the difficulty of interfering on this head, as it is not possible to lay down any rule or guide by which the jury could measure the damages sustained with any degree of accuracy, and sending it down to another jury is merely to take the chance of their finding for a less amount. The jury is by statute made in this particular kind of action judges of the law and fact, and to interfere

with what they have done is a *quasi* usurpation of their province and function. It is to be remembered too, that the change in the law giving to the jury the right to judge of the law and fact was an amendment sought by and obtained on behalf of the public press, whose freedom was supposed to be imperilled by observance of the rules of law which courts and judges were bound by; and it is singular that under these circumstances an appeal should be made to the court to stand between this particular member of the press community and the jury to moderate the severe punishment that has been awarded against the defendants.

I am clearly of opinion, however, that the court has a right in this action, as well as in all others, to set aside the verdict of the jury when the damages awarded are far heavier than the circumstances of the case call for, and this too where no precise or accurate rule can be laid down for the measurement of the damages.

In *Belt* v. *Lawes*, 12 Q. B. D. 356, the right of the Court to grant a new trial for excessive damages in an action of libel was conceded. There the jury gave £5,000 damages, and the court directed it, with the consent of the plaintiff, to be reduced to £500, and the defendant's rule for a new trial to be discharged. The defendant having appealed, the Court of Appeal did not question the power of the court below to grant a new trial, and affirmed the right of the court, instead of granting a new trial, to reduce the damages without the consent of the defendant with the consent of the plaintiff.

It only remains to consider whether a new trial should now be granted on the ground of excessive damages, or with the concurrence of the plaintiff, the damages be reduced to such sum as may, in the opinion of the court, be reasonable. No good object can be gained by granting a new trial, as the libel is one of a gross character, quite as hurtful to the feelings of any right minded person in the plaintiff's position as an imputation of crime would be; in fact if the allegations in the libel had been true, it would be

difficult to say that a crime had not been committed by the plaintiff.

The better course will be to fix an amount to which the judgment should be reduced. The difficulty is, to do this without doing an injustice to the plaintiff, or giving the countenance of the court to the departure from the exercise of the just and beneficial liberty that belongs to the press, the defendants have been guilty in publishing the defamatory articles complained of. I trust the opinion which the jury in this case so emphatically pronounced by their large verdict will prove a salutary caution and admonition, not only to the defendants but to the press generally, that the good sense of the people is utterly opposed to the liberty, which it is essential the press should enjoy, being degenerated and debased into a vehicle for the gross and licentious abuse and defamation of either public or private men.

If the plaintiff consents thereto, the amount of verdict will be reduced to the sum of $1,000, on condition that that sum, with the costs of suit, be paid by the defendants by the 1st day of April; in default of which the rule will be discharged, and the verdict be allowed to stand.

ROSE, J.—I see no ground whatever upon which I can agree in saying that the verdict is too large. I was compelled by the rules of law governing me at the trial to tell the jury that the amount was entirely a matter in their discretion. Whether if it had been my duty to fix the amount I would have named the same sum I do not know. Such was not and cannot become my duty. So far as I could judge, a more intelligent and conscientious body of jurors never were selected for the county of York, than the whole panel acting at the last sittings; and nothing that I saw and nothing in the result can justify me in coming to the conclusion that the jury were actuated by prejudice or any improper motive in fixing the amount of the verdict. It was apparent that the sum arrived at was the result of a compromise, and that to some of the jurors

the circumstances of the case appeared to warrant the giving of a larger sum.

My brother Galt says, that if the articles complained of had been written by the defendants, he would not have thought of interfering. I charged, and it has been held correctly charged, the jury, that they must treat the defendants as if their editor had written the articles, he having refused to give the names of the writers. The defendants were then in the position of "fathering" the articles, and urging they were "fair comment," while at the same time the editor was compelled to state that he had no knowledge whatever of the alleged facts which formed the text for such wild, cruel, and unjustifiable accusations.

I cannot wonder at the action of the jury. The plaintiff appeared before them as a public official who had been unjustifiably attacked and vilified, who had been accused of almost everything that a man in his position should not be guilty of, and who, if guilty of such acts, should have been removed from his position without further notice, and refused the privilege of associating with any one of fine feelings or refined instincts.

As I said to the jury, if we are to have men in public places of trust and responsibility who are persons of sensitive honor, and who will be held in check by the force of public opinion, desiring to stand well in the opinion of those whose good opinion is worth having, we must protect them when attacked; and it seems to me we are affording them but little protection when we take upon ourselves to say that such persistent and malicious vilification, unapologised for, and attempted to be justified without the manly course of pleading that the charges were true, were of so little consequence that when a jury say that in their opinion the interests of the plaintiff and of the public demand very strong mark of disapprobation, we can take upon ourselves to pronounce the amount, which evidences their judgment, so excessive that it would be contrary to good conscience to let it stand.

There was nothing that occurred at the trial to inflame the minds of the jury. The witness Boyle who was the editor of the paper, pursued the very discreet, and, it may be to him, natural course of saying nothing unpleasant and exhibiting a most kindly personal feeling towards the plaintiff. It was the fact that he refused to give the names of the writers that compelled the treatment of the defendants as authors of the articles in question.

Then on the argument of the motion the court suggested the difficulty of interfering on the ground of excessive damages; and further suggested the desirability of the defendant offering to pay the plaintiff some reasonable sum, which the plaintiff then offered to accept.

The defendants' solicitor has since declined to make any offer, and I certainly would not have concurred in naming any less sum than the amount of the verdict, upon payment of which the defendants might be relieved, were it not that on the argument counsel for the plaintiff stated that he would accept any reasonable sum the court might name, if paid within a reasonable time. This offer was probably made in the hope that the defendants might pay a less sum in the desire of not having a larger amount entered up in judgment against them, which the plaintiff might have difficulty in collecting.

For this reason, and this alone, I concur in saying that if the plaintiff is willing to accept $1,000, if paid by the 1st of April, the verdict may be reduced to that amount; but if not paid within that time, this motion to be dismissed; but I entirely dissent from so much of the judgment as provides for a new trial if the plaintiff will not accept such sum.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

McROBERTS v. STEINOFF.

Fraudulent conveyance—Chattel mortgage—Intent to prefer—R. S. O. ch. 118, 47 Vic. ch. 10, sec. 3 (O.)

A chattel mortgage given as security for a *bonâ fide* debt cannot be avoided under R. S. O. ch. 118, by simply shewing that the debtor was insolvent, and intended to give the mortgagee a preference, but there must be knowledge on the part of the creditor taking the mortgagee so as to constitute a concurrence of intent on the part of the debtor and creditor; and the amendment made by 47 Vic. ch. 10, sec. 3 (O.) does not affect the matter.

Burns v. *McKay*, 10 O. R. 167 followed.

In this case there was no knowledge on the part of the mortgagee of the debtor's insolvency; and it also appeared that the mortgage was given in pursuance of a previous promise to give security for the debt. The mortgage was therefore upheld.

Quære, whether, where the statute may be defeated by shewing an antecedent promise to give security, it must be such as the promise indicated.

INTERPLEADER.

The cause was tried before Armour, J., without a jury, at Chatham, at the Fall Assizes of 1885.

The question was as to the validity of a chattel mortgage given by one Misner to the plaintiff, as against the defendant, an execution creditor.

At the conclusion of the case the learned judge gave the following judgment:

"I find as a fact that Misner was in insolvent circumstances. He knew himself to be insolvent at the time he gave the chattel mortgage; he gave it for the purpose of keeping these goods from being seized under execution against him.

"I find the plaintiff was not aware he was in insolvent circumstances; was not aware what intention was in the mind of Misner; as far as he was concerned the chattel mortgage was taken *bonâ fide* to pay an existing debt, for which security had been promised.

"I find, therefore, in favor of the plaintiff."

In Michaelmas sittings *W. R. Meredith*, Q.C., moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During Hilary sittings, February 3, 1886, *W. R. Meredith*, Q.C., supported the motion. The mortgage was not *bonâ fide*. The plaintiff knew that Misner, at the time he gave the mortgage, was insolvent. Knowledge on the part of the mortgagee was not necessary. [CAMERON, C. J.—The authorities are the other way:—*Burns* v. *Mackay*, 10 O. R. 167.] If the court are of opinion that the effect of the R. S. O. ch. 118, under the authorities, is that such intent must be shewn, this has been changed by 47 Vic. ch. 10, sec. 3, (O.) There was no prior agreement, as contended for by the plaintiff, to give security; but in any event some particular security should have been pointed out, and such security must be afterwards given: *Ex p. Griffith*, 23 Ch. D. 69.

Shepley, contra. The evidence clearly shews that the transaction was *bonâ fide* on the plaintiff's part. The plaintiff had no knowledge that Misner was insolvent when he executed the mortgage. Knowledge must be proved so as to raise the intent to prefer. There was a clear agreement proved to give such security: *Bills* v. *Smith*, 6 B. & S. 314; *Ex p. Kevan*, L. R. 9 Ch. 752; *Ex p. Hodgkin*, L. R. 20 Eq. 746; *Allan* v. *Clarkson*, 17 Gr. 570.

March 6, 1886. GALT, J.—It was clearly proved that Misner had long previous to giving the mortgage now in question promised the plaintiff to give him security for a debt which he owed him. It was also proved that from kindness of feeling on the part of the plaintiff towards Misner (who had been in his employ for many years), the plaintiff had forborne taking security over Misner's house and property for fear of injuring his credit.

It was also proved that Misner had specifically promised to pay $1,000 during the year 1884, and had neglected to do so. Under these circumstances Misner came to the plaintiff in Toronto in December, 1884, when the mortgage was given. The learned judge has found as a fact that at the time when it was given the plaintiff was not aware

that Misner was in insolvent circumstances, and the evidence, in my opinion, bears out that finding, and also that it was taken by him in discharge of a previous promise made by Misner.

Mr. Meredith relied on the amendment contained in sec. 3 of ch. 10 of the Act of 1884, amending ch. 118 of the R. S. O. as rendering the mortgage void. He also referred to the case of *Ex p. Griffith*, 23 Ch. D. 69, as supporting his contention. That case, however, differs very materially from the present in this important particular, that it was shewn that at the time Griffith received the assignment of debt from the bankrupt, who was his employer, he knew the assignor was insolvent and unable to carry on his business. (On the next day his employer signed a liquidation petition.)

As regards the statute, if it had been shewn that without any previous engagement to give security the mortgage in question had been given by Misner; or if at the time when the plaintiff actually received it he knew that Misner was insolvent, and that his object was to give the plaintiff a preference over his other creditors, I have no doubt the mortgage would be void; but the case was not so, the security had been promised long before, and when it was accepted the plaintiff did not know the mortgagor was insolvent.

The case of *Ex p. Hodgkin*, L. R. 20 Eq. 746, cited by Mr. Shepley, is in many of its circumstances very like the present.

Sir James Bacon, V. C., in giving judgment says, at p. 755: "Now that is the whole case; and unless I were to hold that, when the bankers, having a security offered to them, say, 'We will not have it now, but the time may come when we may call upon you for it,'—unless I were to hold that that is an evasion of the law, an illegal transaction, fraudulent against the other creditors, I can find no fault with the transaction."

In the present case when the security was first offered there is no evidence that Misner was insolvent.

In my opinion the motion should be dismissed.

CAMERON, C. J.—I concur in the opinion that this motion must be dismissed. I have no doubt, as was found by the learned judge at the trial, that the plaintiff's mortgagor at the time he executed the mortgage to the plaintiff, was in insolvent circumstances: that he knew he was insolvent; and executed the mortgage for the express purpose of giving to the plaintiff a preference over his other creditors; but the learned judge has found that the plaintiff did not know of the mortgagor's insolvency. This was certainly taking a very favourable view for the plaintiff of the circumstances and the evidence. I am not, however, able to say that it was clearly wrong, though the sudden resolution of the judgment debtor to execute the security to the plaintiff, which might, to say the least, have led him to suspect that there was some other motive than a past promise to give security to induce him to take that step without having been recently urged to do so, and the fact that he had not been fulfilling his promise to reduce his debt to the plaintiff, might well have made him conscious that the debtor was unable to meet his engagement. This, I think, is not enough to justify me in disregarding the finding of the judge, who had the opportunity of seeing the plaintiff's manner under examination and cross-examination, and had therefore a much better opportunity of judging of the plaintiff's truthfulness and honesty of purpose than I can possibly have by merely reading the report of his evidence furnished by the short hand reporter.

I have recently held in a similar case that I could not on mere suspicion hold that the plaintiff knew of his mortgagor's insolvency. If he did not, as I understand the authorities, there being a *bonâ fide* debt to be secured, the mortgage cannot be invalidated simply because his debtor was insolvent, and intended to give him a preference. To avoid the transaction under R. S. O. ch. 118, there must be a concurrence of intent on the part of the debtor and the creditor taking the mortgage.

The latest decision to this effect that I am aware of is that of the present learned Chancellor, in *Burns* v. *MacKay*,

10 O. R. 167. In a note to which case, at p. 169, will be found a judgment of my own to the like effect.

Mr. Meredith admitted that the authorities were against him unless the amendment of ch. 118 by 47 Vic. ch. 10, sec. 3, (O.) made a difference. That statute leaves the question of intent just where it was; and it is unimportant to consider the point raised by Mr. Meredith, that where the statute may be defeated by shewing an antecedent promise to give security, the security afterwards taken must be that which the promise indicated, as, it being found the plaintiff did not participate in the debtor's intent to give him a preference, the mortgage would not be avoided whether there was an antecedent agreement to give security or not.

ROSE, J., concurred.

Motion dismissed.

[CHANCERY DIVISION.]

RE PERCY, STEWART v. PERCY.

Dower in equity of redemption—Husband and wife—Arrears of dower—Instalment mortgage—Administration.

Where one died entitled to an equity of redemption in certain real estate, which he had originally purchased subject to the mortgage still existing thereon, and the same having been sold in certain administration proceedings, his widow now claimed arrears of dower in respect thereof during the period between the death and sale, when she was in possession by herself or her tenants.

Held, that there being no assignment of dower, and the husband not having died seized in fee so as to give his widow legal dower, she was not entitled to arrears of dower as of right, but only upon the equitable consideration of the court, and the proper mode of exercising the same was to deduct from the rents received by the widow plus an occupation rent charged against her, so much as she had properly applied in meeting necessary outlay and expenditure in respect of the land and buildings, and allow to her one-third of the residue as her arrears of dower.

THIS was an appeal from the report of the Master at Walkerton made in this matter, which was an administration of the estate of Thomas Percy, deceased, and this appeal had reference mainly to the sum found due by the said Master to Margaret Percy, widow of Thomas Percy, for arrears of dower.

It appeared that Thomas Percy died on February 2nd, 1882, leaving a will, whereof he appointed Margaret Percy sole executrix, and that the only real estate which he died the owner of was a certain hotel property in Lucknow. This property was subject to a mortgage at the time Thomas Percy bought it, and the mortgage still remained on the property at the time of his death, undischarged. This mortgage was dated April 2nd, 1877, and was made to secure $1,200, the same being payable in half yearly instalments of $96.52, such instalments comprising principal and interest. Margaret Percy remained in possession of this hotel property, either by herself or her tenants, up to the time of the obtaining of the usual administration order herein on February 14th, 1884, which contained a reference to the Master at Walkerton.

There being a deficiency of personalty, the Master proceeded to sell the hotel, and effected a sale of it on November 13th, 1884, for $1,510. There was, however, at that date $976.57 due upon the mortgage, leaving only $533.43 to represent the equity of redemption.

By his report issued on June 13th, 1885, the master stated that he found $335.37 due to Margaret Percy in respect to dower, without distinguishing between dower and arrears of dower. The plaintiff, who had taken these proceedings for the administration of the estate on behalf of himself and the other creditors of Thomas Percy, appealed on the ground that this was excessive. He was met, however, by the widow with affidavits stating that the sum had been agreed upon between the solicitors present at the settling of the report, and handed in to the master by consent. The plaintiff produced counter-affidavits to the effect that he, or his solicitor, had assented to the sum named under a misunderstanding arising out of misrepresentations of facts by the solicitor for Margaret Percy.

The matter came up for argument before Boyd, C., on October 19th, 1885, who referred it back to the master to ascertain whether the consent as to the amount of dower had been arrived at under such circumstances as that it should be held binding on the parties in bar of this appeal or not, and if not, to ascertain what sum was properly due to Margaret Percy in respect of dower, and amend his report accordingly, and leaving the costs of and incidental to that appeal in the discretion of the master.

In January, 1886, the Master made his report that the consent had not been arrived at under such circumstances as that it should be binding on the parties in bar of the appeal, and he reported that the sum properly due for dower was $283.04, without specifically distinguishing between what was due for dower and what for arrears of dower.

It appeared, however, that the way the master arrived at this sum was as follows: He took an account of all rents received by the widow in respect to the property in

question since the death of Thomas Percy, and added to it a further sum with which he charged her as occupation rent, for a period during which she had herself been in possession, which two sums amounted to $937. From this he deducted a sum of $50, which it appeared that Margaret Percy had repaid to one of the tenants of the hotel as a rebate under the terms in his lease; a sum of $16, which she had paid for taxes on the property; a further sum of $75.50 which it appeared the mortgagees had paid for insurance on the property during the period between the death and the sale; and a further sum of $300, which he arrived at by calculating interest on $1200 principal money of the mortgage at the rate of 10 per cent, apparently considering that this was what the instalments payable really amounted to. There was left a balance of $495.50, one third of which he allowed to the widow for arrears of dower. He further allowed to her for dower her life interest in one-third of the $533.43, being the balance of the proceeds of the sale over and above what was due on the mortgage, and thus arrived at the sum of $283.04, which he now reported as due to her in respect of dower. He further reported that he had allowed the costs of both parties of and incidental to the appeal and order of October 19th, 1885, out of the estate.

It appeared that the mortgage did not specify a rate of interest, but was payable by instalments of principal and interest as above mentioned. It also appeared that during the period in question besides the amounts paid in respect of insurance by the mortgagees, Margaret Percy had herself paid certain sums in respect of insurance out of the estate moneys.

The plaintiff now again appealed from this report on the ground that so much of the $283.04 as the master had allowed for and in respect of arrears of dower was excessive, for that the master had not charged Margaret Percy, as he should have done, with one-third of all the half-yearly instalment which fell due during the period between the death of Thomas Percy and the sale, and one-

third of all sums paid by her in respect of insurance premiums, and one-third of all taxes assessed against the property, and also on the ground that the master should have made Margaret Percy pay the costs of and incidental to the order and appeal of October 19th, 1885, or should not have thrown the burden thereof upon the estate.

It appeared from the report that there was a very large deficiency of assets.

The present appeal came up for argument on February 15th, 1886.

A. H. F. Lefroy, for the appellant. The Master has rightly only allowed dower out of the equity of redemption, but in fixing the arrears of dower he has not applied the same principle. A doweress, like any other tenant for life, must take the estate subject to the burdens which properly belong to it, which in this case cover the half-yearly instalments falling due under the mortgage, and any taxes which were assessed against the land: *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334; *Thorpe* v. *Richards*, 15 Gr. 403. [BOYD, C.—But as to taxes which have not been paid, the purchaser has apparently taken the property subject to them.] At any rate as to the insurance premiums paid by the widow she should bear one-third of them, for the insurance was as to one-third for her benefit. If there had been a loss, she would have claimed dower in respect of one-third of the moneys paid under the policy by the insurance company. [BOYD, C.—Could she do so? That is a point you have to argue.] I submit the moneys so paid would stand in place of the property insured. Then as to costs, though the order left them in the discretion of the master, yet as was the practice in Chancery before the judicature act, though costs may be in the discretion of the judge, where they are ordered to be paid out of the estate, then an appeal lies: *Morgan* on Costs, 2nd ed. p. 160.

N. W. Hoyles, for Margaret Percy. As to costs, the appeal is not maintainable, because the order of October 19th, left them in the discretion of the master: *Managers of the*

Metropolitan Asylum District v. *Hill*, L. R. 5 App. Cas. 582; *Harpham* v. *Shacklock*, 19 Ch. D. at p. 215; *Church* v. *Fuller*, 3 O. R. 417. As to dower, the instalments were composed of principal and interest, and the doweress cannot be compelled to pay off any part of the principal: *In re Morley, Morley* v. *Saunders*, L. R. 8 Eq. 594; *Fisher* on Mortgages, 3rd ed. p. 970, 971; *Seton* on Decrees, 4th ed. pp. 1057, 1266. A tenant for life is not bound to pay more than the interest on such an incumbrance: *Coote* on Mortgages, 4th ed p. 1095; *Kent's* Commentaries, 12th ed. vol. 4, p. 75-6; *Washburn*, on Real Property, 4th ed. vol. 2, p. 213; *White* v. *White*, 4 Ves. 32; *Faulkner* v. *Daniel*, 3 Ha. 199; *Reid* v. *Reid*, 29 Gr. 372; *Swaine* v. *Perine*, 5 John. Ch. at p. 491. The ten per cent. allowed by the Master in respect to the mortgage was the value of the money as invested on the instalment principle.

February 17th, 1886. BOYD, C.—The husband of the dowress bought the land in 1877 subject to a mortgage for $1,200 payable by instalments. He died in February, 1882, and his widow went into possession of the land, out of which she claims dower. That was all he had except some small items of personal property, which need not be considered. The master has charged her with rents received $610, and for occupation rent $326. This covers the period from the husband's death down to the day of sale in November, 1884. The land then sold for $1,500, out of which the balance of $976.57 due the mortgage company was paid, leaving a surplus of $553, out of which all parties agree the widow should be allowed dower. But the appeal arises in respect of arrears of dower. There being no assignment of dower, and the husband not having died seized in fee so as to give his widow legal dower, she is not entitled to arrears as of right, but only upon the equitable consideration of the court, which will be exercised in her favour by not requiring her to account for all the rents received and payable by her. She should be allowed for arrears of dower, one-third of what remains

after the rents have been properly applied in meeting necessary outlay and expenditure in respect of the land and the buildings thereon. The gross rents received will be primarily applicable in defraying taxes, insurance, repairs, &c., and payments on the mortgage falling due semi-annually, all of which payments are necessary for the protection of the estate, and to which it is but right and just that the widow should thus contribute by having them paid as a first charge upon the moneys received from the property. Taking the account I make the aggregate of this primary expenditure to be $571 (as by memorandum below :)

Deduction in lease	$50 00
Paid on Mortgage.....	196 00
" Insurance.....	62 50
" Repairs.....	70
" Mortgage.....	60 00
" "	80 00
" "	60 00
" Taxes	16 00
" Insurance.....	16 00
" "	30 00
	$571 20 of outlay on land.

Deduct this from the total $936, and $365 remains, of which one-third to widow for arrears is $122.

This should be added to the master's allowance of dower out of the balance of purchase money (he does not give this amount separately) and the sum of these figures will be the amount payable to the widow out of the money in court.

I do not interfere with the other matter appealed. The costs were in the discretion of the master and he could better adjust them because of the difficulty having arisen before him and in his office, than I can.

There being divided success on the whole appeal, I award no costs.

A. H. F. L.

[CHANCERY DIVISION.]

INGALLS v. MCLAURIN.

Mortgagor and mortgagee—Sale under power—Purchase by agent of mortgagee—Purchase of other lots—Mortgaged property included in deed—Concealment of agency—Escrow—Redemption.

I, being the owner of certain property, mortgaged it to McL., who sold under the power of sale in the mortgage to G., who attended the sale under instructions from McL., and purchased as his agent. McL. deeded the property to G., and G. reconveyed it to McL. I. was not aware that G. was McL.'s agent. McL. being aware that the sale might not be valid subsequently bargained with I. for the purchase of two other lots, and made it a condition that the deed should cover the two lots and the mortgaged property, and that I.'s wife should join in it, which she had not done in the mortgage. McL. swore that the bargain was that he was to get a clear deed of the mortgaged property. I. swore that nothing was said about a clear deed. Before the deed was delivered I ascertained that G. was McL.'s agent at the sale, and he refused to deliver it, and brought an action for redemption.

Held, that the plaintiff was entitled to redeem.

Per CAMERON, C.J.C.P.—Though it may be that a mortgagee is not, strictly speaking, a trustee for the mortgagor, but is entitled to enforce his security for his own benefit to satisfy the mortgage money, the right of the mortgagor to redeem is a very pronounced and decided right, and one that he cannot be deprived of by any dealing between him and the mortgagee that is not carried out in a full spirit of fairness without undue pressure, influence, or concealment of anything of which he should be informed by the mortgagee.

Per BOYD, C.—If the defendant did know, as a matter of fact, the legal effect of G.'s action in buying the property, he should have disclosed it to the plaintiff before he sought to acquire the equity of redemption from him by means of a conveyance of which the obvious intent was only to procure his wife's dower to be barred: if he did not know the effect of it the equity of redemption was not in his contemplation as a property to be acquired from the plaintiff.

THIS was an action brought by Edmond Ingalls against John McLaurin for the redemption of certain lands. The writ of summons was issued on January 22nd, 1884.

The plaintiff set up in his statement of claim that on December 30th, 1878, he executed in favour of the defendant, a mortgage upon eight lots of land in the Neebing addition to the town plot of Fort William, to secure payment of $1,500 and interest as in the said mortgage set forth: that he was entitled to the equity of redemption in the said lots, but the defendant had gone into possession of the same: that he, the plaintiff, had paid large sums of money to the defendant, which with the rents and profits

received by the defendant on the said lands, would pay the amount due upon the said mortgage: that the time of payment of the mortgage had elapsed, and he was ready and willing to pay the balance, if any, due upon the mortgage, but the defendant refused to give an account of the rents and profits and denied the plaintiff's right to redeem the said lands; and the plaintiff claimed that he might be declared entitled to redeem the said lands, and that the defendant might be ordered to reconvey upon payment of the balance due on the said mortgage if any.

In his statement of defence, the defendant admitted the mortgage, and said that it contained the usual power of sale on default: that on the plaintiff making default, he, after three consecutive weeks notice, published in a newspaper at Prince Arthur's Landing, sold the lands at public sale to one Graham, he being the highest bidder, for $1,500 the amount due the defendant; and on November 2nd, 1880, being the day of sale, conveyed the lands to him, who on November 3rd, 1880, conveyed them to the defendant: that subsequent to the sale, the defendant issued a writ in ejectment out of the District Court of the District of Algoma against the plaintiff to recover possession of the said lands, and the plaintiff began proceedings in the Court of Chancery to set the said sale aside, but at the request of the plaintiff, the defendant discontinued all the ejectment proceedings, and the plaintiff the proceedings in the Court of Chancery, and let the defendant into possession of the lands, of which he had continued to hold quiet possession until the present time, and had improved to the amount of $500 or $600 by buildings: that in the spring of 1884, and before this action was brought the plaintiff agreed to convey the said lands free from his wife's dower which had not been barred by the said mortgage to the defendant, together with the two lots immediately in the rear thereof, owned by the plaintiff in fee simple for $700, free from all incumbrances, and the plaintiff and his wife executed a conveyance in pursuance thereof, which was at the time of the said statement of defence,

in the hands of the plaintiff's solicitors: that he, the defendant, was and had always been ready to pay the plaintiff $700 on the delivery of the said deed of the lands free from incumbrances: that the plaintiff had not paid any part of the mortgage debt, nor tendered any sum in redemption or offered to do so before or since this action: that he, the defendant, claimed to be entitled to the lands in the said mortgage, absolutely both by virtue of the sale under the power of sale, and by discontinuance of the ejectment proceedings and possession delivered thereafter, as also by virtue of the said later agreement and conveyance, excepting the said two lots immediately in the rear, as to which he claimed possession in fee simple by virtue of the said conveyance and otherwise, and asked by way of counter-claim that the plaintiff should be ordered to deliver possession and the title deeds thereof to him, and also the said conveyance.

The case was tried at Port Arthur, on July 14th, 1885, before Cameron, C. J. C. P.

The evidence shewed that the defendant advertised the property in question for sale under the power of sale in the mortgage mentioned. One Graham, at the request of the defendant, attended the sale, and purchased the property in his own name, but really in trust for the defendant, and immediately afterwards conveyed it to the defendant. The latter, however, was advised that on account of the form of the deed given under the power of sale there was a defect in his title to the land. He, thereupon, went to the mortgagor, and plaintiff in the present action, and agreed with him for the purchase of his wife's dower in the lands, (the same not having been barred by the mortgage,) and also of two adjoining lots of land, for the sum of $700. The plaintiff joined in the deed of conveyance which was executed pursuant to the said agreement, but stated in his evidence that he understood that his rights in the land had been barred by the sale instituted by the defendant, and that he was merely joining in the deed as

a matter of formality, and was not, as a matter of fact, conveying away his equity of redemption. This was disputed by the defendant. The deed was signed, the plaintiff joining as a party, and was sent by him to his solicitors, who advised him as to his legal position in the matter, and in whose hands it was at the commencement of this action, never having been delivered to the defendant.

J. R. Roaf, for the plaintiff, cited the following cases: *Ford* v. *Olden*, L. R. 3 Eq. 461; *Webb* v. *Rorke*, 2 Sch. & L. 661; *Gubbins* v. *Creed*, ib. 214; *National Bank of Australasia* v. *United Hand in Hand and Band of Hope Co.*, L. R. 4 App. Cas. 391; *Incorporation Co.* v. *Richards*, 1 Dr. & War. 258; *Sugden* on Vend. & Purch. 14th ed., p. 5; *Howard* v. *Harding*, 18 Gr. 181; *Ellis* v. *Dellabough*, 15 Gr. 583.

W. Nesbitt and *A. R. Lewis*, for the defendant, cited *The Merchants Bank of Canada* v. *Moffatt*, 5 O. R. 122; *Dominion Bank* v. *Blair*, 30 C. P. 591; *Trust and Loan Co.* v. *Ruttan*, 1 S. C. R. 564, and *Warner* v. *Jacobs*, 20 Ch. D. 220.

February 1st, 1886. CAMERON, C. J. C. P.—I am of opinion the plaintiff should be allowed to redeem. The evidence clearly establishes that at the sale of the mortgaged premises under the power of sale the defendant was the real purchaser, so the relationship of mortgagor and mortgagee existed between the parties at the time the defendant made the alleged purchase of the equity of redemption. When that transaction took place it does not appear that the plaintiff was aware that the premises had at the sale been bought in for the defendant, and that he was entering into that arrangement with a knowledge of his true position. It is not, I think, under the circumstances in evidence necessary for the plaintiff to make out such a case of active or actual fraud as would entitle him to rescind the deed if the transaction had been fully completed. It was competent, it appears to me, to the plaintiff

before the deed had passed into the possession of the defendant to withhold its delivery. It does not therefore become necessary to decide the somewhat nice question as to whether there was such an execution of the deed as under some circumstances would transfer or pass the title to the land to the defendant, nor whether if there was not such an execution, the deed constituted a sufficient memorandum in writing under the statute of frauds of the agreement between the parties to evidence a valid contract. On the merits, I am unable to distinguish the case on principle from that of *Ellis* v. *Dellabough*, 15 Gr. 583, where redemption was decreed, unless the execution of the deed makes a difference. There is no doubt that under some circumstances an execution such as the one in question, though the deed did not pass into the custody of the grantee, would be sufficient to pass the title to the defendant. But in this case the defendant was not entitled to the actual delivery of the deed till he paid the purchase money, and before that could be required of him by the plaintiff tendering the deed, the plaintiff had discovered what his legal and equitable right was, and at once took steps to assert that right. This, I think, he was entitled to do. Though it may be that a mortgagee is not strictly speaking, a trustee for the mortgagor, but is entitled to enforce his security for his own benefit to satisfy the mortgage money, the right of the mortgagor to redeem is a very pronounced and decided right, and one that he cannot be deprived of by any dealing between him and the mortgagee, that is not carried out in a full spirit of fairness without undue pressure, influence or concealment of anything of which he should be informed by the mortgagee While it may be, in the present case, that the defendant thought in making the purchase of the mortgaged premises under the power of sale, that he was doing that which was not morally wrong when the sale was open and whosoever would, might buy, yet he ought not to have sought to obtain from the plaintiff a release of the equity of redemption or any interest that the plaintiff might possess as

mortgagor, without disclosing to him the fact that he still had the right to redeem. Transactions between mortgagor and mortgagee, are said by Lord Redesdale, in *Webb* v. *Rorke*, 2 Sch. & L. 661, to be looked upon by courts with considerable jealousy, and the sale of the equity of redemption will be set aside where by the influence of his position the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase. Here the evidence is conflicting as to whether the land was worth more than the defendant's encumbrance upon it at the time of the sale under the power of sale, and the sum of $700 agreed to be paid for the additional lots, and the equity of redemption, if that was included, may not have been so disproportionate to the actual value as to warrant interference on that ground alone; but the concealing from the plaintiff by the defendant that he was dealing with the plaintiff in truth as mortgagee instead of being as was put forward, the owner of the land under an absolute title acquired through the purchaser at the sale under the power of sale, was such misconduct according to the principles of equity administered by a court of equity as will avoid the transaction. "The plaintiff swore it was not his intention to release his equity of redemption in the mortgaged premises, but that he joined in the deed to convey the two lots purchased and to sanction his wife's release of dower, which had not been barred in the mortgage. I thought at the trial the letter written by the plaintiff to his solicitors accompanying the deed he sent to them to be delivered on payment of the purchase money, was opposed to the correctness of this statement, but upon further consideration I am not able to say that the letter does in fact militate against the plaintiff's testimony. But if it does it indicates that the deed was given in ignorance of his true position, and under the belief that he had not the right to redeem. On the whole, therefore, I am of opinion there must be a decree for redemption with reference to the master to

take an account of the amount due, if anything, upon the mortgage; also of the rents and profits received by the mortgagee, and of any expenditure made by the defendant in improvement of or repairs to the mortgaged premises, and which would be proper charges to be made against the mortgagor by a mortgagee in possession. The defendant having denied the plaintiff's right to redeem and set up an absolute title in himself, he must pay the costs of the action, while the costs of taking the accounts, must be borne by the plaintiff as in an ordinary redemption suit. The undelivered deed must be cancelled. The case cited by Mr. Nesbitt, of *Warner* v. *Jacobs*, L. R. 20 Ch. D. 220, is an instructive and interesting case, defining the extent to which a mortgagee may be regarded as a trustee for a mortgagor; but it is not opposed to the conclusion at which I have arrived, having regard to the facts of this case, but on the contrary rather supports that conclusion. Mr. Justice Kay, in his judgment, at page 224, says: "The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given him for his own benefit, to enable him the better to realize his debt. If he exercises it *bonâ fide* for that purpose without corruption or collusion with the purchaser, the court will not interfere, even though the sale be very disadvantageous unless indeed the price is so low as in itself to be evidence of fraud." This language is used in reference to the rights of a purchaser under a power of sale, and it being clear that a person cannot be both a seller and purchaser, it is manifest that where the seller is the purchaser, the sale is not for the purpose of realizing the mortgage debt, but for the purpose of acquiring an absolute title to the land, which is foreign to the object of the parties granting and receiving the power to sell; and where the mortgagor gets another to buy under the power as his agent for him, there is clearly that kind of collusion made out that would induce the court to declare the sale void, and place the parties where they stood before the sale took place. That being so, as I have already said, the right

to redeem exists unless destroyed by the subsequent transaction leading to the partial completion of the deed, the effect of which would be to confer the absolute title to the mortgaged premises upon the defendant. But for the reasons before advanced, I do not think that deed can be regarded as a perfect or completed instrument, or as in any way interfering with the right to redeem.

A.H.F.L.

The action came on by way of appeal from the above judgment to the Divisional Court, and was argued on February 23rd, 1886, before Boyd, C., and Ferguson, J.

W. Nesbitt, for the defendant, who appealed. The evidence shews that although Graham did go to the sale to bid up the property for the defendant, he was instructed to let it go if it went over $1,500, and that he purchased it at that figure, which was at its full value. The sale was well advertised, and the bidding by several people was very spirited up to $1,400. McLaurin gave Graham an ordinary statutory deed, and Graham reconveyed to McLaurin. All the parties to the transaction considered it perfectly good in all respects except that the deed to Graham should have recited an exercise of the power of sale. McLaurin went into possession and made improvements. Ingalls considered him so much the owner that he offered him $2,000 in boots and shoes to repurchase it. That offer was declined, and Ingalls then went to him and offered to sell two other lots for $800, and to get his wife to bar dower in the two lots and the property in question, for she had not joined in the mortgage. Then they agreed for the sale of the two lots for $700, and McLaurin was to get *a clear deed* of all these properties. Ingalls, in his evidence, admits that those are nearly the facts, but says that nothing was said about "the clear deed." There is no evidence that the deed was sent to Toronto as an

escrow to ascertain his position, but rather that it was to close the matter up, as, see his letter, "I may as well let it go." The judge in the first instance assumed the law was that the relation of trustee and *cestui que trust* existed between mortgagor and mortgagee, and assumed that *Webb* v. *Rorke*, 2 Sch. & L. 659, established this. In *Moroney* v. *O'Dea*, 1 B. & B. at p. 117, Lord Chancellor Manners, in referring to *Webb* v. *Rorke*, 2 Sch. & L. 661, says: "I cannot go to the full extent of that proposition. I think a dealing may take place between them (mortgagor and mortgagee) which this court will support."

In *Knight* v. *Majoribanks*, 2 Mac. & G. at p. 14, Lord Chancellor Cottenham refers to such a case as not at all connected with a trusteeship, therefore the facts are: the parties agree for the purchase, both in equal ignorance, that the Graham purchase was bad, and both assumed the form of deed had to be cured. No duty devolved upon the defendant to point out the particular defect which ultimately made the sale bad. The letter shews the intention was to hand over the deed in payment of $700, which payment the defendant has always been willing to make: *Gubbins* v. *Creed*, 2 Sch. & L. 214, may be cited by my learned friend, but that case and *Webb* v. *Rorke*, *supra*, went off on the ground of usury. If the dealing is had at the time the security is existing it should be scrutinized closely, but afterwards it is different: *Melbourne Banking Corporation* v. *Brougham*, L. R. 7 App. Cas. 307, at p. 315, refers to *Knight* v. *Majoribanks*, *supra*, and settles that the ordinary rules of vendor and purchaser apply.

The deed in this case was delivered: *Young* v. *Hubbs*, 15 U. C. R. 250; *McDonald* v. *McDonald*, 44 U. C. R. 291. It was a deed and not an escrow and should be formally set aside. Redemption is always in the discretion of the court, and should be refused under the circumstances in this case. Both plaintiff and defendant were in equal ignorance that the purchase by Graham as agent would invalidate the sale. If the original conveyance under the power of sale was bad it has been made good by the subsequent conveyance.

J. R. Roaf, contra. The plaintiff was not aware that Graham was McLaurin's agent until after he signed the deed of the two lots. When McLaurin found that his title was bad, he proceeded to make it good by the bargain as to the other lots, but the plaintiff distinctly denies that he was to make his title good. The evidence shews the object of that bargain was to get the other two lots and a release of Ingall's wife dower in the property in question. The learned Chief Justice accepted Ingall's evidence in preference to McLaurin's. Behind the whole bargain for the two lots was the fact that McLaurin knew his title was defective and wanted to make it good, while Ingalls knew nothing about it, and was told that he had no interest. Even where there is no misconduct no such purchase as this can be made: *Ellis* v. *Dellabough*, 15 Gr. 583. The defendant rests his defence on the subsequent deed to make his title good, and claims under *Gallatley* v. *White*, 18 Gr. 1, that he has a contract to be enforced, but that case is overruled by *McClung* v. *McCracken*, 3 O. R. 596. [BOYD, C.—But your strong ground is, if the defendant seeks to enforce the last deed, the answer can be made, it covers land never intended to be sold, and the Court should not enforce it.] *Gallatley* v. *White*, shewed the contract on the face of it, and does not apply here as the contract does not appear in the deed.

Nesbitt, in reply. The Chief Justice found there had been no act of misrepresentation made. If I hand a deed to any one to be handed over to a third person upon the performance of a condition, I cannot revoke it. If the deed was intended to cover any defect it makes no difference whether there was one or twenty defects. *Roach* v. *Lundy*, 19 Gr. 243, decides that redemption may be withheld, although specific performance would not be decreed. As to interference with the judgment of the judge at the trial, I refer to *Jones* v. *Hough*, 5 Ex. D 127; *Read* v. *Anderson*, 13 Q. B. D. 781. I also refer to *Skae* v. *Chapman*, 21 Gr. 534.

March 6, 1886. BOYD, C.—Having read over all the evidence, and after consideration of the arguments before us, I am of opinion that the judgment of the Chief Justice should be affirmed, with costs. The plaintiff's right to redeem is opposed by the defendant because of the exercise of the power of sale, and because of having obtained possession of the land after some proceedings in ejectment and in the Chancery Division; and because of what is (at first) pleaded as a completed conveyance of the land in question with bar of dower by the plaintiff to the defendant. But all these defences disappear when placed along side of the facts.

The exercise of the power of sale was invalid; because the property was brought in by an agent of vendors; the taking possession was simply the right of the mortgagee if he chose to enter upon the land, and the proceedings in the courts came to no result which binds any one; the alleged conveyance last relied on is unquestionably (having regard to the law as expounded by Sir Charles Hall, in *Watkins* v. *Nash*, L. R. 20 Eq. 262, and adopted by the Supreme Court in *Trust and Loan Co.* v. *Ruttan*, 1 S. C. R. 581), nothing higher than an escrow. The counter claim appears to take this view, and asks that it, the deed, be completed by delivery; but upon this branch of the case the Chief Justice rightly held that the court ought not to aid the defendant. He gives credit to the plaintiff's evidence, who says that he did not know of the defect in the sale by which it was inoperative. He supposed it was a valid sale and that he had no interest in the land thereafter. It was subsequent to the signing of the deed in question, that he learned about the position of Graham as agent of the defendant; that is at least the deduction I make from what is reported in the book of evidence, at pp. 22 and 51.

At the former page, Mr. Roaf in arguing says: "But the plaintiff was not aware of this transaction between Mr. Graham (that is, the agent,) and the mortgagee, that now appears in evidence, * * he adopted that as a way to

acquire the property. * * It was a case of what you may term a fraud upon the plaintiff." Now, if it be the fact as was argued before us, that the plaintiff was aware of the nature of Graham's intervention at the sale before the deed was signed, it would have been very easy to have proved it in response to this challenge of Mr. Roaf's. But this is not attempted; on the contrary, at the latter page the plaintiff's evidence is thus given:

Q. "When did you first become aware that Mr. Graham had any interest in this property; was it before or after this transaction? A. It was after this; I was not sworn before I saw you (*i. e.*, Mr. Roaf,) he had any interest or not."

This may not be very clearly put, but coupled with what I have before mentioned, it shews that the plaintiff did not know what the defendant knew as to the position of Graham anterior to the signing of the escrow. The defendant, however, either did or did not know as a matter of fact, the legal effect of Graham's action in buying in the property; if he did know it, he should have disclosed it to the plaintiff before he sought to acquire the equity of redemption from him by means of a conveyance, of which the obvious intent was only to procure his wife's dower to be barred. If he did not know of the effect of it, then the equity of redemption was not in his contemplation as a property to be acquired from the plaintiff, and this is the view which the plaintiff also presents, when he says that he did not intend to deal with this equity as an existing estate at the time he forwarded the deed to his solicitor at Toronto.

The counter claim thus assumes the aspect of a claim for specific performance; and in circumstances such as these, the court will never assist one party at the expense of the other.

I do not know what disposition was made in the judgment of alleged improvements on the property made by the defendant, and the matter was not discussed before

us. If it is desired by the defendant, the Master may be directed to ascertain all necessary facts, and report specially as to these, in which case further directions will be reserved.

FERGUSON, J., concurred.

G. A. B.

[COMMON PLEAS DIVISION.]

THE CANADA ATLANTIC RAILWAY COMPANY v. THE CORPORATION OF THE TOWNSHIP OF CAMBRIDGE.

Municipal corporations — Bonus to dominion railway—Debentures not payable within twenty years—By-law acted upon—Power to repeal—Compliance with conditions—Certificate of engineer—Promulgation—Requisites for—Effect of.

By a by-law to grant aid to plaintiff's railway—a dominion railway—the debentures were made payable more than twenty years from the by-law taking effect, and which the plaintiffs were only to be entitled to on the certificate of the engineer, that the rails had been laid on the line of railway and the first locomotive had passed thereon through the municipality; and no interest was to be payable until the locomotive had so passed and the debentures handed over. The vote for and against the by-law was equal, and the clerk, who was also returning officer, gave a casting vote in favour of the by-law and returned it to the council as carried by a majority, and it was finally passed by the council. The by-law was subsequently promulgated. The notice of promulgation was not authorized by resolution of the council; and it did not appear whether there was any resolution designating the paper in which the resolution was published; but the paper was the one usually employed by the council, and the account therefor was passed and paid by the council. The by-law came into force on the 1st March, 1880. On 24th July, 1882, the council passed a resolution revoking it. The by-law was acted upon by the plaintiffs, stations built, &c.

Held, following *Canada Atlantic R. W. Co.* v. *Corporation of Ottawa*, 12 A. R. 234, that under sec. 559, sub-sec. 4 of the Municipal Act, R.S.O. ch. 174, a grant by way of bonus may be made to a dominion railway.

Held, also, that promulgation validates any defect in form or substance in the by-law or in the time or manner of passing it; and therefore cured the defect in the by-law in making the debentures payable after the twenty years which was one of form; but that it does not give jurisdiction; and therefore would not cure the error, if such were the case, in passing the by-law without the required majority of votes; but there was a majority, as the clerk had the right to vote under secs. 155, 299.

Held, also, that under the circumstances the gift was not revocable, and therefore there was no power to repeal the by-law.

Held, also, that sec. 319, as amended by 42 Vic. ch. 31, sec. 9 (O.), does not require a resolution for promulgation; but merely that the paper in which the notice is to be published should be designated by resolution; and that there was sufficient publication here.

An objection was raised that the terms of the by-law on which the debentures were to issue had not been complied with; but *Held*, that the decision thereon rested with the engineer, and he had given his certificate; but even if it was necessary to decide this question, the evidence shewed that the terms had been substantially complied with.

THIS action was brought for a mandamus or peremptory injunction commanding the defendants to issue and deliver forthwith to the plaintiffs debentures to the amount of $20,000, being the amount of a bonus granted to the plaintiffs by by-law of the defendants.

The action was tried before Rose, J., without a jury, at Ottawa, at the Spring Assizes of 1884.

The material parts of the by-law were as follows:

"A by-law to aid and assist the Canada Atlantic Railway Company, by granting the sum of $20,000 to the said company by way of bonus, and to issue debentures therefor, and to authorize the levying of a special rate for the payment thereof," &c., &c.

"Be it therefore enacted by the corporation of the township of Cambridge.

"1. That it shall be lawful for the said corporation to aid and assist the Canada Atlantic Railway Company in the construction of their proposed road, by granting by way of bonus to the said company, debentures of the said corporation to the amount of $20,000, in the manner, and subject to the conditions hereinafter mentioned.

"2. For the purpose aforesaid it shall be lawful for the reeve of the said corporation to cause debentures of the said corporation to the amount of the sum of $20,000, each debenture to be for not less than $100, to be sealed with the seal of the said corporation, and to be signed by the reeve and treasurer thereof, and shall declare on the face thereof the authority on which the same was issued.

"3. The said debentures shall bear date on the day when they are handed over to the said railway company in accordance with the conditions of this by-law, and shall be payable in twenty years therefrom, and shall be payable at the Bank of Montreal in Ottawa.

"4. The said debentures shall bear interest at the rate of six per cent per annum, which shall be payable half-yearly, to wit, on the second days of July and January in each

and every year at the Bank of Montreal, Ottawa, and such debentures shall have coupons attached thereto for the payment of the interest thereon.

"5. For the purpose of paying the interest of the debt hereby created the sum of $1,200 shall be raised and levied in each year during the currency of such debentures on all the ratable property in said municipality.

"6. For the purpose of paying the debt hereby created the sum of $606 shall be raised and levied in each and every year during the currency of such debentures, such sums being sufficient with the interest from the investments thereof estimated at the rate of five per cent. per annum capitalized annually, for the payment thereof.

"7. The said company shall only be entitled to the said debentures, or the proceeds thereof, as follows, that is to say:—$20,000 being total amount of said debentures, to be issued to the company whenever and so soon as the engineer in charge shall certify that the rails have been laid upon said line of railway, and that the first locomotive has passed thereon through the said municipality.

"8. This by-law shall come into force on the first day of March, A.D. 1880," &c, &c.

"Provided, also, that the said line of railway shall pass through the said township by way of High Falls, where there shall be a station: that there shall be a flag station on the boundary between Cambridge and Russell; and that said railway company shall carry cordwood at the usual rates charged for lumber and such freight.

"The municipal corporation of Cambridge shall not be liable for any interest until after the first locomotive shall have passed over the line through the township, and the debentures have been handed over to the company in compliance with the above named condition. The work on said line of railway to commence within one year from the ratification of this by-law, and to be prosecuted to completion without unnecessary delay."

The additional facts, so far as material, are set out in the judgment of the learned judge at the trial, and of this court.

The following judgment was delivered by the learned judge at the trial:

ROSE, J.—As some of the questions involved herein were the same as those raised in the Chancery Division in

the suit of the *same plaintiffs* v. *Corporation of Ottawa*, in which Mr. Justice Proudfoot's decision in favour of the defendants was then being reheard by the Divisional Court, it was agreed that I should reserve judgment until judgment in the Divisional Court should be given.

Immediately upon judgment being given by the Divisional Court, which upheld the judgment of first instance, the plaintiff appealed to the Court of Appeal.

Judgment was given in appeal on the 26th of May last dismissing the appeal. Although not yet reported, I have been favoured with a perusal of the manuscript opinions, (*a*) and think I should not further delay my judgment.

The by-law was passed on the 22nd March, 1880, and approved by the Governor in Council on the 17th of April, 1880.

The grounds of objection may be briefly stated as follows:—

1. Sec. 559, subsec. 4, of the Municipal Act, R. S. O. ch. 174 (sec. 628 of the Consolidated Municipal Act, 1883), does not authorize a grant to a dominion railroad.

2. The by-law is defective and invalid in that it makes debentures payable in more than twenty years from the day it took effect. See sec. 330 of ch. 174 (sec. 342 of 1883).

3. The council has no power to pass the by-law as a majority of the electors did not approve of the by-law: secs. 310, 333; also 299, and 151-2, ch. 174 (320, 321, 346, 307, 155, 156, of 1883).

4. The bonus was a gift revocable and revoked by resolution, dated 24th July, 1882.

5. The work was not completed, and the certificate of the engineer was untrue, and therefore not binding.

The plaintiffs reply—

1. As to defects of form or substance, that the by-law was promulgated under secs. 319, 320, 321, R. S. O. ch. 174 (3 31, 332, 333 of 1883).

(*a*) Since reported in 12 A. R. 234.

2. That sec. 559, ch. 174 (628 of 1883) is a code in itself, and does not incorporate the provisions of sec. 330 (342 of 1883).

3. That the by-law provides (*a*) for handing over the debentures on the certificate of the engineer, which was given and cannot be gone behind; and (*b*) that the work has been substantially performed.

The facts in this case are materially different from those in the action against the Corporation of Ottawa.

Here the by-law was not passed until after the consolidation; and there does not seem to have been any delay which would prevent relief, if no other objection is found to exist. The main ground for the decision in that case is therefore not found on the facts before me.

Some of the grounds argued here have been considered and disposed of in that case.

The first taken by the defendants was, I think, decided adversely to their contention; and the second ground to the plaintiffs' reply was decided adversely to their contention.

I will first consider the effect of promulgation.

I regret that I am not assisted by any decision; at least I was not referred to nor have I found any.

It seems clearly not to give jurisdiction; for if a by-law deal with any matter not within the proper competence of the council to ordain the sections do not apply. See sec. 333.

It would not therefore cure the error, if there be one, in passing the by-law before it received the assent of the electors.

It in terms validates the by-law notwithstanding any defect of form or substance, either in the by-law itself or the time or manner of passing it; and having in view the cases collected by my brother Osler in his exhaustive judgment in the Divisional Court, it seems to me that a defect in form as to making the debentures payable after the expiry of twenty years cannot now be urged by the municipality.

The steps taken for promulgation seem to me to be

somewhat as if the council had waited upon each interested ratepayer and pointed out all objections that could be taken advantage of on a motion to quash; and had said: "We have passed this by-law; certain defects exist; you may move to quash; if you do not within the time limited we will as your council act upon it, and you cannot afterwards be heard to object to discharge any liability imposed upon you by our action; after the time for moving has passed no defect of form or substance can invalidate the by-law."

Mr. Maclennan urged, that as the council could not move to quash they were not prevented from urging the objection.

This seems to me not to be a valid argument. They are the agents of the municipality and of the ratepayers to take the steps to pass and promulgate. If any one of the council was opposed to the by-law it was not argued that as a ratepayer he could not move to quash.

There was evidence given to shew that the council had not by resolution designated the paper in which the notice was published. I have no note of that ground being taken in argument. The fact that the publication was in a paper usually employed for such purpose, and that the account for the printing had been passed and paid by the council, prevents its being successfully urged.

The Act 42 Vic. ch. 31, sec. 9, (O) (sec. 331 of 1883) which introduces the provision as to designating by resolution, only requires the newspaper to be named by resolution. It says nothing as to the promulgation being ordered by resolution. If it can be successfully urged that the council can now say there was no promulgation because there was no preceding resolution or by-law directing it, then there will be some strength in the objection. No authority was cited for such a proposition; and on the facts of this case, I think I should not give effect to it. The resolution ordering the payment of the account was dated August 23rd, 1880. The case of *Robins* v. *Corporation of Brockton*, 7 O. R., p. 481, shews the inclination of the courts not to allow want of formality in initiating proceedings to avail as a defence to claims arising out of such proceedings.

I must, therefore, hold that it is not open to the defendant to raise any objection on the ground that the by-law is defective or invalid by reason of non-compliance with the directions of the statute as to form; and that the provision as to payment of the debentures, is a defect in form which, even if it affected the substance, is cured by the promulgation.

As I have said, in my opinion, promulgation is no answer to the third objection.

It seems to me if a majority of the electors do not assent to the by-law it is not within the proper competence of the council to pass it. The fault does not appear to be either in the form or substance of the by-law, or in the time or manner of passing it. We have had an illustration of a defect in form, and may, be substance.

The case in the Chancery Division may afford an illustration of a want of form or substance in the time or manner of passing.

If I am correct in my view, it becomes necessary to consider Mr. Maclennan's argument that the clerk had no right to vote.

The electors voting were equally divided. Voting was under the Act by ballot: sec. 298, of R. S. O. ch. 174. The clerk did not vote by ballot. He did not vote as an elector. It was his duty not to do so: sec. 152. Under sec. 310 it was his duty to sum up from the statements the number votes and forthwith "certify to the council under his hand whether the majority of the electors voting on the by-law have approved or disapproved of the by-law."

It is manifest that if he sent in his certificate on the summation of votes according to the statement he could not have certified a majority either way. Then under what authority did he vote?

R. S. O. ch. 174, sec. 299, enacts that "the proceedings at such poll, and for and incidental to the same, and the purposes thereof, shall be the same as nearly as may be as at municipal elections; and all the provisions of secs. 116 to 160 inclusive of this Act, so far as the same are applic-

able, and except so far as is herein otherwise provided, shall apply to the taking of votes at such poll, and to all matters incidental thereto.

Sec. 152 provides that "in case it appears, upon the casting up the votes as aforesaid, that two or more candidates have an equal number of votes the clerk * * shall, at the time he declares the result of the poll, give a vote for one or more of such candidates, so as to decide the election."

It is argued that applying that provision as nearly as may be, it was the clerk's duty at the time he declared the result of the voting to give a vote for or against the by-law so as to decide the question, and forthwith to certify to the council the majority, and that having done so there has been no error.

Section 321 of 1883, a new section, is pointed to as affording a strong argument in favor of the proposition. It reads: "Where the assent of the electors, or of the ratepayers, or any proportion of them, is necessary to the validity of a by-law the clerk or other officer shall not be entitled to give a casting vote."

It is said that this is a declaration of the legislature that in its opinion such a clause was necessary.

I think the clerk was not in error in giving the casting vote; and that this objection fails.

The fourth ground of objection is referred to incidentally in the case against the corporation of Ottawa, and from the cases there referred to, and from general principles, it seems to me that after the work was entered upon the gift became irrevocable, and if the plaintiffs have complied with the conditions they are entitled to the debentures.

This brings us to the last ground taken by the defendants. If the engineer had withheld his certificate the difficulty in the plaintiffs' way when they came for the debentures has been fully pointed in such cases as *Oldershaw* v. *Garner*, 38 U. C. R. 37; *Hamilton* v. *Myles*, in appeal, 24 C. P. 309, and cases there cited.

If the work has been substantially performed, the plain-

tiffs are entitled to the debentures. It seems to me the defendants by their by-law chose the engineer as the judge of that fact. Even if I can examine the evidence and review his decision, I am not sure that which remained to be done when the action was commenced, should prevent the plaintiffs' recovery.

It is not beyond argument that the words "through the municipality" in the 7th section of the by-law qualify all that precedes so as to read "so soon as the engineer in charge shall certify that the rails have been laid upon the said line of railway through the municipality, and that the first locomotive has passed thereon." The same arguments that render reasonable the application of the words to the running of the locomotive through the municipality, might be sufficient to render reasonable the above construction. It was suggested that as the road would not pay the promoters by being laid through a section the defendants were content with evidence of the completion of the line to such an extent as rendered practicable the running of trains, so that, however, the trains ran through their municipality.

Mr. Cassleman, who was reeve at the time, was examined on behalf of the plaintiffs. He said, as I noted his evidence, "The people were naturally desirous of a road, and most desirous of a way to Ottawa. No local interest in having connection with American market."

If necessary I think I must find as a fact that, so far as the defendants were interested or concerned, the plaintiffs had substantially completed their contract at the date of bringing this action. I however think I am not called upon to decide such question, but that the decision rested with the engineer who had given his certificate.

I do not happen to have the certificate before me, but nothing was argued as to its form.

The case of *Arnold* v. *Walker*, 1 F. & F. 671, may be referred to. That was an action for work and labour. The contract not under seal provided for erecting and completing buildings as described in certain plans to the satis-

faction of C., the architect, for the sum of £430, to be paid by instalments, the balance one month after the completion was certified by the architect, and a stipulation for completion by the 17th of November under a penalty of £5 a week.

The architect gave a certificate of the completion of the works to his satisfaction, and that the contractor was entitled to the balance. As a matter of fact the work was not completed by the 17th of November, nor during November. The defendant claimed £70 for penalty, being for 14 weeks at £5 per week.

Crowder, J., was of opinion that the certificate concluded the question of penalties; and directed a verdict for the plaintiff.

This is, I think, a decision in point, and although a *nisi prius* one it is, I venture to think, quite in accord with the reasoning in those cases which prevent the contractor recovering without a certificate.

On the whole, I am of the opinion the plaintiffs are entitled to the order for delivery of the debentures, with costs of suit.

The reeve and treasurer have been made parties. The form of the order may be settled by speaking to the minutes The order as to costs will be only as to the municipality.

In Michaelmas Sittings, *Maclennan*, Q. C., moved on notice to set aside the judgment entered for the plaintiffs, and to enter judgment for the defendants.

During Hilary sittings, February 4, 1886, *Maclennan*, Q. C., supported the motion. The by-law does not comply with sec. 330 of the Municipal Act, R. S. O. ch. 174, as modified by 42 Vic. ch. 31, secs. 9, 10, (O.) Sec. 330 gives authority to pass by-laws to create debts under certain conditions, one of which is, that the debentures must be payable within twenty years from the by-law taking effect. The by-law here took effect on the 1st March, and should therefore be payable within twenty years from that date; while here the debentures are not to be handed over

until the work is completed; and the rate is to be raised during the currency of the debentures. The date of the debentures is uncertain, as they are not to be dated until they are handed over. This is a very serious matter, as it is impossible to ascertain the leaseholders entitled to vote on the by-law, as only those leaseholders can vote whose leases extend during the currency of the by-law: secs. 301, 302, 309. The statute is express that no by-law is to be valid where the conditions have not been complied with. The next objection is that the by-law did not receive a majority of votes. There was an equality of votes, and the clerk in summing up the votes, gave a casting vote, or voted, as he says, verbally, for the by-law, and returned the by-law to the council as carried. Sec. 152 which authorizes the clerk to give a casting vote in municipal elections, does not apply to by-laws. In such elections it is necessary to decide the election so as to fill the office, but there is no such reason in case of a by-law. Secs. 307, 318, shew how the result of the vote is to be ascertained, and are express that there must be a majority of votes. Sec. 299 enacts that the proceedings on by-laws shall be the same as nearly as may be as at a municipal election, but only "so far as the same is applicable;" and the right to give a casting vote clearly is not applicable for the reasons already pointed out Sec. 321 of the Act of 1883, providing expressly that the clerk shall not have a casting vote, shews what was the intention of the legislature. The clerk had no right to vote as an elector for his name was not on the roll. The defendants, however, contend that the defects in the by-law have been cured by promulgation. Unless there was a majority in favour of the by-law promulgation can have no effect, as it cannot give jurisdiction where there is none. There was also no due promulgation. The requisites of sec. 319, as amended by 42 Vic. ch. 31, sec. 9, (O.), were not complied with. There was no authority from the corporation to publish the notice of promulgation, and no paper was designated by resolution of the council, in which the notice should be

advertised. All that is shewn here, is that a private person obtained a copy of the by-law from the clerk, and, without any authority from the council, published it. The payment of an account with the item for this publication cannot be deemed to be a ratification or recognition of the publication. Promulgation is an act which interferes with or takes away the rights of the ratepayers, and the authority to do so must be by resolution of the council. The terms also of the by-law have not been complied with. By the by-law the work was to be commenced within the year, and was to be completed before the debentures were to be handed over, and neither of these conditions have been complied with. There was no power to grant aid to this railway, being a railway incorporated by the dominion. The act only authorizes aid to be given to railways incorporated by the old province of Canada or by the now Province of Ontario. Under the circumstances there was clear power to repeal the by-law.

McCarthy, Q.C., and *Chrysler*, contra. As to the first objection the by-law has been acted upon, and the time within which to move to quash has passed, and it is too late now to raise any objection. The whole by-law read together shews that the debentures are payable within the twenty years. The by-law says that the debentures or their proceeds are to be paid over. The debentures could be issued and the rate levied therefor and be payable within the twenty years; but their proceeds retained until the work was completed. The debentures were all signed and sealed, and though the council for some reason refused to deliver them over, they were in fact issued; and the debentures having been issued all objection to them is removed. The court is not bound to quash the by-law, but it is matter purely within their discretion. The promulgation settled all difficulty as to the by-law and debentures. Sec. 34 of 44 Vic. ch. 24 (O.), amending sec. 388 of the municipal act, makes the debentures valid where no successful application to quash is made within the time limited in the notice of promulgation.

Section 559 and following sections form a code in themselves, and all that is necessary is that the by-law should receive the assent of the electors. Then sec. 286 exactly fits this, and shews how the assent of the electors is to be obtained. The sections commencing with sec. 330 refer to a different class of by-laws altogether, namely, by-laws for creating debts apart from those mentioned in sec. 559. This point is now before the Supreme Court in *Canada Atlantic R. W. Co.* v. *Corporation of Ottawa.* The objection as to the publication of the notice of promulgation cannot prevail. The certified copy of the by-law was obtained from the proper officer, and was duly published, and the payment of the account was a recognition or ratification of the publication. The clerk properly voted. Under the sections referred to by the other side he had a casting vote; but, if not, then he had the right to vote as an elector on the by-law. His name was on the assessment roll, although it was not on the list of voters which the clerk made up for the elections, as he thought he had no vote and therefore omitted his name. In either way there was a majority. Then as to the completion of the work, the engineer's certificate in the absence of any collusion was final and conclusive. There was power to grant aid to this railway. The sections have not the restricted meaning contended for. They referred to *Trust and Loan Co.* v. *City of Hamilton*, 7 C. P. 98, 100; *Re Billings and Corporation of Gloucester*, 10 U. C. R. 373; *Jenkins* v. *Corporation of Elgin*, 21 C. P. 325, 329; *Re Michie and Corporation of Toronto*, 11 C. P. 379; *Nichol* v. *Corporation of Alnwick*, 41 U. C. R. 577, 589; *Grand Junction R. W. Co.* v. *Corporation of Peterborough*, 8 S. C. R. 76, 120; *Canada Atlantic R. W. Co.* v. *Corporation of Ottawa*, 8 O. R. 201, 212; *Smith* v. *Spencer*, 12 C. P. 277; *Re Cameron and Municipality of East Nissouri*, 13 U. C. R. 190; *Gilchrist* v. *Corporation of Sullivan*, 44 U. C. R. 588, 592.

Maclennan, Q.C., in reply. The amending Act, 44 Vic. ch. 24, sec. 34 (O.) does not assist the plaintiffs, as it only

applies when the debentures have been issued, and there was clearly no issue here. Signing and sealing does not of itself constitute issuing; they must also be delivered over; and this, it is admitted, the defendants have refused to do. Section 330 and following sections are clearly applicable. This has been expressly decided by a co-ordinate court, namely, the divisional court of the Chancery Division.

March 6, 1886. CAMERON, C. J.—I am of opinion the motion to set aside the judgment of my learned brother Rose, and to enter judgment for the defendants, is not entitled to prevail.

I have had the opportunity of reading the reasons given by my learned brother for his decision in which, as well as in the conclusion to which he came, I quite concur; and will only add a few words in respect to the points pressed most strongly upon the court during the argument.

The case of these plaintiffs against the city of Ottawa referred to on the argument removes from the field of discussion all questions as to the sufficiency of the by-law. Were it not for the fact of promulgation, it would be clearly bad on an application to quash from the uncertainty upon its face as to when it would be incumbent on the municipality to issue the debentures. By the third section of the by-law it was declared that the debentures should bear date on the day when handed over to the railway company, and shall be payable in twenty years therefrom. This provision accepted literally would seem to make the debt extend beyond the term of twenty years from the day on which the by-law should take effect, which was fixed for the first day of March, 1880, having regard to the time when the work was completed according to the certificate of the engineer; and the by-law would be clearly bad according to the decisions already referred to.

Its validity, therefore, depends upon the promulgation; and this has been urged to be insufficient on two grounds: first, the by-law was not passed by a majority of the electors

entitled to vote, and voting thereon, and so the promulgation gave no validity to it; secondly, the promulgation itself was not authorized by resolution of the council, and therefore the promulgation was in fact no promulgation.

The first is the most important objection, and its value depends upon the right of Mr. LaFrance, the clerk of the municipality and returning officer, to vote. If his vote was wholly unauthorized and bad, the by-law was not approved by the majority of the electors. Mr. LaFrance, as the evidence discloses, if not incapacitated by his office of returning officer, was a duly qualified elector having the right to vote on such a by-law; and I think he had a right as returning officer to vote, for the simple reason by section 152, the clerk of the municipalty has in case of an equality of votes for two candidates a right when he declares the poll to give a vote for one of them, and so decide the election; and this clause is made applicable by section 299 to the vote or poll in respect of by-laws, and until the legislature had expressly declared otherwise there was no reason why the clerk of the municipality should be disqualified and denied the right to vote in a matter in respect of which he had much more interest than in the election of a counsellor, as by the passing or rejection of such by-law he might be seriously affected in respect of his property that he had a right legitimately to protect and represent as other ratepayers represented theirs. Of course it is possible that a clerk of a municipality may not have the proper property qualification to vote on such by-laws. In which case his casting vote would decide unfairly the question when without it the by-law could not be passed. But, as I have said, in the present case he had the right to vote, and he ought not to be denied the exercise of such right in the absence of express enactment. I therefore concur in the opinion expressed by my learned brother that the by-law was carried by a majority of the electors.

I do not overlook the objection taken by Mr. Maclennan that his name was not on the voters' list of electors. His name was, in fact, on the voters' list, but not on the copy

of that list which the clerk himself had provided for taking the vote on the by-law.

The next question is, was the promulgation a valid one? As pointed out in the judgment of the learned judge clause 319, as amended by sec. 9 of 42 Vic. ch. 31(O.), does not require that a resolution shall be passed in terms directing the promulgation to be made, but merely that the paper in which the notice is to be published may be designated by resolution of the council; and as the notice was published in the county-town, there being no paper published in the municipality, I think it must be assumed, in the absence of a resolution requiring it to be otherwise published, there was a sufficient publication to make a complete promulgation within the statute; and therefore the by-law has thereby been shielded from the defects in form and substance urged against it.

I entertain a very strong opinion that by-laws such as this, acted upon as this has been by the company locating its stations at the points indicated by the by-law, are to be regarded as more than gifts, and, if they do not absolutely amount to contracts, they constitute gifts of an irrevocable character which are enforceable against the corporation on compliance by the company with the conditions imposed by the by-law. And I am of opinion all conditions precedent to the right of the plaintiffs to recover the debentures were performed by them; and that the motion of the defendants must be dismissed, and the judgment of the learned Judge at the trial affirmed, with costs.

I do not, in the apparent weight of judicial opinion in favour of the view that the requirements of by-laws under section 330 are to be incorporated in by-laws passed under section 559, intend to express dissent therefrom; but I certainly entertain the doubt expressed by Mr. Justice Burton in the Court of Appeal in the case of these plaintiffs against the city of Ottawa already referred to.

GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

THE INTERNATIONAL WRECKING AND TRANSPORTATION COMPANY V. LOBB, ET AL.

Salvage—Jurisdiction of High Court—Admiralty rules—Wrecking company—Services performed on request or under agreement—Quantum meruit.

A vessel being stranded on the northern shore of Lake Erie, the master telegraphed to the manager of a wrecking company at Detroit, for tugs and wrecking apparatus, to which the manager answered agreeing to furnish same. They were accordingly sent and the vessel rescued and saved. The plaintiffs claimed to recover an amount exceeding the value of the vessel, made up of *per diem* charges for the tugs and apparatus.

Held, that in actions in the High Court, salvors, in the absence of a specific or express agreement to the contrary, must be taken to render their services under and subject to the rule of the Admiralty Court, limiting the maximum amount of salvage to a moiety of the value of the saved vessel, and cargo, if any, which rule is equally applicable to wrecking companies as to ordinary vessel owners: that the agreement must define a specific amount as to the salvage to be paid or a rule whereby it may be determined; and that there was no agreement here, but merely a request to perform the services.

Semble, that the master of a vessel cannot by express agreement bind the owners to pay salvage beyond the value of the vessel.

THIS was an action brought by the International Wrecking and Transportation Company against the executors of of Charles Lobb, deceased, to recover a bill of charges amounting to $6,065.27, for services rendered in rescuing a schooner called "*The Huron*," which was stranded on the north shore of Lake Erie at Tyrconnell. (See "*The Huron*," reported in 6 C. L. T. 127.)

The statement of claim alleged that the plaintiffs were a Wrecking and Transportation Company carrying on business at Windsor, and called upon in the ordinary course of their business to "salve vessels in distress and do other coast-wrecking and submarine and transportation business, by vessel-owners and masters of vessels": that at the time of the disaster "*The Huron*" was owned by the defendants, and in charge of one George Brooks as master: that on the 22nd of October, 1884, S. A. Murphy, the president of the plaintiffs' company, received a telegram from Brooks, then on board the vessel, expressed as follows:

"TYRCONNEL, 22nd October, 1884.

"Send biggest tug and line, three screws, to schooner 'Huron' ashore here; answer."

(Signed) "GEORGE BROOKS."

That Murphy answered the telegram, "offering to send the tug line and screws as asked for by Brooks to to take the schooner off the shore," and immediately sent the tug "Charlton" with three hydraulic jacks to the place where the schooner was ashore: that this tug was employed "in salving said schooner" up to the 15th of November, 1884: that on the 29th of October, previously, Murphy received from Brooks another telegram, expressed as follows:

"TYRCONNEL, October 29, 1884.

To S. A. MURPHY, DETROIT:

"Can you send another tug immediately and two jacks? answer."

"(Signed) GEORGE BROOKS."

that Murphy answered this telegram, and agreed to send the tug and jacks; and accordingly entered into a contract with the Detroit Tug and Transit Company to furnish a tug called the "Balize," and agreed to pay, and did pay for her services rendered, as thereinafter mentioned. (a)

The statement of claim further alleged, that during the progress of the work "of salving said schooner," a jack and hawser were broken: that it was also thought advisable "in order to insure the safety of said schooner," to furnish a steam pump for pumping water out of the schooner when she should be taken off the shore, and Murphy agreed to send the pump, on receiving a telegram therefor, "to assist further in rescuing said schooner:" that the plain-

(a) (The Detroit Tug and Transit Company is another wrecking company, having its head office at Detroit. Both companies are managed by Murphy, and the business of both is practically one; the American vessels being used where the work is in American waters, and *vice versa*. By permit from the Canadian Government, the American tugs are frequently allowed, as in this case, to work in Canadian waters. The bill for the services of the "Balize" rendered by Murphy amounted to $2,650, making the total claim for salvage of the schooner, $8,715.27. The vessel saved, when delivered to the owners, was valued by competent persons at $2,500.—REP.)

tiffs accordingly sent their steam-pump on the 7th of November, and it was employed up to the 19th of that month, in pumping water out of the vessel. By reason of the services of the plaintiffs the vessel was saved. The plaintiffs claimed that the defendants were liable to them for work and labour done for them at their request, and for material supplied, to the amount aforesaid, the bill being a detailed account for work of the tugs and pump at so much *per diem*; for materials broken or destroyed; and for wages of one engineer and helper who worked the steam-pump.

The statement of defence, among other defences, set up that at the time the schooner was wrecked, Brooks was navigating her contrary to the express orders of the owners, and the plaintiffs were employed by him on his own responsibility and not as agent of the owners: that the plaintiffs did their work negligently and unskilfully, and their demand was grossly exorbitant and unreasonable, and that the two companies referred to were in fact identical; and that they were not entitled to perform wrecking or salvage services for British ships in Canadian waters.

The cause was tried before Rose, J., and a jury, at Toronto, at the Winter Assizes of 1886.

Kerr, Q.C., *Moss*, Q.C., and *Ingersoll*, for the plaintiffs.
Osler, Q.C., and *R. G. Cox*, for the defendants.

At the opening of the case, counsel for the defendants submitted that the action was a salvage action, and that the amount of the remuneration for the plaintiffs' services should be determined upon the principles which were acted upon in such cases in Admiralty Courts; and offered to consent to the sale of the vessel and payment of one-half the proceeds to the plaintiffs in full of their claim, a moiety of the vessel saved being the maximum salvage award; and the following authorities were referred to: The Wreck and Salvage Act, 1873, 36 Vic. ch. 55 (D.); *McCart* v. *Young*, 1 C. L. J. 76; *Grover* v. *Bullock*, 5 U. C. R. 297; *Moore* v. *American Trans-*

portation Co., 24 How. 1; *Appendix* to 2 Stuart V. A. R. 340; *The Inca*, 1 Swab. 370; (reported as *Gore* v. *Bethell*, 12 Moo P. C. 189.) *The Earl of Eglinton*, Swab. 7; *The Ewell Grove*, 3 Hagg. 221; *Jones* on Salvage, and *James* on Salvage, *passim*.

The plaintiffs, in answer, contended that they were entitled to recover on a *quantum meruit*, as for services rendered, wholly without regard to the value of the property saved: that the services in question were not properly *salvage* as they were performed *at the request* of the defendants; and that the maritime law of salvage did not apply to vessels engaged in the business of salvage.

The learned judge decided to take the opinion of the jury as to the value of the services rendered, when the parties arrived at the following agreement:

"The parties agree as follows:—The services claimed for were performed for the defendants, and the defendants admit that the plaintiffs are entitled to compensation therefor; and the only question is between the alternatives stated below, it being admitted that there is liability on the part of the defendants to pay on one or other alternative.

"The parties agree to the following facts: The defendant's vessel was ashore, as stated in the statement of claim, and received aid from the plaintiffs, which it is agreed is worth $4,000.

"The services were rendered upon request of the defendants by their captain, the telegrams set out in the statement of claim being the several requests, and no agreement was made as to the amount to be paid for such services.

"It is agreed that if the plaintiffs are entitled to be paid on a *quantum meruit* as for services rendered, the defendants are liable to the extent of $4,000 and costs, and judgment is to be given accordingly.

"If the plaintiffs are entitled to recover as for salvage only, under the law as administered in the Admiralty Courts, then it is admitted that the proportion of value of the ship payable to the plaintiffs is fifty per cent, and they are to have judgment for the sale of the ship under

the direction of the court and for one half of the proceeds, free from any encumbrances or charges on the vessel; and they are to have their costs to this date out of the other half.

"The plaintiffs' claim judgment as on a *quantum meruit*.

"The defendants contend that the plaintiffs are only entitled to salvage.

"The jury are to be discharged, and the case decided by the Judge as in a non-jury case.

"The plaintiffs are not to be entitled to costs of the attempt to try at Sandwich last fall, the defendants waiving their right to costs of the day at that assize.

"The judgment herein is to be in full, and it is admitted that there is no further claim for salvage or services by the Detroit Tug and Transit Company in respect of the wreck."

The above agreement was signed by counsel for all parties, and by Murphy, as President of both wrecking companies.

Afterwards a brief of authorities was handed in by counsel for the defendants, citing the following cases:

I. As to the meaning of "voluntary" as applied to salvage: *The Neptune*, 1 Hagg. 227, 236; *The Florence*, 16 Jur. 572; *The Atlas*, Lush. 482; *The Two Friends*, 1 C. Rob. 278; *The Branston*, 2 Hagg. 3 note; *Akerblom* v. *Price*, 7 Q. B. D. 129.

II. Services are none the less salvage because performed upon request: *The Raikes*, 1 Hagg. 246; *The London Merchant*, 3 Hagg. 394; *The Royal William*, 1 Stuart V. A. R. 107; *The Royal Middy*, 2 Stuart V. A. R. 82; *The America*, 2 Stuart V. A. R. 214; *The Palmyra*, 2 Stuart V. A. R. 4; *The Medina*, L. R. 1 P. D. 272; *The Nasmyth*, L. R. 10 P. D. 41; *The William Lushington*, 7 Notes of Cases 361; *The Kenmure Castle*, L. R. 7 P. D. 47; *The Marie*, L. R. 7 P. D. 203; *The Camellia*, L. R. 9 P. D. 27; *The Philotaxe*, 29 L. T. N. S. 515; *The Renpor*, L. R. 8 P. D. 115; and the American cases: *The A. D. Patchin*, 1

Blatch. 420; *The Emulous*, 1 Sumn. 210; *The Birdie*, 7 Blatch. 238.

III. As to salvage being contingent on success: *The Fusilier*, Br. & L. 341; *The Zephyrus*, 1 W. Rob. 329; *The India*, 1 W. Rob. 406; *The Killeena*, L. R. 6 P. D. 193; *The Camellia*, L. R. 9 P. D. 27.

IV. As to salvage by wrecking companies and the right of seamen employed by them to share in the salvage award: Merchant Shipping Act, 1854, sec. 182; Merchant Shipping Act, amended Act, 1862, sec. 18; *The Pride of Canada*, Br. & L. 208; *The Ganges*, L. R. 2 Ad. & Ec. 370; *The Maryanne*, 11 L. T. N. S. 85.

The learned judge reserved his decision, and afterwards delivered the following judgment:

February 9, 1886. ROSE, J.—There are here (1) a vessel in distress, (2) assistance rendered by the plaintiffs, (3) successful effort.

Therefore, all things have been shewn to entitle the plaintiffs to recover in a salvage suit: *Jones* on Salvage, 1.

The services were voluntary in the sense that the salvors were under no obligation to render them, as, for instance, were the crew: *The Neptune*, 1 Hagg. 226, 236. They were rendered on request, but no amount was fixed for remuneration. If it had been for a fixed sum, and made with the owners, it would have been a salvage agreement capable of enforcement in the High Court of Admiralty: *The Sir C. T. Van Straubenzie*, 6 C. L. T. 35, 48. If made with the master, the court would disregard it, if inequitable. See cases collected in *Jones* on Salvage, pp. 94 *et seq.*

That the service was rendered on request would apparently not render it the less salvage service: *The Raikes*, 1 Hagg. 246; *The London Merchant*, 3 Hagg 394; *The Royal William*, 1 Stuart's V. A. R. 107.

I have not overlooked the definition of a salvor in "*The Neptune*," but it must be read in the light of the facts of that case, and with the other cases referred to.

The fact that the plaintiffs are a company whose special

business is to perform salvage services, does not change the nature of the service. In the *Maryanne*, 11 L. T. N. S. 85, it is said (see head-note), "The court in distributing a sum awarded for salvage, will award very liberal remuneration to a steam vessel specially built for and devoted to salvage services, inasmuch as she is not employed in the general trade for the conveyance of goods and passengers, and depends entirely on her chances for public encouragement and support." And sec. 182 of the Merchants' Shipping Act, 1854, (Imp.) was amended by 25-26 Vic. c. 63, s. 18 (Imp.), to enable a ship which is to be employed in salvage services, to enter into an agreement with seamen binding them to abandon any right to share in salvage.

If, therefore, proceedings to recover this claim had been taken in the High Court of Admiralty, I am of the opinion that the court would have awarded such a sum for salvage as it might have deemed just, subject to the rules adopted by such court for its guidance, among others, that the sum awarded should not exceed a moiety of the proceeds of the vessel saved: *Gore* v. *Bethel*, 12 Moo. P. C. 189; *The Scindia*, L. R. 1 P. C. 241; *The Rasche*, L. R. 4 Ad. & Ec. 127.

I have not overlooked *The Charlotte*, 3 W. Rob. 68, where salvage was refused to persons who sent out vessels but did not go with them. They were not owners, and risked neither property nor life. See references to this case in *Jones* on Salvage, 30.

Then is this case to be governed by the rules of the High Court of Admiralty? The rules as to general average were held to apply in *Grover* v. *Bullock*, 5 U. C. R. 297; *Rogers* v. *Hooker*, 15 U. C. R. 63; *McCart* v. *Young*, 1 C. L. J. 76.

By 36 Vic. ch. 55, sec. 24. (D.,) it was provided that a reasonable amount of salvage, including expenses properly incurred, should be awarded to salvors. By sec. 25, sub-sec. 2, that any court having jurisdiction in civil matters to the amount claimed, or the value of the pro-

perty liable, may hear and determine the claim. Sec. 30 provides for apportioning the aggregate amount of salvage among the persons entitled. Sec. 34 confers on the civil court jurisdiction to proceed *in rem* or *in personam*. The schedules annexed to the act, give forms of statements to be made by the salvors and master, and clearly indicate that the amount of salvage has relation to the amount of *res* saved.

By sec. 1 of the Maritime Jurisdiction Act, 1877, it is enacted that "save as by this act excepted, all persons shall, after this act comes into force, have in the province of Ontario the like rights and remedies (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade, or commerce, on any river, lake, or inland water, of which the whole or part is in the province of Ontario, as such persons would have in any existing British Vice-Admiralty Court, if the process of such court extended to the said province." Although by sec. 2, a Court is created to enforce the rights and remedies given by the Act, it is not said it shall have exclusive jurisdiction. In *Georgian Bay Transportation Co.* v. *Fisher*, 5 A. R. 383, it was held that the limitation clause in the Merchant Shipping Act, (Imp.) did not apply to the Waubuno, as she was not a British ship. This was changed by 43 Vic. ch. 29, (D.)

In *Monaghan* v. *Horn*, 7 S. C. R. 409, the jurisdiction of the Maritime Court as to claims for damages arising in cases of collision is considered.

I am of the opinion that the *quantum* of salvage must be governed by the rules of the High Court of Admiralty, and that no more than a moiety can be awarded.

No agreement has been shewn as to the seamen. Whether the defendants desire any protection as to them does not appear. That may be spoken to.

The statute, 36 Vic. ch. 55 (D.), was stated by counsel for all parties to be similar in its provisions to the Act in force in England as to salvage (secs. 432-457 of the Merchant Shipping Act, 1854).

I have looked at *The Renpor*, L. R. 8 P. D. 115, but do not derive much assistance from it, as I think the decision turns largely upon the terms of the agreement.

I have derived much assistance from the carefully prepared brief of cases handed in by Mr. Cox since the argument, which I shall place among the papers for reference in the event of further proceedings.

I would be glad had I more time to review the authorities, but I think it better to express the opinion I have formed, to enable the parties to take the opinion of the Divisional Court, if they so desire, in which event I will have the opportunity of further consideration.

The American cases cited by Mr. Cox are much in point in his favour.

Subject to the question of the seamen's rights, judgment must be entered for the plaintiffs, decreeing a sale of the vessel, and for one half of the proceeds, free from any encumbrances or charges on the ship; and they are to have their costs to this date out of the other moiety.

During Hilary sittings, *Moss*, Q. C., moved on notice to increase the amount of the judgment entered for the plaintiffs.

During the same sittings, February 20, 1886, *J. K. Kerr*, Q. C., and *Moss*, Q. C., shewed cause. Salvage is a voluntary risk and service whereby property is saved: *Maclachan* on Shipping, 2nd ed., p. 608. There must be three things: 1. Marine peril; 2. Voluntary service; and 3. Success. Servants, or passengers or pilots, cannot be salvors as their service is not voluntary, as they owe a duty to render assistance. Where services are performed under an agreement then payment is made on a *quantum meruit*. The defendants contend that a formal agreement should have been entered into; but if the plaintiffs had waited until a formal agreement was entered into their services would have been of no use. The plaintiffs are suing in *personam*. The rule of the Admiralty Court limiting the claim to a moiety of the vessel saved does not apply

here. They also referred to *Parsons* on Shipping, vol. ii., pp. 282, *et seq.*, 308; *The William Lushington*, 7 Notes of Cases, 361; *Virden* v. *Brig Caroline*, 6 Am. Law Reg. 222, 227; *The Independence*, 2 Curtis Cir. Ct. 350, 356; *Jones* on Salvage, 94-5; *Hennessey* v. *Ship Versailles*, 1 Curtis Cir. Ct. 353, 360; *The Helen and George*, 1 Swab. 368, 369; *The Maryanne*, 11 L. T. N. S. 85; *The Aztecks*, 21 L. T. N. S. 797; *The Charlotte*, 12 Jur. (Irish) 567, 568; *The Renpor*, L. R. 8 P. D. 115; *The Nithsdale*, 15 C. L. J. N. S. 268; *The Sir C. T. VanStraubenzie*, 6 C. L. T. 35; *Henry's* Admiralty Jurisdiction and Procedure, 40; *The Emulous*, 1 Sumner 207; *The Waverley*, L. R. 3 Ad. & Ec. 369; *The I. C. Potter*, L. R. 3 Ad. & Ec. 292; *Kay* on Shipmasters, 1062-3; *The A. D. Patchin*, 1 Blatch. 414, 416; *Maude and Pollock* on Shipping, 4th ed., 659 *et seq.*

Osler, Q. C., and *R. G. Cox*, contra. Under the statute, 36 Vic. ch. 55, secs. 23, 27, 30, (D.) the plaintiff's right is restricted to salvage compensation, and this applies as well to volunteers as to persons acting under agreement. The plaintiff was a mere volunteer here. What was done here no more constituted an agreement than the hanging out a flag of distress. The *quantum meruit* principle is not to be extended, as it would have a tendency to prevent the captain calling aid if he were to render his owners liable to an unknown sum. The agreement also must not only be an express agreement to render aid, but must be one fixing the compensation. There was clearly no agreement here. In addition to the authorities referred to at the trial, and in the brief of authorities, they referred to *James* on Salvage, p. 83; *The Calhoun*, 12 Jur. 682; *Boyd's* Merchant Shipping Laws, 378, *et seq.*; *The Camanche*, 8 Wall. 448; *The Earl of Eglinton*, Swab. 7; *The Cheerful*, L. R. 11 P. D. 3; *H. M. S. Thetis*, 3 Hagg. 14.

March 6, 1886. CAMERON, J.—The plaintiffs have appealed from the judgment of my learned brother Rose, delivered at the trial of this cause, limiting the plaintiffs' right on a *quantum meruit* for salvage services in rescuing the defen-

dants' vessel under circumstances entitling the plaintiffs to be paid for salvage services to one-half the proceeds of the vessel saved. The plaintiffs appeal on the ground that they were requested to perform the services, and are entitled to what those services were worth without reference to the value of the vessel saved. It was admitted, if the plaintiffs were not to be so limited, the services would be worth $4,000, which amount would exceed one-half the value of the defendants' vessel.

The rule adopted by my learned brother seems to be by a long course of decisions correct, unless the circumstance of the defendants' captain having requested the plaintiffs to send their tug and appliances to the relief of the vessel takes the assistance rendered out of the ordinary rule which is to be found stated in the judgment of the Privy Council in *Gore* v. *Bethel*, 12 Moo. P. C. 189.

The Right Honourable Dr. Lushington in pronouncing the judgment said, at p. 195: "Now, as to the general rule, we apprehend that little doubt can be entertained, for we find Lord Stowell expressing himself in the case of *L'Esperance*, 1 Dod. 49, in these words: 'In no instance (except where the Crown has been concerned, and where the claim has been given for a private owner) has more than one-half been decreed as salvage.' And, in a subsequent case (though it occurred many years after) he adhered to the same rule. He said, in the loss of *The Frances Mary* (2 Hagg. Ad. Rep. 90.) 'The fund is unfortunately small, but it is a case of extraordinary merit, and the Court should be liberal. I incline to decree £350, and if an instance can be produced in which, in a case of this description the court has exceeded a moiety, I will allow the sum I have mentioned; but if not, I shall direct a moiety to be paid to the salvors. Then there is this note to the case: 'On the 18th May a moiety was decreed to the salvors, their expenses being first paid out of the other moiety.' It appears, therefore, to be perfectly clear, after an examination of all the previous cases, that no instance can be found in which salvors have had decreed to them a sum exceeding a moiety of the proceeds."

In that case the Court of first instance had allowed to the salvors 66 per cent. on a portion of the property saved; 70 per cent. on a further portion, and 76 on another portion. Judgment was rendered on appeal therefrom limiting the salvor's claim to 50 per cent. The service was purely voluntary, not requested, and no agreement of any kind entered into between the salvors and the vessel or any party interested therein, or in the cargo.

It would seem equally clear that an agreement makes no difference, unless it defines a specific amount as the salvage to be paid or a rule by which the amount shall be determined: *The Raikes*, 1 Hagg. 246; *The London Merchant*, 3 Hagg. 394, 399, and *The Royal William*, 1 Stuart V. A. R. 107. These authorities decide that the service rendered on request do not make it less a salvage service and subject to the rules relating thereto.

If there is a specific agreement entered into, unless in the opinion of the court the circumstances under which it was entered into make it inequitable, it will bind the parties and will not be interfered with by the court: *The Waverley*, L. R. 3 Ad. & Ec. 369.

No agreement was made in this case. There was a request by telegraph,—which in itself would be no more efficacious in constituting an agreement than a signal of distress to a vessel remote or near, and on the approach of the latter a request made by the captain of the vessel in peril to assist in saving it; both captains being silent as to the remuneration to be paid for the assistance. The law as administered in a Court of Admiralty in such case gives a reasonable amount of compensation, and reasonableness is limited as a maximum to half the value of the vessel and cargo saved, and to as much less as the circumstances may seem to call for.

But it has been contended on behalf of the plaintiffs that this limitation is simply a rule of a Court of Admiralty, and only applies to proceedings in *rem*, and not to proceedings in *personam*—that is to say, the proceeding in the Admiralty Court is for the enforcement of the

salvor's lien upon the thing salved, and is not recognized in the Courts of Common Law, where the proceedings are in *personam* for the enforcement of a claim for damages for the breach of an assumpsit express or implied to pay the value of the services rendered, without regard to the value of the thing in respect of which the services are rendered.

This presents a question which to my mind is by no means free from doubt. The service was one that, before the Maritime Court was established in this Province, a Common Law Court might have heard and decided.

It would, I think, be difficult to hold that if one of our inland streams or rivers was dammed and a large pond was thereby created on which small steamers and sailing vessels plied carrying passengers to places established for recreation, and one of such sailing vessels got aground, and the steamer was requested to aid in getting it off, the owner of the steamer would not be entitled to compensation according to the value of the service rendered without reference to the value of the vessel aground.

The character of the services rendered by the plaintiffs in this case, were not unlike those just suggested. And if the common law courts of this Province have jurisdiction, why should it not be exercised on the principles that govern these decisions? But, as my learned brother has pointed out in *Grover* v. *Bullock*, 5 U. C. R. 267, the Court of Queen's Bench adopted the rule of the Court of Admiralty in dealing with the question of general average, and in *Regina* v. *Sharp*, 5 P. R. 135, the present Chief Justice of the Queen's Bench Division, was of opinion the Admiralty jurisdiction extended to Lake Erie—the lake in which the defendant's vessel was wrecked—I am not prepared to differ from the conclusion my learned brother arrived at on this point. If Lake Erie was subject to Admiralty jurisdiction then, there is no doubt it is now, and the common law courts are expressly clothed with jurisdiction in questions of salvage, and may exercise such jurisdiction in common with the Maritime Court. By 36

Vic. ch. 55 (D.), they are empowered to award a reasonable amount of salvage including expenses. This reasonable amount must be determined, it seems to me, in accordance with the rule and practice of the Admiralty Court, and it would be anomalous that the Maritime Court having jurisdiction *in rem* and *in personam*, should be governed by one rule and the High Court of Justice by another.

In the absence then of a specific or express agreement to the contrary, salvors must be taken to render their services under and subject to the rule of the Admiralty Court, limiting the maximum amount of salvage to one moiety of the value of the saved vessel and cargo, if any. It appears to me exceedingly doubtful whether a master could by express agreement bind the owners to any greater extent. Certainly he could not go beyond the full value, as that would be the fullest extent to which salvage could be awarded by the court under the act.

The language of Brett, M. R., in *The Renpor*, L. R. 8 P. D. 115, at p. 118, would seem to sustain this view. He said: "Then it has been argued that an action in the nature of a common law suit can in this case be supported on the agreement, which, it is said, is binding on the ship owner. But there are two circumstances necessary in order to make an agreement binding on an owner; first, the contract must be made under a necessity; and, secondly, it must be made for his benefit."

A contract, therefore, to pay more than the value of the property saved could not be said to be for the benefit of the owner.

The case is also an authority in support of the contention that the services rendered here were purely salvage services. The plaintiffs' motion must be dismissed, with costs.

GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

PIRIE v. WYLD.

Privileged communications—Letter written without prejudice, admissibility—Principal and surety—Discharge of surety by the giving of time—Reservation of rights against surety.

All communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and wrong motives, are not admissible in evidence.

Where therefore a letter written without prejudice and coming within the above rule was admitted at the trial; and the court not being able to say that the defendant was not prejudiced thereby, a new trial was directed.

After the maturity of a note for $300, and after an action had been commenced against the defendant, one of the endorsers thereof, alleged to be a surety, the principal debtor executed a document whereby he acknowledged his liability on the note, notwithstanding that defendant had been sued solely thereon, the Statute of Limitations or any legal or equitable defence that might be set up; and he covenanted to pay the note and interest by half-yearly payments of $50 each. There was contradictory evidence as to the acceptance of the document by the plaintiff.

Quære, whether the document, if accepted by plaintiff, constituted a discharge of the surety by the giving of time; and whether the statement of the pendency of the action against defendant could be looked upon as a reservation of plaintiff's rights against him.

THIS was an action tried before Rose, J., and a jury, at Hamilton, at the Fall Assizes of 1885.

The plaintiff sued as indorsee of a promissory note made by one A. S. Wink, payable to Wink & Wyld, and endorsed by the maker in the name of Wink & Wyld to the plaintiff, to secure her for a loan made to the maker Wink. The money was used to pay a liability for which the firm was responsible, but which had been incurred by Wink using money of a client of the firm without the knowledge of the defendant Wyld. Wink & Wyld were practising solicitors and barristers.

There was no evidence to shew that one partner had any general authority to use the name of the firm in signing or endorsing notes; but there was conflicting evidence as to whether the defendant was not present at the time Wink endorsed the note in question, and received the note from him to be handed to the plaintiff.

At the trial the plaintiff put in evidence a letter written by defendant, on its face stated to be without prejudice. The defendant's counsel objected to this being received in evidence, and the learned judge admitted it, subject to the objection.

The letter was as follows:

Without Prejudice.

OTTAWA, December 11, 1884.

DEAR MADAM—"The appearance in the action which you have instituted against me has this day been forwarded. I can think of no reason why you have sued me alone, unless it be you are under the impression I am worth firing at, and Mr. Wink is not. I only wish (this being the case) you were correct. I am now being pressed for a claim to settle which I am forced to hypothecate all my available property. I would be glad, for your sake as well as my own, in the event of your recovering judgment, if I had property or means to satisfy you. If I am correctly informed, Mr. Wink is much better able to pay than I am, and no one knows better than yourself that he ought to pay, and not me. I am under no moral, and, as at present advised, no legal obligation to satisfy this demand. I have, from the first knowledge I had of it, repudiated, and to the end of the chapter will repudiate all liability in the matter.

"My object in writing is to suggest that your solicitor add Mr. Wink as a party. Your right to recover against him, I take it, is certain, whereas, as against me, it is, to say the least of it, doubtful, and in the event of a judgment I think you can more readily make the amount out of Mr. Wink. I write this entirely in your interest. I am content, in the best possible good natured feeling, to fight the matter out with you, and I certainly have the consolation, should I win, that you are good for the costs.

"I feel satisfied you have, as I have stated, brought this action against me thinking, in the event of a judgment, you could readily make the amount. Knowing my circumstances, I can only say I feel flattered to think I enjoy this reputation, and I would be sorry indeed for you to incur the costs of a High Court action before you realize your mistake.

"Yours truly,

"WILLIAM WYLD.

"Mrs. Margaret A. Pirie, Dundas.

"You might shew this to your solicitor.

"W. W."

The plaintiff's counsel also, in order to repel an implication that the defendant's counsel wished to make, that the plaintiff was favouring defendant's former partner, who was the maker of the note, and had allowed the Statute of Limitations to bar the claim against him, put

in a document under seal, executed by Wink after this action was commenced, whereby Wink covenanted to pay the plaintiff the amount of the note in half yearly payments of $50 each; the first payment to be made on the 6th of February then next.

The covenant was as follows:

PORT ARTHUR, August 6, 1885.

"Mrs. Margaret Pirie, Dundas.

"MADAM—I acknowledge my liability to you upon a promissory note, dated at Dundas 31st January, 1878, for $300, payable one year after date, with interest at 8 per cent, payable to the order of Wink & Wyld, and by them endorsed to you, notwithstanding that W. Wyld has been sued by you solely to recover the same, and notwithstanding any writing signed by yourself or me heretofore, and notwithstanding the statute of limitations, or any legal or equitable defence which might be set up. And I hereby covenant, promise and agree with you to pay the said note and interest in manner following in half-yearly payments of $50 each, the first payment to be made on the 6th of February next. This agreement is given in consideration of your agreeing to accept interest at the rate of 6 per cent per annum, from the date of the note in lieu of 8 per cent thereby secured.

"As witness my hand and seal.

("Witness.)

"W. P. KNOWLES. "A. S. WINK."

At the close of the plaintiff's case the defendant's counsel contended that there was no evidence to go to the jury, and that a nonsuit should be entered: that the plaintiff, by putting in evidence the covenant, showed there was an acceptance of it, and therefore the defendant, the surety, was discharged because by the covenant time was given to the debtor without the surety's knowledge and consent; and also that there was was no evidence of any authority on the part of the defendant, a partner in a legal firm, to the partner, Wink, to endorse the note. He also contended that Wink should be added as a defendant.

Questions were submitted to the jury, which, with their answers thereto, were as follows:

1. Was Mr. Wyld to receive a portion of the profits of the firm of Wink & Wyld, or was he to receive a salary for the first year? Ans. Yes, he was to receive profits.

2. Were the $1000 belonging to Mr. Weir appropriated by Mr. Wink, or by the firm of Wink & Wyld? Ans. Yes, by the firm.

3. Was Mr. Wyld aware that Mr. Wink had endorsed the firm's name upon the note before Mrs. Pirie advanced the money? Ans. Yes.

4. Did Mr. Wyld give Mr. Wink authority to endorse the firm name? Ans. Yes.

5. Did Mr. Wyld know of Mr. Herald's intention to borrow the money from Mrs Pirie prior to her advancing the money? Ans. Yes.

This question was framed, as it appeared, in consequence of the money having been obtained from the plaintiff through the intervention of Mr. Herald.

The learned Judge did not formally enter judgment for the plaintiff on the findings of the jury, but left the plaintiff to move to have judgment entered in his favor.

In Hilary Sittings *G. T. Blackstock*, pursuant to notice of motion, moved for judgment for the plaintiff for the amount of the note and interest.

During the same sittings *McCarthy*, Q. C., obtained an order *nisi* to set aside the findings of the jury, and for new trial, on the ground that the said findings were contrary to law and evidence; were preverse and contrary to the Judge's charge; and for the improper admission of the letter from the defendant to the plaintiff written without prejudice. The order also asked that Wink should be added as a defendant.

During Hilary sittings, February 11, 1886, *G. T. Blackstock* supported his motion, and shewed cause to the defendant's order *nisi*. The letter was properly put in evidence. In any event it had no effect on the verdict, as in it the defendant repudiates his liability on the note: *Williams* v. *Thomas*, 2 Dr. & Sm. 29, 37; *Murray* v. *Coster*, 4 Cowan N. Y. 617; *Unthank* v. *Travelers' Ins. Co.*, 4 Birrel's U. S. Cir. Ct. R. 357; *Greenleaf* on Ev., 14th ed., p. 252-3, sec. 192. The covenant did not constitute a

release by the giving of time. The plaintiff never accepted the agreement. It is quite clear there must be a binding agreement; but, even if there were, there was a reservation of the plaintiff's rights against the surety. The pendency of the suit against the defendant at the time the covenant was executed must be taken as a reservation of the plaintiff's rights against him, and the fact of the pendency of the suit is set out in the covenant. Moreover on the evidence the relationship of principal and surety did not exist between Wink and Wyld, but they were joint debtors. He further referred to *Kearsley* v. *Cole*, 16 M. & W. 128; *Petty* v. *Cooke*, L. R. 6 Q. B. 790, 795-6; *Owen* v. *Homan*, 4 H. L. Cas. 997, 1037; *Hulme* v. *Coles*, 2 Sim. 12; *Swire* v. *Redman*, 1 Q. B. D. 536, 541-2; *Oriental Financial Corporation* v. *Overend*, L. R. 7 Ch. 142, 150-1; *Green* v. *Wynn*, L. R. 4 Ch. 204; *Price* v. *Barker*, 4 E. & B. 760; *Watters* v. *Smith*, 2 B. & Ad. 889; *North* v. *Wakefield*, 13 Q. B. 536; *Carter* v. *White*, 25 Ch. D. 666; *Bank of Montreal* v. *McFaul*, 17 Gr. 234; *Ex p. Harvey*, 23 L. J. N. S. Bank. 26; *Wyke* v. *Rogers*, 1 DeG. McN. & G. 408; *Currie* v. *Hodgins*, 42 U. C. R. 601. The judgment, therefore, should be entered for the plaintiff, and the defendant's order *nisi* should be discharged.

McCarthy, Q. C., contra. The letter having been written without prejudice, it should not therefore have been admitted in evidence: *Williams* v. *Thomas*, 2 Dr. & Sm. 29, 37. The relationship of principal and surety existed between Wink and Wyld. The taking of the covenant either amounted to a release in itself of the surety or it had that effect as it gave time to the principal. The surety has the right to call on the creditor to sue the principal debtor, and if the right is gone the surety is discharged. The creditor cannot release the principal debtor and retain the liability of the surety. The only exception is in bankruptcy, when there is a composition made, and thus part of the liability of the principal debtor is released, the liability of the surety in such case can still be retained. By the acceptance of the covenant the note became merged, and

remedy on it is gone: *Rees* v. *Berrington*, W. & T., L. C., vol. ii., 5th ed., p. 1018; *Dawson* v. *Bank of Whitehaven*, 4 Ch. D. 639; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Davies* v. *Stainbank*, 6 DeG. McN. & G. 679, 696; *Wulff* v. *Jay*, L. R. 7 Q. B. 756; *Polak* v. *Everett*, 1 Q. B. D. 669, 675; *Molson's Bank* v. *Girdlestone*, 44 U. C. R. 54; *Molson's Bank* v. *Turley*, 8 O. R. 293; *Gould* v. *Robson*, 8 East 575; *Strong* v. *Foster*, 17 C. B. 201, 219; *Grant* v. *Winstanley*, 21 C. P. 257; *Healey* v. *Dolson*, 8 O. R. 691. The plaintiff clearly accepted the covenant. She took it and made use of it to shew that the debt was not barred, as to Wink, by the statute of limitations, and it was only when she saw what the effect of the acceptance was that she attempted to repudiate it. Under the circumstances the judgment should be entered for the defendant; but in any event there must be a new trial.

March 6, 1886. CAMERON, C. J.—The questions chiefly raised on the argument of the plaintiff's motion and defendant's order *nisi*, were the improper reception of the letter written without prejudice; and whether the effect of the covenant of the principal debtor A. S. Wink was not to discharge the defendant as surety from all liability, on the ground that it extended the time for the payment of the debt by the principal debtor.

This last point was not taken by the order *nisi*, but both counsel for the plaintiff and defendant argued it at great length.

The authorities seem, though not very numerous, to be clear upon the first point, that letters written or communications made without prejudice, or offers made for the sake of buying peace, or to effect a compromise, are inadmissible in evidence. It seemingly being considered against public policy as having a tendency to promote litigation, and to prevent amicable settlements.

The language used in the cases is sufficiently wide to cover all communications made under the words "without prejudice." The cases in which the rejection of such letters

or communications has taken place have generally contained some offer of settlement.

It was so in *Paddock* v. *Forrester*, 3 M. & G. 903, where it was held not only that the letter written without prejudice, but also the answer thereto, was inadmissible. Chief Justice Tindal saying, at p. 918: "There is nothing to take this case out of the general rule. It is of great importance that parties should be left unfettered by correspondence, which has been entered into upon the understanding that it is to be without prejudice. It would be a hard thing to allow the answer to an offer, which is stated to be without prejudice to be received in evidence, because the same words are not adopted in such answer."

Re River Steamer Co., Mitchell's Claim, L. R. 6 Ch. 822, Sir G. Mellish, L. J., expressed himself as to the admissibility of such a letter thus, at page 831: "As to the letter of the 19th of February, there is this further objection, that it is stated to be without prejudice. I am strongly of opinion, although it is not necessary to decide it in this case, that a letter which is stated to be without prejudice cannot be relied upon to take a case out of the statute of limitations, for it cannot do so unless it can be relied upon as a new contract. Now, if a man says his letter is without prejudice, that is tantamount to saying, 'I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all.'"

In *Jones* v. *Foxall*, 21 L. J. Ch. N. S. 725, Lord Romilly, M.R., did not seem to treat the rejection of such evidence as required by any decided and well understood rule of law, but rather as something to be discountenanced in practice by the courts; for he uses this language, at p. 728: "But, in addition to this, I find the offers were made without prejudice to the rights of any parties, and I shall, as far as I am able, in all cases endeavour to suppress a practice, which, when I was first acquainted with the profession, was rarely, if ever, ventured upon; but which, according to my experience, has been common of late, namely, that of

attempting to convert offers of compromise into admissions and acts prejudicial to the parties making them." But he added: "In my opinion, such letters and offers are admissible for one purpose only, *videlicet*, to shew that an attempt has been made to compromise the suit, which may be sometimes necessary; as, for instance in order to account for lapse of time, but never to fix the persons making them with admissions contained in such letters, and I shall do all I can to discourage this, which I consider to be a very injurious practice."

Mr. Justice Proudfoot in *Corporation of York* v. *Toronto Gravel Road, &c., Co.*, 3 O. R. 585, at p. 593, thus presents his understanding of the rule: "The rule I understand to be that overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy."

It may be said that no ground of public policy requires that a letter written by one litigant to another to intimidate that other, containing an admission against himself, should be held inadmissible; and if that is the only principle of rejection it might be that the letter written by the defendant in this case was of that character, and the admissibility or inadmissibility would entirely depend upon the circumstances under which and the purposes for which the letter was written or communication made, making the rule thus uncertain and variable. The letter in question, however, is deprecatory and complaining rather than abusive or minatory, and it seems to me should be held to be within the rule, which should be held to cover and protect all communications expressed to be without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and from wrong motives. I think the jury to which this letter was submitted might draw an inference from it that the writer was not disputing his liability on the ground

that the indorsement of the note had been unauthorized by him, but because it was unfair to proceed against him without joining the maker of the note, who ought to pay.

The jury, therefore, might have been much influenced in deciding in favour of the evidence of Mrs Pirie, and against that of the defendant upon the important point bearing upon the issue to be tried, the knowledge of the defendant of the fact that A. S. Wink had signed the firm name to the note in the presence of the defendant.

I am then of opinion the letter ought not to have been admitted in evidence; and not being able to say that the defendant was not prejudiced by its admission, the general rule that when evidence has been improperly received or rejected the verdict must be set aside, must be allowed to prevail.

In this view of the case, it will not be necessary to decide how far the covenant of A. S. Wink, if accepted by the plaintiff, may operate to relieve the defendant from liability. Whether the plaintiff has or has not accepted the covenant, is a question of fact and must be pronounced upon when the evidence with regard thereto, is made to appear after the amendment of the pleadings so as to raise that defence in a proper manner.

The ordinary rule is, that such an arrangement between the creditor and debtor as this covenant discloses, discharges the surety when there has been no reservation of the creditor's rights against the surety. But there may be much force in the contention of Mr. Blackstock, that the pendency of this suit against the defendant at the time the covenant was executed, must be taken to show as clearly as if the reservation had been contained in the covenant the plaintiff was reserving her rights against the defendant.

The present inclination of my mind is that the pendency of the action makes no difference; and, assuming the acceptance of the covenant by the plaintiff, it would be matter pleadable in bar to the further continuance of the action as a matter of defence after the commencement of the action.

The principle, as I understand it, in which a surety is discharged by the creditor giving time to the principal debtor, is that the surety's hand is tied thereby and he cannot take any step against the principal during the extended credit. The creditor must therefore do no act at any time by which the surety's hand will be stayed. The pendency of the suit does not then affect the question. It does not amount to a stipulation with the debtor that the creditor's rights against the surety are expressly reserved, whereby the debtor, being a consenting party, he cannot say to the surety whom the creditor is pursuing, "there is no debt due which I am bound to pay as my creditor has by a valid agreement, made upon good consideration, extended the time of payment," because by his own act of consent to the creditor's reservation of his rights against the surety he has left the surety in the peril it is his duty to protect him from: the arrangement between the debtor and creditor does not stay the surety's hand.

In the covenant in question it is just as consistent with the view that proceedings against the surety were to be stayed as that they were to go on, no stipulation can be implied either way. There being nothing except the declaration, "notwithstanding Mr. Wyld has been sued solely to recover the same" (the amount of note and interest) "I covenant to pay," &c. These words are not demonstrative of intention on the part of the plaintiff and Wink that the suit shall be proceeded with, and appear to me to leave the matters just where they would have been if no reference had been made to the suit at all; and I do not see that in consequence thereof, if the defendant took proceedings against Wink to compel him to pay the debt, the latter would be estopped from saying the old debt has been extinguished or payment thereof suspended. These are reasons which predispose me to the adoption of the opinion that the defendant has been discharged by the dealing between the plaintiff and the principal debtor; but as it is not essential now to finally determine the question I do not wish to hold myself concluded by anything I have

said from changing my first impression, if, upon further argument and consideration of the authorities, I find it to be erroneous.

Both parties are to be allowed to amend their pleadings as they may be advised, with costs to be costs in the cause; and, if the plaintiff elects not to proceed further with the action, she ought to get her costs up to the time of taking the covenant, and since that time each party should bear her and his own costs. Up to the time of taking the covenant the costs were properly incurred and should be paid by the defendant who was in default. After that, if the plaintiff becomes satisfied that the covenant bars her further maintenance of the action, it was inequitable and unjust for her to have proceeded with it. But the defendant could not have any claim to costs as he was resting his defence on an entirely different ground.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.

IN RE NICKLE AND THE CORPORATION OF THE TOWN OF WALKERTON.

Municipal corporation — Negligence — Action — Compensation — Mortgagee, adding as a party.

The approaches to a bridge built over a river were supported on trestle work, the water flowing through the trestle work and spreading over the low land until it fell into the river. The municipality subsequently filled in the trestle work and made a solid embankment there whereby the water was penned back, and was sent down in a greater body and with greater force in the regular channel, by reason whereof a great part of the bank of the river upon which the plaintiff's factory was erected, was washed away, and was being so washed away from year to year.

Held, that as the work was done by defendants in such a way as to occasion damage to the plaintiff, whereas it could and should have been done without such effect, this was a matter in which the plaintiff must prosecute his rights by action, and was not the subject of compensation under the arbitration clauses of the Municipal Act.

The land in respect of which the claim was made was mortgaged.

Held, that the mortgagee was not a necessary party, the proceeding not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but as the compensation was only some $50, the court would not require him to be made a party.

THIS was an order *nisi* obtained by the defendants, the corporation of the town of Walkerton, by way of appeal from the award made between the parties by Donald Sinclair, James Brocelbank and A. B. Klein, on the 2nd of January, 1886, and for an order setting aside the award and making one in favour of the municipality, upon the grounds:

1. That no legal liability on the part of the municipality to compensate the said Nickle for the damages, if any, suffered by him, exists.

2. The damage, if any, did not arise from the exercise by the municipality of any of its powers, but from negligence in the building of the roadway referred to in the evidence taken herein; and the only remedy of the said Nickle is by action against this municipality, and not by arbitration.

3. The claim, if any, of the said Nickle is barred by the statute of limitations.

4. The land in respect of which the claim is made was mortgaged, and the mortgagee was a necessary party to the proceedings.

5. No damage was proved by the said Nickle.

6. The award is contrary to the evidence taken, it not appearing that the injury to the land of the said Nickle was caused by the building of the said roadway.

The proceedings shewed that Yonge street, in the town of Walkerton, was on the approaches to the bridge, which is built over the river Saugeen which flows through the town, supported on trestle work, and the water flowed through that trestle work to the north of the bridge, and there spread over the low land until it fell into the river in a westerly direction.

The municipality some four years ago filled in the trestle work and made a solid embankment of that part of the roadway; and the claimant alleged that by reason thereof the water, which used to escape through the trestle work and which afterwards spread over the low land and so found its way into the river, was now penned back by the solid embankment mentioned, which raised the river to the east of the embankment, and sent down in the regular channel of the river a greater body of water and with greater force than came down in the channel before the formation of this embankment; and by reason thereof a great part of the bank of the river upon which the claimant's factory was erected had been washed away, and was from year to year being washed away, which was the injury complained of.

The water, which the claimant said, formerly spread over his flats, fell into the river upon the east side of it, but since the embankment had been made, the greater body of water thrown into the river above his factory, was now by the form of the channel driven against his bank, which was upon the west side of the river, and so did him the injury from which he was free while the water flowed

from the flats into the river upon the east side of the channel.

The claimant appointed an arbitrator to assess him the necessary compensation under the arbitration clauses, of the municipal act of 1883, secs. 393 to 396. The council did not name an arbitrator. The judge of the County Court, under sec. 396, appointed an arbitrator for the town, and the two arbitrators so-named appointed the third arbitrator, and the three arbitrators proceeded with the arbitration.

On the arbitration *H. P. O'Connor* appeared for Nickle, and *W. A. McLean* for the municipality.

No objection was made by or on behalf of the municipality, that the damage in question was not a subject for arbitration under the statute until after the close of Nickle's case; and the municipality took part in the reference throughout.

The arbitrators over-ruled the objections, and made an award whereby they granted compensation to the claimant.

On the 16th April, 1886, *H. J. Scott*, Q.C., supported the motion. The case was not one for compensation under the statute. The water which, it was said, found vent through the former trestle-work and over the flats and so into the river on the north or east side of it, was not a flood course; and, if not, apart from the other questions, the municipality could not be made liable for stopping the flow of water over such flats: *Bickett* v. *Morris*, L. R. 1, H. L. Sc. 47; *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Attorney-General* v. *Earl of Lonsdale*, L. R. 7 Eq. 377. The following cases were referred to, shewing that parties are not injuriously affected under the words of the enactment, although the municipality is raising or lowering its roads under the statute; and that where negligence against the municipality is shewn the remedy, if any, must be by action: *Re Yeomans and the Corporation of Wellington*, 43 U. C. R. 522; *McArthur* v. *Corporation of Collingwood*,

9 O. R. 368, and *McGarvey* v. *Corporation of Strathroy*, 10 A. R. 631.

H. P. O'Connor, contra. This is clearly a case for compensation under the statute. The work was done by the corporation under under its statutory powers; and was such as necessarily and unavoidably caused damage to the claimant. If it had been shewn that the work might, and could have been done, as to avoid damaging the claimant's property, it might be only the subject of an action. In addition to the cases referred to, he cited *Van Egmond* v. *Corporation of Seaforth*, 6 O. R. 519, 614.

March 23, 1886. WILSON, C. J.—The evidence for the claimant is, that the north fill or embankment is the cause of the washing away of the claimant's land; while the evidence for the municipality is it is not.

I cannot, even if I were to try the case from beginning to end, assume to say I could properly determine the case upon the merits, under section 405 of the act, differently from the manner in which the arbitrators have determined it by their award. The evidence for the municipality shows the loss of the claimant's land is caused by the ordinary flow and wash of the river; and it does appear it rises in freshets to a considerable height, and that it has washed the banks away nearly all along its course, and thereby widened very much the channel of the stream, and that the natural course of the stream has been for some years, and before the making of the embankment, and still is, toward the claimant's side or west, or, it may be called, the south side of the stream.

I cannot undertake to say the arbitrators have not found rightly for the claimant from their own local knowledge of the river, and from the evidence of the witnesses who were examined by them. They are far more competent to deal with the matter than I am.

There are just the two points remaining to be considered.

1. Should the mortgagee be joined in the proceeding?

2. Is this a matter for compensation under the statute, or is it a cause of action for damages?

It appears to me the mortgagee need not necessarily be made a party to this arbitration. It is not a proceeding to obtain compensation for land taken. It is a proceeding in defence of and for the protection of the property. There is no objection however to his being joined, if required, for the security of the mortgagee may be prejudiced or diminished in value by the washing away of the land, and he may be able to assert some right to the compensation money; but as that compensation is only $50, I do not think it necessary to require him to be made a party in respect of so small a sum.

The principle applicable in such a case will be found in *Fairclough* v. *Marshall*, 4 Ex. D. 37.

As to the second question, I am of opinion this is a case in which the land of the claimant, according to the award of the arbitrators, has been injuriously affected by the exercise of the powers of the municipality. The work done by the municipality was well done, so far as it has been done, and but for the addition of these words "injuriously affected" the municipality would not have been liable for the construction of the embankment, because it was work done by it on its own property, and it was work which it was required to do by statute.

It is said, however, the municipality has been guilty of negligence in the performance of their work, for they should have taken means to prevent the water of the river from doing the injury complained of, and which, it is said, could have been done by the construction of some kind of breakwater to prevent the flow of the water against the property in question, to a greater extent than it flowed against it before the formation of the embankment upon the line of road made by the municipality.

If the work could have been done without in any way damaging the claimant's property, and was not so done, that would give a claim by way of action for damages; but if the work, however well and however completely done, must necessarily and unavoidably be a damage to the property, that entitles the party injured to a claim

for compensation. In the one case there is a species of wrong done, which should not have been done. In the other there is not a wrong done, because the act is done by the rightful authority of the statute, but that rightful act has occasioned an injury to another, which the statute declares shall be made good to the party by a pecuniary compensation to be assessed to him by means of an arbitration. Besides, when compensation is to be made it is compensation once for all; but when a wrong has been done and damages are to be given, the claimant can recover his damages from time to time, if the wrong be removable, until the wrong is corrected.

In this case the claim is made because the municipality has done its work in such a way that it has occasioned damage to the claimant, when the work could and should have been done without doing damage to him. That, therefore, is, in my opinion, a case in which the party injured must prosecute his rights by way of action for damages, and not by way of arbitration for compensation.

I regret to come to this conclusion in this case because the sum in question is a very small sum in amount, but it may be important to the municipality to know how such claims are to be determined, and it may be there are other cases which are abiding the result of this case.

I must make the order absolute to set aside the award, and with the costs of this motion.

Order absolute.

[COMMON PLEAS DIVISION.]

IN RE THE MINISTER OF EDUCATION.

AND

MCINTYRE V. THE PUBLIC SCHOOL TRUSTEES OF SECTION EIGHT IN THE TOWNSHIP OF BLANCHARD, ET AL.

Public schools—Suspension of pupil for misconduct—Teacher—Trustees—Resolution passed in absence of parent interested—Mandamus—Malice.

On the 3rd of December, 1884, a school teacher dismissed the plaintiff, a boy thirteen years of age, for disobedience, speaking impudently when questioned about it, and refusing to be punished for misconduct. The matter was brought before the trustees, and on 6th January they held a meeting and passed a resolution that the boy could return to school on his expressing regret for his misconduct. After the receipt of a solicitor's letter on behalf of the father, the trustees, on the 10th February, held another meeting and passed a resolution, that the boy could return to school after one day's suspension. On the 11th February another meeting of the trustees was held and a resolution passed reinstating the resolution of the 6th January. The father was not notified nor was he present at the meetings of the 6th January and 11th February; but he was notified of, and was present at, the meeting of the 10th February. The boy returned to school, but relying on the resolution of the 10th February, made no apology, and remained there for several days, but was not interfered with by the teacher, who, however, would give him no instruction. In an action in the Division Court against the teacher and trustees for an alleged wrongful dismissal, the learned judge dismissed the case against the teacher, but held the trustees liable.

Held, that the action must be dismissed against the trustees: that it was not their act, but that of the teacher, that caused the boy's removal: that the passing of the resolution as to apologising was not an expulsion: that the teacher in not instructing the boy was not acting under the trustees' direction; and that they were not liable for not compelling her to give the instruction.

Quære, whether in such a case as this malice must not be shewn, unless followed by some act amounting to assault or trespass; and whether a mandamus, and not an action, was not the proper remedy.

The action of the trustees in proceeding in the absence and without notice to the parties interested, and also the unreasonable conduct of the father, commented on.

THIS was an appeal by the Minister of Education against a judgment of the Judge of the County Court of the county of Perth.

The decision was given in a case in the Third Division Court in the county of Perth, wherein Wesley McIntyre,

by William John McIntyre, his next friend, was plaintiff, and the Public School Trustees of Section 8 in the township of Blanchard, in the county of Perth, and Lizzie Irvine, the schoolteacher, were defendants. The subject of complaint was the wrongful dismissal of the plaintiff from the school in question.

It was proved before the learned Judge that the teacher, Miss Irvine, had dismissed the plaintiff, a boy thirteen years of age, from the school, and she sent the following note to the father: "Wesley McIntyre is dismissed from school to-day for disobedience in the first place; speaking to me impudently when questioned about it, and lastly refusing to be punished for misconduct." This was on 3rd December, 1884.

A meeting of the trustees was held on the 6th January, 1885, and a resolution passed which was sent to the father, and was as follows: "Wesley is at liberty to come back to school when he expresses his regret to the teacher for his misconduct; until then he will not be admitted."

The father was not notified of this meeting, and was not present at it.

After a letter received from a solicitor on behalf of the father, the trustees, on the 10th February, held a meeting when a resolution was passed, which was embodied in the following notice to the father: "The conclusion we have come to after the investigation is, that Wesley McIntyre be admitted back to the school after one day's suspension."

The father was notified, and was present at this meeting.

On 11th February another meeting of the trustees was held, at which they passed a resolution reinstating the resolution of the 6th January.

The father was not notified, and was not present at this meeting.

The boy, returned to school, and relying on the resolution of the 10th February, would not make an apology. He remained there for several days without being interfered with, but the teacher would not give him any instruction, relying on the resolution of the 11th February, that he must first apologise.

At the conclusion of the case the learned judge held that the action was maintainable by the boy; sec. 102, sub-sec. 19, R. S. O. ch. 204, giving him a right to attend: that he was suspended by the teacher properly: that the complaint was adjudicated on in said resolution of the 6th January, 1885; and the refusal to admit after this was wrongful: that the terms imposed were beyond the power of the trustees: that the damage was not much if the boy's and the father's conduct were looked at: that 50cts. were sufficient damages as to the trustees; and that the action must be dismissed as to the teacher.

During Hilary Sittings February 1, 1886, the appeal was argued.

Shepley, in support of the appeal. The only evidence as to the boy's conduct is that of the defendant Irvine, and that shews that the plaintiff was refractory. The matter was brought before the trustees, and they very properly decided that the boy should apologize to the teacher. This did not constitute an expulsion, but merely a suspension. The action of the trustees was authorized by R. S. O. ch. 204, sec. 102, sub-secs. 19, 22. This is a matter in which the trustees are clothed with judicial functions, and their action cannot be questioned; at all events malice must be shewn: *Ashby* v. *White*, 1 Sm. L. C., 8th ed., 264; *Cullen* v. *Morris*, 2 Stark. 577; *Tozer* v. *Child*, 7 E. & B. 377; *Tuckett* v. *Eaton*, 5 O. R. 585-7. Also no action will lie at the suit of the son, but must be by the father. Sec. 8 of R. S. O. ch. 204, might seem to lend colour to the boy's right to maintain the action; but this is in effect repealed by sec. 1 of 44 Vic. ch. 30, (O.) which requires the parent to cause his child to attend the school. No action will lie at all, and the proper remedy is by mandamus: *Re Hill* v. *Trustees of Camden and Zone*, 11 U. C. R. 573; *Stewart* v. *School Trustees of Sandwich East*, 23 U. C. R. 634; *Re Dunn* v. *Board of Education of Windsor*, 6 O. R. 125, 128; *The*

People v. *Board of Education of Detroit*, 18 Mich. 400; *Schouler* on Domestic Relations, 2nd ed., sec. 318.

E. Sydney Smith, contra. The evidence is not very fully taken down as it was not probably contemplated by the learned Judge that any appeal would be made. If all the evidence were before the Court it would clearly appear that there was no such refractory conduct as alleged. The duty of the teacher was only to have suspended the child and reported the matter to the trustees. This appears from the school regulations: *Hodgins* on Duties of School Trustees, &c., sec. 58. Here there was an expulsion. The office of trustee is merely ministerial and not judicial, and they are liable for the wrong sustained by the plaintiff through their misfeasance. But even if their duties are judicial there was malice shewn. Under the statute the action is maintainable.

March 6, 1886. GALT, J.—In my opinion the conduct of the trustees was quite correct. It would be impossible to carry on a public school, particularly when it is under the control of a mistress, if a boy was entitled, as a matter of right, to receive instruction notwithstanding misconduct towards his teacher, without making an apology when the trustees find that he has misconducted himself.

CAMERON, C. J.—I also am of opinion this appeal must be allowed. The action of the trustees in modifying their judgment in the absence and without notice to the parties interested was an irregular proceeding; but it is quite manifest from the evidence before the Court they were actuated only by a desire to do their duty properly, and the slip made was one that men in their position, unaware of the requirements of the law, might very readily make. The condition requiring the boy to apologise to the teacher was a reasonable one, and if it had been determined upon at the meeting of 10th February, I think no objection could be urged against it.

The father, in my opinion, acted most unreasonably in the course he took. If capable of understanding what was

in his boy's own interest he ought to have insisted upon his making the apology. There is no humiliation in doing right, and in acknowledging an error there can be none. The error itself is the cause for feeling humiliated, not the acknowledgment which if frankly and sincerely made goes far to atone for the fault. Courts, however, have to deal with the legal rights of parties, not with their tastes; and if the plaintiff made out that a legal right to which he was entitled had been invaded, he would not be denied the legal redress pertaining to the wrong, no matter how objectionably he may have conducted himself,

The learned judge in the Division Court dismissed the action against the school teacher, and it was her action not that of the trustees that removed the plaintiff's son from school. The passing by the trustees of a resolution, that he should be allowed to return if he apologised, was not an expulsion. The boy after the passing of the resolution returned to the school, and remained there for several days without being interfered with, but the teacher would not give him any instruction.

It did not appear that in not instructing the boy she was acting under the direction of the trustees, and they would not be liable to an action for not compelling the teacher to give instruction.

I have very grave doubt as to the school trustees being liable to an action for an error such as committed in this case, without its being alleged and shewn that the act was malicious, unless followed by some act that would amount to an assault or trespass.

The proper way to obtain redress if the action of trustees is illegal in denying the right of attendance at school, it seems to me, is by mandamus and not by action. It is not necessary to decide that in the present case as I think the plaintiff fails on the facts, and so I do not rest my opinion on that ground. I should require to give more consideration to the question than I have done before expressing a positive opinion upon the point.

ROSE, J., concurred.

Appeal allowed.

[COMMON PLEAS DIVISION.]

RE THE MASSEY MANUFACTURING COMPANY.

Company—Increase of capital stock—Notice by Provincial Secretary for publication—Ministerial act—Mandamus—27 & 28 Vic. ch. 23, sec. 5, sub-sec. 18..

The M. Manufacturing Company passed a by-law increasing the capital stock by $300,000, making the capital stock $500,000, and declaring the number and amount of the shares of the new stock to be 3000 shares of $100 each. They then applied to the Provincial Secretary to issue a notice under his signature for publication as required by sub-sec. 18 of sec. 5 of 27 & 28 Vic. ch. 23, filing a duly authenticated copy of the by-law; and declaring that none of the stock had been subscribed for, and nothing paid thereon. On objection by the minority of the shareholders the application was refused, when a mandamus was applied for.

Held, that the Provincial Secretary of this Province is now the officer appointed to perform the duties of the office of Provincial Secretary named in 27 & 28 Vic. ch. 23: that his duty in issuing the notice was merely ministerial; and that on the requirements of the statute being complied with he had no discretion in the matter, but must issue the notice.

Held, also, that mandamus was the proper mode of enforcing the issue of the notice.

THIS was a motion for a writ of mandamus, to be directed to the Hon. A. S. Hardy, Provincial Secretary of the Province of Ontario, commanding him forthwith to issue a notice under his signature, pursuant to the terms of sec. 5, sub-sec. 18 of 27 & 28 Vic. (1864), ch. 23, of the late Province of Canada, stating that a by-law of the said company had been passed increasing the capital stock thereof by $300,000, making the total capital stock $500,000, and declaring the number and amount of the shares of the new stock to be 3000 shares of $100 each, and that none of the new stock had been subscribed, and nothing paid in in respect thereof, and that a copy of such by-law duly authenticated had been filed with him as such Provincial Secretary, in order that the company might require and cause the notice to be published as required by law; and why the company should not be paid their costs of, and incidental to this application, on the following grounds, amongst others:

That the duties of the Provincial Secretary in respect to the issue of the notice under the statute are of a ministerial character only.

That the Provincial Secretary had no discretion to refuse to issue the notice for publication.

That it was the statutory duty of the said Provincial Secretary to issue the notice, the formal requirements of the statute antecedent thereto having been complied with; and on grounds disclosed, &c.

During Hilary sittings, February 16, 1886, the motion was argued.

Robinson, Q. C., and *Lash*, Q. C., supported the motion, and referred to *Lindley* on Partnership, 3rd ed., 612-3, 619; *Thring* on Joint Stock Companies, 4th ed., 112; *Stevens* on Joint Stock Companies, 153; *Beatty* v. *North-Western Transportation Co.*, 11 A. R. 205; *Rex* v. *Lords of Treasury*, 4 A. & E. 286; *Re Baron de Bode*, 6 Dowl. 776; *Regina* v. *Lords Commissioners of Inland Revenue*, 12 Q. B.D. 461; *Kinloch* v. *Secretary of State for India*, 7 App. Cas. 619; *Regina* v. *Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387; *Regina* v. *Lords Commissioners of the Treasury* 16 Q.B. 357; *Regina* v. *McFarlane*, 7 S. C. R. 216, 244-5; *Viscount Canterbury* v. *Attorney-General*, 1 Phil. 306; *Feather* v. *Regina*, 6 B. & S. 257; *Regina* v. *McLeod*, 8 S. C. R. 1, 35-37; *Lacon* v. *Hooper*, 6 T. R. 224; *Schinotti* v. *Bumstead*, 6 T. R. 646; *Barry* v. *Arnaud*, 10 A. & E. 646; *Butterworth* v. *United States ex rel. Hoe*, 112 S. C. R. (U. S.) 50; *Common Council of Hudson* v. *Whitney*, 53 Mich. 158; *State* v. *Turpen*, 24 Am. Law Reg. 622; *Tapping* on Mandamus, pp. 80, 164; *High* on Extraordinary Legal Remedies, secs. 42-8, 80-8, 118-28.

Æ. Irving, Q.C., for the Provincial Secretary.

McCarthy, Q.C., and *Neville*, for the dissatisfied shareholders, referred to *Regina* v. *Lords Commissioners of the Treasury*, L. R. 7 Q. B. 394; *Re Grand Junction R. W. Co. and Corporation of Peterborough*, 6 A. R. 339;

Re Commonwealth of Kentucky v. *Dennison*, 24 Howard 66; *The People* v. *Hatch*, 33 Ill. 9; *Tapping* on Mandamus, pp. 63, 81, 112, and cases in note, 115, 265, *Todd's* Parliamentary Law, 392, 394, 458, C. S. U. C. ch. 23, sec. 119, R. S. O. ch. 134; *Decatur* v. *Paulding*, 14 Peters 497.

Robinson, Q.C., in reply, referred to R. S. O. ch. 150, sec. 18; Act of 1877, 40 Vic. ch. 43, sec. 23 (D.); *The State of Ohio ex rel. Whiteman* v. *Governor*, 5 Ohio 528; *High* on Extraordinary Legal Remedies, secs. 63, 110, 119, 128-9; *Beatty* v. *North-Western Transportation Co.*, 11 A. R. 205, 218; *Christopher* v. *Noxon*, 4 O. R. 672; *Re Stratford, &c., R. W. Co. and Corporation of Perth*, 38 U. C. R. 112.

March 6, 1886. ROSE, J.—I will consider first the objections raised to the application as I apprehended them.

Mr. Irving, who appeared for the Provincial Secretary, admitted that proceedings by a petition of right would be wholly inapplicable.

Sir William Ritchie, C. J., in *Windsor and Annapolis R. W. Co.* v. *Regina and the Western Counties R. W. Co.*, 10 S. C. R. 335, at p. 357, states when a petition of right would be an appropriate remedy. He says: "That a petition of right is the suitable and proper remedy for the subject, when by misinformation (as in this case) or inadvertence the Crown has been induced to invade the private rights of any of its subjects, or where the Crown has in its hands property to which the subject has a legal title, ancient and modern authorities, in my opinion, unquestionably establish." And in *Regina* v. *McFarlane*, 7 S. C. R. 216, at p. 239, it is said that a petition of right lies only to enforce claims upon contract. See also *Regina* v. *McLeod*, 8 S. C. R. 1, at p. 68.

He also admitted that the remedy in this case could not be by action. That is apparent, for damages are not what is sought, and there would be no basis upon which they could be assessed.

He argued, however, that the Provincial Secretary was

vested with a discretion: that his duties were not ministerial, but political, *i. e.*, having relation to the policy of the Government; and that, if there was any discretion, this application must fail.

I will consider the last objection later on.

Mr. McCarthy, who with Mr. Neville was heard by the Court on behalf of the dissentient shareholders, objected:

1. That there was no evidence that the Provincial Secretary of this Province is the officer appointed to perform the duties of the office of Provincial Secretary named in the 27 & 28 Vic. ch. 23.

This objection was, it seems to me, completely answered as follows:

Section 135 of the B. N. A. Act provides that "until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this Act vested in or imposed on the * * secretary and registrar of the Province of of Ontario * * * by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them."

Clause 7 of the affidavit upon which this application was founded stated, "that on the 1st day of December, 1885, I deposited and filed at the office of the Provincial Secretary of the Province of Ontario, at Toronto, being the proper officer in that behalf, a duly authenticated copy of the said by-law last hereinbefore mentioned."

This statement remains unanswered.

Moreover the patent under which the company was incorporated, was dated after Confederation, and is certified under the hand of the then Provincial Secretary, now the learned Chief Justice of this Court; and the Provincial Secretary, who appears by counsel on this motion, assumes jurisdiction in the premises. I think we must assume he has been duly appointed to discharge the duty.

2. That the by-law was not passed for "the carrying

out of the objects of the company," as required by sec. 16 of ch. 23.

I think on this motion we must assume to the contrary, and are not at liberty to enquire whether this is so or not, as, on the material before us, it appears that the Attorney-General's report to the committee of council was as follows:

REPORT.

"The undersigned has considered the application of the Massey Manufacturing Company for an increase of capital from $200,000 to $500,000. The application is opposed by the minority of the shareholders on grounds which appear in the papers.

"The undersigned has heard all parties in person and by counsel.

"The applicants for the increase claim that the matter is to be determined by and under the Statute of the late Province of Canada, 27 & 28 Vic. ch. 23, and that the applicants having complied with the directions given in the 16th article of section 5, the Provincial Secretary cannot refuse to issue the notice therein mentioned, whatever view either he or your Honour in council may form as to either the good faith or the propriety of the increase.

"According to the statute referred to the effect of the notice, after its publication in the *Canada Gazette*, is that from the date of the notice the capital stock is increased to the amount and in manner and subject to the conditions set forth in the by-law of the company.

"The undersigned is of opinion that the applicants have no right to insist on receiving the notice referred to for publication, if there is thought to be reason for witholding the same, either absolutely or without some modifications of the by-law.

"The undersigned is of opinion that the increase in question would not under all circumstances appearing in the papers be granted by the Legislature in a bill for the purpose, without some further provision being made for the protection of the minority; and the applicants having refused to consent to any modifications in the by-law or to any other provision for the purpose, the undersigned is of opinion that it is the duty of the Provincial Secretary to decline issuing the notice; and he recommends that he do decline accordingly.

"(Signed,) O. MOWAT."

12th January, 1886.

It will be observed that the Attorney-General assumes that the applicants have complied with the directions given in the 16th sub-section, and rests his opinion on the ground that the Provincial Secretary has a discretion to judge as to the propriety of the action of the company.

If the question were for our decision I could not without more information than is given us on the material before us, say that, if the object is as stated by the dissentient shareholders, viz.: "to go into the manufacture of malleable iron, and buy other premises," such object was without the scope of the business of "manufacturing agricultural machines and implements of all kinds." For all that appears it might save a large percentage on the cost of the necessary material.

It seems to me that the questions before us are two:

1. Will a writ of mandamus be granted against an officer such as the Provincial Secretary, if his duties be commanded by statute, and are ministerial?

2. Is the duty, the performance which is here sought to be enforced, ministerial? for it is admitted on behalf of the applicants that, if judicial, the application must fail.

On this application it seems to me we therefore have nothing to do with the question of hardship or injustice. If the company is acting within its powers, the case of *Beaty* v. *North-Western Transportation Co.*, 11 A. R. 205, and the cases there cited, especially *Pender* v. *Lushington*, 6 Ch. D. 70, will shew the extent to which the courts go in refusing to interfere in the matter of internal management of companies. If the company is acting outside of its powers, or in fraud of the minority, the courts are open and full redress can be obtained.

In this case the company declines to allow such questions to be tried and disposed of in any other forum unless it is compelled to do so.

3. Mr. McCarthy further urged that the naming of the Provincial Secretary—a cabinet officer—implies that the duty to be performed is judical in its nature.

This must be considered under one or other of the above heads.

The first question, as to whether the Provincial Secretary is liable to be commanded to perform the duty assigned, is one which must be answered without the assistance of any decided case directly in point.

In no case cited and at all similar has a writ of mandamus been granted save, in *Rex* v. *Lords Commissioners of the Treasury*, 4 A. & E. 286; and the authority of that case has been shaken, if indeed it has not been overruled, by *Regina* v. *Commissioners of Inland Revenue*, 12 Q. B. D. 461. Nor is there any case which decides that where the statute directs an officer, occupying a position like that of the Provincial Secretary, to perform a purely ministerial act, he may not be required by the court to perform it at the instance of one interested and who will suffer from its non-performance.

Many American authorities were cited; but much assistance cannot, I think, be derived from them, for the reasons pointed out by Mr. *High* in his work on Extraordinary Legal Remedies, 2nd ed. At p. 7 he says: "In this country, however, a mandamus cannot in any strict sense be termed a prerogative writ; and much confusion of ideas has resulted from the efforts of many of the courts to attach prerogative features to the remedy, as used in the United States. This confusion has resulted chiefly from a failure to properly discriminate between the English and American systems. Under the English constitution, the King is the fountain and source of justice; and where the law did not afford a remedy by the regular forms of proceedings, the prerogative powers of the Sovereign were invoked in aid of the ordinary judicial powers of the courts, and the mandamus was issued in the King's name and by the Court of King's Bench only, as having a general supervisory power over all inferior jurisdictions and officers. Originally, too, the King sat in his own court in person and aided in the administration of justice, and although he has long since ceased to sit there in person, yet by a fiction of law he is still so far presumed to be present, as to enable the court to exercise its prerogative powers in the name and by the authority of the Sovereign."

In the United States the writ "is regarded as in the nature of an action by the person in whose favor the writ is granted, for the enforcement of a right in cases where

the law affords him no other adequate means of redress:" p. 8.

He also says, at p. 8, that in England "there seems to be a growing tendency to divest the writ of its prerogative features, and to treat it in the nature of a writ of right."

On page 9, he states the result of the decisions in the United States Courts, which he states to be utterly irreconcilable: "Upon the one hand it is contended, and with much show of reason, that as to duties of this character the general principle allowing relief by mandamus against ministerial officers should apply; and the mere fact of ministerial duties having been required of an executive officer should not deter the courts from the exercise of their jurisdiction. Upon the other hand it is held that under our structure of government with its three distinct departments, executive, legislative and judicial, each department being entirely independent of the other, neither branch can properly interfere with the duties of the other; and that as to the nature of the duties required of the executive department by law, as to its obligation to perform those duties, it is entirely independent of any control by the judiciary, while the former theory has the support of many respectable authorities, and is certainly in harmony with the general principles underlying the jurisdiction as applied to purely ministerial officers, the latter has the clear weight of authority in its favor, and may be regarded as the established doctrine upon this subject."

It seems to me from the above quotations that if the two systems had been the same the result would have been the prevalence of the first view, as the second is rested entirely upon the structure of government peculiar to the United States.

It may be put thus: "The Queen's Most Excellent Majesty, by and with the advice and consent * * of the Lords, spiritual and temporal, and Commons in Parliament assembled," and by the authority of the same enacts that a certain one of her subjects shall do or perform a

purely ministerial duty. Her Majesty present in court is informed that such person refuses to perform the duty as commanded, and her Majesty sends forth her letters or writ "mandamus;" and, pursuant to such command, the refusal is withdrawn or the disobedience is punished.

It follows clearly that if the duty is that of the Crown, the subject cannot ask the Crown to command itself. If the duty is judicial the Crown has vested the subject with discretion, and will not interfere at the instance of another subject, for such discretion is in one sense the discretion of the Crown; and if the officer is indiscreet, to the Crown alone must he answer. The investing him with discretion does not entitle others to guide him in the exercise of such discretion; but, if ministerial, the Crown being dominant and supreme, the duty must be performed. To Her Majesty no subject ceases to be a subject because called to occupy a high position in the state, and, although occupying such a position, may be required to perform any service his sovereign may require. In such a view, the nature of the assistance being so high, it follows that the assistance must not be invoked when any of the other modes of redress can be resorted to.

It is clear also that as the Crown cannot be required by itself to command itself, so it cannot be asked to command its officers to perform duties for the performance of which the Crown is responsible; for thus through its officers the Crown would be commanded.

Such were the cases cited of *Re Baron de Bode*, 6 Dowl. 776, and the case above cited from 12 Q. B. D. 461; *Palmer* v. *Hutchinson*, 6 App. Cas. 619; *Kinloch* v. *Secretary of State for India*, 7 App. Cas. 619; *Regina* v. *Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387.

In the case of *Regina* v. *Lords Commissioners of the Treasury*, 16 Q. B., 357, mandamus was held to lie, but was refused on the facts.

The Judges were Lord Campbell, C.J., Patteson, Coleridge, and Wightman, JJ. Sir John Romilly, attorney-general, represented the commissioners, with Sir A. J. E. Cockburn,

solicitor-general, M.D. Hall, and Welsby; while Merewether, Sergeant, Sir J. Thesiger, Peacock, Henderson, and Seare, represented the applicants.

The case is of interest as involving the right of the representatives of Queen Adelaide, consort of King William IV., to a proportionate part of the quarterly payment of the annuity for the quarter in which she died.

It was held that the annuity was not apportionable, and so the writ was refused.

Lord Campbell, C.J., said, at p. 360: "The claim here being for the arrears of an annuity granted under an act of parliament and charged upon the consolidated fund, we think the application for a mandamus is regular. The right, if it exists, is a legal right; and there is no efficient remedy without the aid of this prerogative writ; Stat. 4 & 5 Wm. IV. ch. 15, sec. 13, has enacted that the payment of such an annuity can only be obtained by the warrant of the Lords of the Treasury; and the duty of granting the warrant, where the payment is due, is imposed upon them."

Blackburn, J., in the cited case from L. R. 7 Q. B. 387, speaks somewhat doubtingly of this case, saying it was not much argued. He does not further discuss it as the statute upon which it rested had been repealed; but does not suggest that the office of the Lords Commissioners in any way saved them from such a writ being issued if the duty were ministerial. On the contrary, at p. 397, he says: "The question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, namely, to issue a minute to pay that money; because it seems to me clear that we ought to grant a mandamus if there is such a statutory obligation, particularly where the application is made on behalf of persons who have a direct interest in the matter."

And in *Kinloch* v. *Secretary of State for India*, above cited, Lord Selborne, L. C., said, at p. 622: "It is said, and I dare say rightly said, that for some other purposes, under particular acts of parliament which define those purposes, he may be in like manner sued."

Lacon v. *Hooper*, 6 T. R. 224, was an action against commissioners of the customs for not making an order on the receiver general of the customs to pay the plaintiff a premium of £700, to which the plaintiff claimed to be entitled under 28 Geo. III. ch. 20.

No question was raised as to their liability to be sued if they had wrongfully refused to make the order.

28 Geo. III. amended 26 Geo. III. ch. 50, by sec. 13 of which it was enacted: "That in case all and every the several rules, regulations and restrictions, prescribed and directed by this act, shall have been observed and fully complied with, it shall and may be lawful for the commissioners of his Majesty's customs in England, or any four or more of them * * to order the receiver general of his Majesty's customs in England * * to pay out of any money in his hands, arising by any duties under their management, to such person as shall be legally entitled thereto any of the premiums hereinbefore granted."

It will be noted that the commissioners had imposed upon them the duty of seeing that the rules, &c., had been observed, and that the persons applying were legally entitled thereto, prior to ordering the receiver general; and also that the words, "it shall and may be lawful," were construed as imperative.

It would seem therefore reasonably free from doubt that the mere holding of an executive office, a cabinet office, would not prevent a writ issuing if the statutory duty be, ministerial. Then was the duty of the Provincial Secretary, the performance of which is sought here to be enforced, a ministerial duty; and will it make any difference if it be found that the ministerial act is only to be performed after certain judicial or quasi judicial acts?

Before examining the statute in question and the arguments of counsel, we may find assistance from one or two decisions to which we have been referred.

In *Schmotti* v. *Bumsted*, 6 T. R. p. 646, the defendants were managers and directors appointed by 33 Geo. III. ch. 62, to prepare tickets and oversee the drawing in

a lottery approved by that act. They were sued for neglect of duty in not declaring the plaintiff's ticket to be the last drawn, whereby the plaintiff was deprived of the benefit of £1,000 belonging to his said ticket.

By section 10 of the act, the managers and directors are directed to "examine, adjust, and settle the property" in the tickets. By section 11, "And if any contention or dispute shall arise in adjusting the property of the said fortunate ticket, the major part of the said managers and directors agreeing therein shall determine to whom it doth or ought to belong."

By section 14, they were required to take a certain oath to execute their trust faithfully, to prevent any sinister practice; and, to the best of their judgment, to declare to whom any prize, lot or ticket of right does belong according to the true intent and meaning of the said act.

The last drawn ticket was to entitle the owner to the prize.

The plaintiff's ticket was in fact last drawn, but there was another ticket which was missing, and in fact was never drawn.

The defendants decided that the plaintiff's ticket was not to be considered as the last drawn ticket.

At the trial there was a verdict for the plaintiff, against which there was a motion. The judges were Lord Kenyon, C. J., Ashurst, Grose, and Lawrence, JJ. The counsel for the plaintiff was Erskine, and for the defendants Law and Wood.

It was argued that the decision was final, and that the commissioners were not subject to an action for mistake of judgment; and further that their decision was right.

Lord Kenyon, C. J., said he had no doubt that the plaintiff was entitled to the prize, and that the defendants were liable for neglect of duty. His language, at p. 649, was: "The commissioners of the lottery are mere ministerial officers. It might at least be said with as much reason that a sheriff in returning members of parliament is a judge; and though in *Ashby* v. *White*, 2 Lord Raym. 943, 950, Mr. Justice

Powys said that the sheriff was *qua* a Judge, Lord Holt, C. J., said he was neither a Judge nor anything like a judge, but a mere ministerial officer. So here the defendants were acting ministerially, and this action against them may be supported for their neglect of duty."

Lawrence, J., said: "Then if the defendants be only ministerial officers, they are liable to an action; and a sheriff, who is liable to an action for a false return of members to parliament, is as much a judicial officer as these defendants."

Barry v. *Arnaud*, 10 A. & E. 646, was an action against a collector of customs who was held to be a substantive and immediate officer of the Crown, whose functions were ministerial; and therefore he was held liable in an action for non-feasance in the exercise of his office, as for refusing without payment of excessive duty to sign a bill of entry, which was under the act a warrant for delivery of the articles on which duty was paid.

The questions for the court were, (1) whether the tender of duty was sufficient; (2) if so, whether the defendant was liable to the action. The arguments for the defendant are reported at great length, and refer to most of the cases previously decided. Counsel for defendant, at p. 660, stated the result of the judgment of Coleridge, J., in *Re Baron de Bode*, as follows: "If the statute expressly ordered what the plaintiff has required, a mandamus would lie though the defendant was the servant of the Crown."

I note this although it more properly bears on the point we have first considered than on the question of whether the duty here required is ministerial.

Lord Denman, in giving judgment, at p. 669, said: "And we are of opinion that such action is maintainable, although no malice or ill motive is imputed to the defendant;" and at p. 671: "The nature of those duties is next to be considered; and as regards the present question they are plainly and merely ministerial. He is, according to the statement, to collect the proper amount of duty and sign the bill of entry. This is not the less a ministerial duty

because in some instances, as in the present, it may not be clear upon the face of the statute what the proper amount of duty may be. Difficulties both of law and fact arise repeatedly to ministerial functionaries, such as the sheriff, in the discharge of his duties; but these do not alter their nature. The defendant, then, is a public ministerial officer, and, being so, he is responsible for neglect of his duty to any individual who sustains damage by such neglect." He then refers to *Schinotti* v. *Bumsted*, 6 T. R. 646, as "a strong authority to this effect, the facts in that case respecting the commissioners of the lottery tending much more to raise a doubt whether the defendants had not a judicial discretion entrusted to them;" and points out that in *Lacon* v. *Hooper*, 6 T. R. 224, "it was not questioned but that even they" (the commissioners of customs) "would be liable to the action if the neglect of duty were made out."

It would seem clear on principle and authority that the duty of an officer may, up to a certain point, be judicial, and afterwards ministerial; and though the performance of the duty while it remained judicial, could not be enforced, the moment the judgment has been exercised and that which remains to be done becomes solely ministerial, its performance may be commanded.

And so it was stated in the case of *Butterworth* a commissioner of patents, appellant, and *The United States ex rel. Hoe and others*, reported in 112 S. C. R. (U. S.), at p. 50, where the District Court of Columbia awarded a peremptory writ of mandamus commanding Butterworth, the commissioner of patents, to receive the final fee of $20 tendered to the relators, and cause letters patent of the United States to R. Hoe & Co., to be prepared and sealed. The judgment of the court was delivered on 3rd November, 1884, by Matthews, J. He said, at is 68: "Some question is made as to the remedy. We think, however, that mandamus will lie, and that it was properly directed to the commissioner of patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it

before the secretary for his signature, and to counter-sign it, were all that remained, and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the secretary to reverse and set aside the decision on the merits in favour of the relators. This we have held not to be a valid excuse."

We now come to consider the provisions of the statute in question.

By 13 & 14 Vic. ch. 28 (1850), provision was made for the formation of joint stock companies. Five or more persons might make and sign a declaration in writing in duplicate, which they might acknowledge before the registrar of the county or his deputy, who were authorized to receive the acknowledgment and grant a certificate thereof. One of the duplicates was to be filed in the office of the registrar, and the other, with the proper certificate of the acknowledgment of filing and registration thereof endorsed, was to be forthwith transmitted to and filed in the office of the secretary of state.

By section 2 compliance with such formalities constituted incorporation.

No discretion was exercised by the executive or government over the formation of such corporation. All persons complying with the formalities became a body corporate. The registrar alone supervised the declaration, and his duties could hardly be said to be judicial. In terms he was not required to see that the statement was in proper form. The incorporation was made to depend on compliance with the formalities; and compliance seemingly was left to the risk of the parties desiring to form a company.

There was no power to increase the stock. This was given in 1856 by sec. 1 of 19 Vic. ch. 12, by the provisions of which the trustees were authorized to call a general meeting of the stockholders, who might authorize the passing of a by-law for that purpose.

Upon the passing of the by-law those who desired to

become new subscribers might sign a declaration in duplicate, to be acknowledged before the county registrar or his deputy, and to be "certified and filed in the office of the Provincial Secretary and the county registry office" in the manner above described for obtaining incorporation: sec. 2.

It will thus be seen that no supervision was exercised over the increasing of the stock, save that the formalities required by the act were to be complied with.

These acts were consolidated, and may be found in C. S. C. ch. 63.

In 1864, the act in question 27 & 28 Vic. ch. 23, was passed, authorizing the "Incorporation by letters patent of companies for manufacturing, mining and other purposes," &c.

By section 1, "The Governor in Council *may*, by letters patent, * * grant," &c.

By section 3. Before letters patent are issued, * * the applicants therefor must "*prove to the satisfaction* of the minister" certain things pointed out by the section.

Sub-sec. 7 of sec. 5, gives to the directors of the company full power "to administer the affairs of the company," and to "make by-laws," &c.; and by sub-sec. 16, to "make a by-law for increasing the capital stock of the company to any amount *which they may consider requisite* in order to the due carrying out of the objects of the company; but no such by-law shall have any force or effect whatever, until after it shall have been sanctioned by a vote of not less than two-thirds in amount of all the shareholders at a general meeting of the company duly called for the purpose of considering such by-law, nor until a copy thereof duly authenticated shall have been filed as hereinafter mentioned with the Provincial Secretary or such other officer as the Governor-in-Council may direct."

Sub-sec. 18. "The company may, within six months after a duly authenticated copy of such by-law has been filed with the Provincial Secretary, or such other officer as the Governor-in-Council may have named for the purpose

require and cause a notice under the signature of the Provincial Secretary or other proper officer, to be inserted in the *Canada Gazette*, that such by-law has been passed and filed as aforesaid, and stating the number and amount of the shares of new stock, the amount actually subscribed, and the amount paid up in respect thereof, and from the date of such notice the capital stock of the company shall be and remain increased, to the amount, in the manner and subject to the conditions set forth in such by-law."

In 1869, by 32 & 33 Vic. ch 13, secs. 10 to 15, any by-law for the increasing or decreasing of capital was made subject to confirmation by supplementary letters patent. To entitle the applicants to which "they must produce such by-law, and establish to the satisfaction of the Secretary of State, or of such other officer as may be charged by order of the Governor-in-Council to report thereon, the due passage and sanction of such by-law, and the *bonâ fide* character of the increase or decrease of capital thereby provided for: (3) and to that end the Secretary of State or such officer may take and keep of record any requisite evidence in writing under oath or affirmation, and may administer every requisite oath or affirmation."

Similar provisions were introduced by the legislative assembly of this Province by 37 Vic. ch. 35, secs. 12 to 17.

It would thus seem that at first companies might be formed and capital increased by merely complying with certain formalities. That to increase the capital the previous consent of the shareholders was necessary before any by-law could be passed; and there was further to be made a declaration before and certified by the registrar and filed in his office and that of the Provincial Secretary.

That next the legislature assumed control over the formation of such companies as were incorporated by letters-patent; and such patents were no doubt issuable only at the will of the Crown; but they left the increasing of the stock to the will and judgment of the directors, to whom was given full power to administer the affairs of the company, but required their action to be sanctioned by

the shareholders after, instead of being authorized before, the passing of the by-law; and having changed the mode of incorporation, now no longer required a declaration to be made before and certified and filed by the registrar, but, instead, required them to file the by-law with the Provincial Secretary, who, it may be assumed, is by the statute charged with the duty of enquiring into the observance of certain formalities, for the notice which the company may "require and cause," under his hand, to be inserted in the *Gazette*, must state that certain formalities have been complied with.

It will be observed that the Provincial Secretary is not in direct terms charged with the duty of ascertaining that the formalities have been complied with. If he has such duty it is only by inference from the fact that the notice to be signed by him states certain formalities to have been complied with; and, it seems to me, that the same inference that charges him with such duty also charges him with the duty of signing the notice if these formalities have been complied with.

Now what is the notice to state?

1. The number and amount of the shares of the new stock.

Sub-sec. 16 places the limit to be what the directors may consider requisite, thus vesting in them the discretion subject of course to the sanction of the shareholders. 2. The amount actually subscribed and the amount paid in respect thereof. The act does not require any shares to have been subscribed or any amount to have been paid in.

There is nothing in the notice as to whether the increase was "requisite to the due carrying out of the objects of the company." As to that the discretion was, as I have pointed out, vested in the directors.

If the sole duty of the Provincial Secretary was to sign the notice, and to see before he signed it that it stated the truth then, his office was in the clearest manner merely ministerial, possibly not a whit more responsible or judicial, even if as much so, as was the office of the registrar who

was to take the statement or declaration provided by the former acts.

And is not this made the more clear when we see that when the legislature desired to assume control over the increase or decrease of stock they required that the applicants must establish to the satisfaction of the officer, not only the observance of the formalities, but the *bonâ fide* character of the increase or decrease, and authorized that officer to keep a record of the evidence, and to administer an oath or affirmation?

But is the Provincial Secretary commanded to sign the notice?

The language certainly is not well chosen; but if the increase can only be upon insertion of the notice,—although that is not so said in so many words, and what is said seems contradictory, for it is said the by-law shall have no force or effect until sanctioned by the shareholders "nor until a copy thereof duly authenticated shall have been filed as hereinafter mentioned with the Provincial Secretary;" and sub-sec. 18 says, "and from the date of such notice," &c., not the date of its insertion, unless that is the fair reading of the words; and, if such notice can only be inserted when signed by the Provincial Secretary, if any force or effect is to be given to the by-law,—the section must be read as requiring the Provincial Secretary to sign the notice.

What force and effect are to be given to the words "require and cause a notice under the signature of the Provincial Secretary to be inserted?" It seems to me we must read the whole clause fairly as requiring the Provincial Secretary to sign the notice—if the by-law has been passed and filed, and if the notice give the further information required by sub-sec. 18.

Is the remedy by mandamus the proper one? Counsel have, as I have stated, admitted that the remedy could not be by petition of right or by action, and no other form of action or application was suggested.

If there is no other form of proceeding, and the duty is clear, then mandamus is the proper proceeding.

To quote the words of Mr. *High*, at p. 26: "But if on the other hand a clear and specific duty is positively required by law of any officer, and the duty is of a ministerial nature involving no element of discretion, and no exercise of official judgment, mandamus is the appropriate remedy to compel its performance in the absence of any other adequate and specific means of relief, and the jurisdiction is liberally exercised in all such cases."

In my opinion the applicants have brought themselves well within the above statement of the law, and are entitled to have the relief asked for.

CAMERON, C. J.—I am of the same opinion. At the close of the argument my impression was very strongly in favor of the right of the applicants to obtain the mandamus. Further consideration, and a perusal of the history of the legislation relating to joint stock companies made by my learned brother Rose in his judgment which I had the opportunity of reading, and examination of the authorities, have only served to confirm my first impression.

I will only briefly add to what my learned brother has said, that my concurrence in his opinion is based on the following considerations: The applicants' charter, in conformity with the act under which it was granted, expressly gives to them the right to increase their stock capital subject to no condition, requirement, or limitation, other than the approval of the requisite majority of the shareholders. No one under the law, not a shareholder, is given the right to say such increase is unwise or hurtful to the interests of the shareholders as a whole or to a number of them. A majority of the required number controls the minority, and the latter, if the majority is acting within and under the law, must submit to the will of the majority. This being so, and that it is so does not admit of doubt under the authorities that have been referred to, the company were in the position, after the passing of the by-law and filing it, to have it made operative by publishing notice thereof in the Canada Gazette, but before the notice could be pub-

lished it required to give authenticity to it to be be signed by the officer indicated by the statute. That officer, in the present case, no other person having been named by order of the Governor in Council, is the Provincial Secretary. The statute assigns to him no duty in connection with the matter, except that of seeing that the by-law has been approved of by a vote of not less than two thirds of the shareholders at a meeting duly called for the purpose, and that a duly authenticated copy of the by-law has been filed with him.

This duty is not one of direct imposition but one by implication, and that of signing the notice required to be published. He is certainly not charged with the duty of determining whether the increase is beneficial or injurious.

There is no reason why he should import himself into the company's domestic management. Then to the enjoyment of the right granted to the company an act is required to be performed by him under the statute.

The act required is, to my mind, purely ministerial There is nothing judicial, nothing political in it, nothing that might not as well be performed by any named person. It was an act required to be done by some one by the legislature, and as the act was passed for the future as well as the present, it was thought expedient to indicate as the proper person the incumbent of an office that was likely to endure, so that there would always be some one to perform the act necessary to insure to the company the right conceded to it by its charter and the Legislature. The Provincial Secretary, moreover, being the official through whom the charter itself is obtained, was the most appropriate permanent official to perform this ministerial act.

The company, if he will not perform it, is deprived of the right conceded to it. Then how is the right to be enforced? An action will not lie; and, if it would, it would not furnish an adequate and appropriate remedy. Under such circumstances, it seems to me, the performance of the duty can only be enforced by means of the high and

beneficial remedy by mandamus. This writ is not grantable as of absolute right. It is a discretionary process. The discretion in giving it or withholding it is not, however, arbitrary. It must be exercised in any case with regard to the circumstances and upon legal considerations. If it could have been shewn that the by-law in this case, though passed was not legally passed, the writ would have to be denied, because the court could not properly be asked to direct the doing of any act that would be giving countenance to an illegal and ineffectual proceeding; but it would not be proper for the court to deny the writ to the applicants in the present case, on the ground that the minority of the shareholders entertain apprehensions that the increasing the capital of the company will be injurious to them, any more than it would be right for the court, at the instance of one of the shareholders, to prohibit by injunction the increase of stock on that ground. That that would not be a ground for such injunction was conceded by counsel on the argument; and there is no doubt the concession was properly made.

We have then here an officer by statute directed by necessary implication, under sub-sec. 18 of sec 5 of the Joint Stock Companies Act, 27 & 28 Vic. ch. 23, to perform an act. He declines to do it, and claims the right to exercise a discretion not vested in him—the refusal deprives the applitants of a right conferred upon them by their charter, and by statute—there is no adequate or appropriate remedy other than by mandamus to enforce the performance of the duty that enables the applicants to enjoy and exercise their right, which are the things needful to call for the exercise by the court of its inherent power to enforce the discharge of the duty by mandamus.

The writ must therefore be granted.

I need hardly say if the signing of the notice by the Provincial Secretary was an act that in the remotest degree affected or could affect the policy of the government, or the proper control or management of any department of the government, the courts could not interfere.

This is undeniably clear; but it is equally clear the Government could not, nor could any officer of it, convert the doing a mere ministerial act, which under the law a private individual was entitled to have performed, into one of policy to avoid the performance of such act. Nothing would be more dangerous to the public interests and safety than to permit such a course, which would be a virtual usurpation of the functions of the courts and an interference with the administration of justice. I do not make these remarks with the view of reflecting upon the action of the Provincial Secretary in declining to sign the notice, as he was requested to do in the present instance, for doubtless in so doing he was actuated, as also was the Attorney-General in advising him to take this stand, by the best of motives, and the proper desire of preventing what he deemed might prove an injustice to those shareholders who think the increase of the capital of the company will prove injurious to their interests. At the same time, it is manifest, it is more fitting that private rights should be protected through the legitimately constituted tribunals of the country, rather than by the political executive.

GALT, J., concurred.

Motion allowed. (*a.*)

See 49 Vic. ch. 16, sec. 32 (O.)—REP.

(*a.*) This case has been taken to the Court of Appeal.—REP.

[CHANCERY DIVISION.]

IMPERIAL BANK OF CANADA V. METCALFE.

Vendor and Purchaser—Conditions of sale—Time for objections—Statute of Uses—Discharge of mortgage—Compensation—Specific performance.—Presumption of payment of old mortgage.

When on a sale of lands the contract provided that the purchaser should be allowed ten days to make requisitions on title, and time was made of the essence of the contract, and the purchaser made certain objections within the ten days, and the answers not being satisfactory refused to complete, whereupon the vendor sued for specific performance and obtained the usual judgment.

Held, that the purchaser could not raise in the master's office fresh objections not raised within the ten days mentioned in the contract.

In examining the title the purchaser found a mortgage, which matured over 80 years ago, apparently outstanding, and required the vendors to produce the discharge of it, which they declined to do.

Held, that, under all the circumstances, the mortgage must be presumed to have been paid.

Certain owners of the equity of redemption in lands by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto, and to the use of B., his heirs and assigns." This was dated July 17th, 1875, and registered July 21st, 1875.

Held, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B.

The equity of redemption in the said deed conveyed was subject to a mortgage, a discharge of which was registered on July 21st, 1875, the same day as the deed.

Held, that the deed must be assumed to have been delivered before it was registered, and the discharge of the mortgage on registration operated as a re-conveyance to B., who was the assignee of the mortgagor within the meaning of the statute respecting the effect of registering a discharge of a mortgage.

M. having purchased lot 14 for a building lot resisted completion of the contract on the ground that a party wall of the width of nine inches had been built on the line between lots 14 and 15, which at some places came over on to lot 14 to the extent of six inches, and at another place to the extent of nine inches, and that he could not get rid of the wall without engaging in a lawsuit with the owner of lot 15, and that the party wall was not suitable to the class of buildings which he desired to put up, and was worse than useless to him. The evidence shewed the wall did not depreciate the value of the land.

Held, that this being so, and under all the circumstances of this case, specific performance must be decreed, though the matter complained of might have been proper for compensation, had such been sought under the condition of sale relating thereto.

THIS was an appeal from the report of the Master in Ordinary in this action, which was for specific performance of a contract for the sale of lot 14, as delineated on a certain

plan of part of lot 3 in the city of Toronto, sold by the plaintiffs, the Imperial Bank of Canada, at public auction by virtue of a power of sale contained in a mortgage of the said lands of which they were the holders.

The defendant, James Metcalfe, admitted the contract in his statement of defence; but alleged that the plaintiffs had failed to shew a good title to the said lands, and had failed to answer certain reasonable requisitions on their alleged title, and, by way of counterclaim, asked for a return of his deposit paid to the plaintiffs at the time of sale.

The sale took place on November 10th, 1883, subject to conditions of sale which, so far as material, were as follows:—

5. The purchaser shall be allowed ten days to investigate the vendors' title at his own expense, during which time he must object to the title, if he has any objections thereto, the vendors only agreeing to produce the title deeds and papers relating to the said land which they have in their possession. Should any sufficient objection be shewn within the time allowed the vendors shall have a reasonable time to rectify the same, and if not so rectified, the deposit shall be returned and the sale cancelled; and the purchaser not having made any valid objections to the vendors' title within the time specified shall pay the balance of the purchase money as above provided and be entitled to his conveyance from the vendors.

The above stipulations as to title and time are hereby made the essence this contract, and no purchaser shall be entitled to call for the production of any abstract of title or any further or other proof of title, nor any deeds, papers, documents, or copies of any deeds, papers or documents in relation to the property sold, other than those before mentioned, and it shall not be necessary to tender a conveyance or any other instrument to the purchaser.

6. If any mistake be made in the description of the premises, or any other error whatsoever, shall appear in the above particulars, such mistake or error shall not annul the sale, but a compensation or an equivalent shall be given or taken as the case may require, such compensation or equivalent to be settled by three referees to be chosen as hereinafter mentioned, etc.

The contract, which was written at the foot of the conditions of sale, was as follows:—

Dated at Toronto, this 10th day of November, A. D. 1883.

I hereby agree to purchase the property described in the annexed advertisement as parcel No. 1, subject to the foregoing conditions of sale, for $1,600.

(Signed) JAS. METCALFE.

The purchaser delivered certain requisitions on the title. The second requisition was as follows: "Required discharge of mortgage No. 189, Small to Forsyth, and same registered." The vendors replied to this: "The vendors cannot be required to shew any title prior to 1820. This mortgage was made in 1801."

On November 17th, 1885, judgment by consent was given for specific performance, subject to a reference as to title, (regard being had to the terms of the contract), which reference was to the Master in Ordinary, further directions and costs being reserved.

As to the mortgage in the above second requisition referred to, it appeared that it matured over eighty years ago; that as it comprised over seventy acres of land, and the land in controversy was only a small portion thereof, the possession of the mortgage deed would not be with the mortgagor; that the land was dealt with by the mortgagor, and not sold by him as an equity of redemption but as land, and all subsequent dealings were with the land as land, and not as an equity of redemption; and that no claim was ever made on the mortgage or for possession. Certain statements in subsequent documents of title were also, as appears by the argument set out below, relied on by the vendors.

On March 13th, 1885, the master made his report, and the defendant now appealed therefrom. In their notice of appeal they alleged, as the first ground, that they were entitled to have their second requisition, above mentioned, complied with by the discharge of the mortgage, and stated other grounds of appeal, which, with their other requisitions and the contents of the master's report, are sufficiently stated in the judgment *infra*.

The matter came up on May 20th, 1884, by way of this appeal and also of further directions, before Ferguson,

J., when it was in part argued, and, after an enlargement, the argument was completed on December 17th and 18th, 1885.

J. Maclennan, Q. C., and *A. C. Galt*, for the appellant.

Under the terms of the contract here the purchaser having made one valid objection within the ten days, one objection that required clearing up, he was at liberty after the time had expired to make further objections, and he should have been allowed to make further objections in the master's office, which he was not. (*a*.) Notwithstanding all that occurred by way of contract, conditions, requisitions and answers, if the purchaser can or could have in the master's office put his finger upon a fatal defect, he had the right to do so. This the purchaser endeavoured to do, but the master ruled it out. As to the first ground of appeal, the vendors have not got the mortgage in question. If they had there would be a presumption in favor of their contention that it must be taken as discharged: *Velsor* v. *Hughson*, 9 A. R. 390; *Cooke* v. *Soltau*, 2 S. & S. 154, referred to in *Coote* on Mortgages, 3rd ed., p. 996. There was no court of equity in this province until 1837. This mortgage title may be now the true root of the title to this land. When the mortgage is not produced, and the mortgagee has not been in possession, there is no presumption of payment. As to the 5th and 6th grounds of appeal the legal estate being outstanding the deed 11,102 did not operate under the statute of uses so as to pass the fee to the parties of the fourth part: *Smith* on Real Property, 6th ed. part 2, title 8, ch. 1, s. 668. As to ground No. 7, we refer to *Watson* v. *Gray*, 14 Ch. D. 192. The sixth condition of sale makes no sufficient provision

(*a*) This point arose in connection with the second ground of appeal, which raised an objection to the title, which was not taken by the purchaser's requisitions before action. Counsel for the vendor objected therefore to its being gone into, urging that the judgment was by consent referring the title to the master with the then requisitions, in which this matter was not raised.

for such a case. Moreover no steps have been taken under it, and the time has elapsed. The purchaser is entitled to the whole of the land: *Ashton* v. *Wood*, 3 S. & G. 436; *Want* v. *Stallibrass*, L. R., 8 Ex. 175; *Shackleton* v. *Sutcliffe*, 1 Dr. & S. 609; *Nouaille* v. *Flight*, 7 Bea. 521; *Denny* v. *Hancock*, L. R., 6 Ch. 1; *Edwards* v. *McLeay*, Geo. Cooper 308; *Sharp* v. *Adcock*, 4 Russ. 374. The court cannot now entertain a question of compensation. After decree the case must be dealt with under the decree, which requires a title. We refer, also, to *Smith* v. *Robinson*, 13 Ch. D. 148; and in *Re Bannister*, 12 Ch. D. 131.

Bain, Q. C., and *Masten*, for the respondents.

The purchaser can only raise such objections as he raised within the ten days mentioned in the conditions of sale, and the Master had no power to go beyond them. As to the first ground of appeal, the vendors would not in any case be entitled to the possession of the mortgage in question. The *onus* is upon the purchaser of shewing that the mortgage was outstanding and unpaid. The title is shewn to have been all along transmitted by the mortgagor. As to the presumption of payment in the case of an old mortgage such as this, see *Chalmer* v. *Bradley*, 1 Jac. & W. 51, 62; *Wilson* v. *Allen*, 1 Jac. & W. 611, 617; *Dart's* V. & P., 5th ed., 323; *Cooke* v. *Soltau*, 2 S. & S. 154; *Emery* v. *Grocock*, 6 Mad. 54; *Coventry* on Conv. 264; *Doe ex d. McGregor* v. *Hawke*, 5 O. S. 496; *Lyon* v. *Reed*, 13 M. & W. 285; *Attorney-General* v. *Ewelme Hospital*, 17 Beav. 367, 390. Moreover, in a subsequent conveyance by the mortgagor he covenants that there were no incumbrances on the land, and these covenants are statements under the Vendor and Purchase Act: *Casselman* v. *Casselman*, 9 O. R. 442. This being so, the burden was on the purchaser to shew that the covenantor had not a good title. Again, in a memorial of a will made in 1831 the mortgagor stated that he was possessed of the land: *Allan* v. *McTavish*, 28 Gr. 539, 8 A. R. 440. As to the conveyances No. 11,112 and 12,511, they operated to vest the

fee in equity according to their purport: *Sweet's* Law Dict. p. 749, *Sub voce "Seisin"; Mitchell* v. *Smellie*, 20 C. P. 389. The equitable estate in any view of it became vested in the two women and the legal estate was afterwards got in. Hornibrook never was anything but a bare trustee of an equity. The discharge of the Syme's mortgage operated to transfer the legal estate. As to ground of appeal No. 7, this was not taken in any of the objections or requisitions. Moreover it should have been raised on the pleadings: *Cisamajor* v. *Strode*, 2 M. & K., at p. 730. In any case it is a question of compensation, and no more: *Fry* on Spec. Perf.. 2 ed., p. 518, s. 1,177; *Henricks* v. *Stark*, 37 N. Y. 106.

Maclennan, in reply, referred to *Ontario Industrial Loan, &c., Co.* v. *Lindsay*, 3 O. R. 66; *Swansborough* v. *Coventry*, 9 Bing. 305; *Allen* v. *Taylor*, 16 Ch. D. 355.

At the conclusion of the argument the learned Judge gave judgment, overruling the first ground of appeal, holding that under all the circumstances the mortgage in question must be presumed to have been satisfied, and specially referring to *Cooke* v. *Soltau*, 2 S. & S. 154; *Emery* v. *Grocock*, 6 Madd. 54, 56. He also over-ruled certain other grounds of appeal not necessary to report, and reserved judgment as to the rest.

January 12th, 1886. FERGUSON, J.—This case came on by way of appeal from the master's report upon the title and also on further directions.

At the close of the argument of the appeal I held and decided that, looking at the contract, the conditions of sale, the pleadings and the judgments, the duty of the master was to report that there was a good title in the plaintiffs, unless some one or more of the objections to it taken within the ten days mentioned in the contract should prove fatal to its validity.

There were eight grounds of appeal from the report, by

which the master found that, having regard to the contract between the parties, and subject to the second paragraph of the report, the plaintiffs had a good title.

This second paragraph states that "prior to the plaintiffs' acquiring title to the lands, and in the year 1877, in pursuance of a verbal agreement made between them, the then owner of the lands (being lot 14, as mentioned in the pleadings) and the owner of the adjoining lot, No. 15, a party wall of the width of nine inches, and a part of a house on the said lot 15, was built by the owner of lot 15 on the line between the lots 14 and 15 for the use and benefit of both the owners of the said lots: and one-half of the cost of building the same was paid by the then owner of lot 14 to the owner of lot 15: that the said party wall is still on the line between the lots and commencing at a distance of twenty feet from the front of the lots, the said party wall comes over on to lot 14 to the extent of six inches for a depth of nineteen feet seven inches; to the extent of nine inches (for the purpose of a chimney on lot 14) for a further depth of five feet one inch, and to the extent of six inches for a further depth of five feet three inches," all of the measurements being shown upon a plan filed in his office.

The fourth paragraph of the report is as follows:—"4. At the request of the solicitor for the plaintiffs I report specially that I find on the evidence the said party wall does not depreciate the value of the plaintiffs' lot."

The grounds of appeal, Nos. 3 and 8, were abandoned by the appellant, and it was conceded that ground No. 7 was not a proper ground of appeal; but that what is stated in it is nevertheless proper matter for consideration on further directions.

On the argument I disposed of grounds Nos. 1, 2 and 4 in the plaintiffs' favor.

There remained then only, of the appeal, grounds No. 5 and 6 to be considered, and these were argued as one, they involving the same matters of law.

Ground No. 5 is as follows: "That No. 11,112" (of the

registered title) "pretends to be a conveyance of the legal estate in the land to uses under the statute of uses; but as the legal estate was not in the grantor such instrument does not operate under the statute," and ground No. 6 is as follows: "That No. 12511 (of the registered title) also pretends to be a conveyance of the legal estate in the land to uses under the statute of uses; but as the legal estate was not in the grantor such instrument does not operate under the statute."

In the conveyance No. 11,112 Davis and McCullough are the parties of the first part; their wives are the parties of the second part; one Frances Ellen Hornibrook is the party of the third part, and the wives of Davis and McCullough are the parties of the fourth part.

The operative words in this conveyance are "Do grant unto the said party of the third part, her heirs and assigns,' and the habendum, so far as it relates to the matter in question here, is as follows: "To have and to hold the same to the said party of the third part, her heirs and assigns, unto and to the use of the said parties of the fourth part, their heirs and assigns, forever." It bears date July 17th, 1875, and was registered July 21st, 1875. On the argument it was said that this deed was defective by reason of no words of limitation of the estate occurring after the words "the party of the third part," but that this was cured by a subsequent deed. In the copy of the conveyance since procured from the registry office and by consent handed to me, I do not find this alleged defect at all.

Then as to the effect of the conveyance, even if the contention of the appellant as to its not operating under the statute of uses is correct, it is nevertheless a conveyance of an equity of redemption by the owners of that equity to the party of the third part in fee, to the use of the parties of the fourth part in fee, and, I think, the parties of the fourth part took the beneficial interest in fee, for the use in such case becomes, or rather is, a trust; and the conveyance has, I think, the same effect as if it were a conveyance

to the party of the third part upon trust for the benefit of the parties of the fourth part who took the whole beneficial interest, and upon the execution of the conveyance, became entitled to the whole of the equity. This equity was subject to two mortgages—one called, on the argument, "the McMaster mortgage" and the other "the mortgage to Syme." The discharge of the McMaster mortgage was registered the 21st day of July, 1875. The deed in question (11,112) was registered the same day, and must have been, or must be assumed to have been, delivered before. As before stated, it bears date the 17th of July, 1875; and although the discharge bears date the 14th of July, 1875, it took effect as a reconveyance upon being registered; and at the time of its registration the parties of the fourth part (in the conveyance in question) were the owners of the equity of redemption and, I think, assignees of the mortgagor within the meaning of the statute respecting the effect of registering a discharge of a mortgage.

The mortgage to Syme was assigned to O'Keefe, who assigned to Hawke, who, by a deed bearing date the 17th of April, 1876, conveyed to the parties of the fourth part in the conveyance in question (11,112). This was after the execution of the conveyance in question and while they were the owners of the equity, and, I think, the effect of the conveyancing may be shortly stated in this way: By the conveyance in question the parties of the fourth part in it named became entitled to the whole of the equity in fee, and they got in and became owners of the legal estate in fee, that they thereupon became the owners of the land in fee, and that no estate either at law or in equity remained outstanding in Frances Ellen Hornibrook, the party of the third part in the conveyance now in question. The legal estate is not outstanding, nor do I see that any estate or interest is outstanding in Francis Ellen Hornibrook that renders the title of the plaintiffs defective. Now, I think, I need not state the facts to which the sixth ground of appeal has reference. As before stated, that and the fifth ground were argued together; and if the view that

I have taken as to the fifth ground of appeal is the correct one, the conclusion in regard to the sixth ground must be same.

The result is that the finding of the learned Master in Ordinary should be affirmed, and the appeal, as to all the grounds thereof, dismissed with costs.

Then as to the case on further directions: What the defendant specially complains of is that which is stated as the seventh ground of appeal, which, as I have already said, was admitted not to be a proper ground of appeal, but only matter available on further directions. It is this: "That the defendant cannot get rid of the wall in question without engaging in a lawsuit with the adjoining proprietor, and that this wall as a party wall is not suitable to the class of building which he desires to put up, or which a purchaser from the defendant might desire to put up, and is in fact worse than useless to him."

In his third finding the Master states that the evidence proving the verbal agreement in the second finding mentioned was adduced before him by the plaintiffs, but no evidence was adduced before him proving that either the plaintiffs or the defendants had any knowledge of this verbal agreement prior to the contract in the pleadings mentioned (the contract between the parties).

It does not appear that the lands were purchased by the defendant for any specific purpose further than as "building lots," or a "building lot." The frontage of the lot or parcel, as was stated by counsel, is fifty feet. I have before referred to the part that is under or occupied by the party wall as found by the master in his report. It is certainly not more, and, I think, much less than one-hundreth part of the land purchased and sold, and the plaintiffs are not wholly without title to this small part, for they have in respect to it such rights as are stated by the master; and as I have before said the master finds and reports that this party wall does not depreciate the value of the lands sold.

Now the highest ground, as I think, in favor of the de-

fendant on which this matter of the party wall can be put is, that there was a mistake or error within the meaning of the provisions of the sixth condition of the conditions of sale, which provides that such mistake or error shall not annul the sale, but that a compensation or equivalent shall be given or taken as the case may require, the same to be settled by three referees, or by any two of them, pointing out the manner in which such referees are to be chosen, &c.

The defendant was perhaps entitled to have such a reference had he chosen to avail himself of it; but instead of so doing he has defended the suit on grounds entirely different, and, looking at the very small value of the piece of the land so occupied by the wall, even if the plaintiffs had no title at all to it, the very small fractional part of the whole purchase that it is, the fact that the Master states in his report that the existence of the party wall does not under all the circumstances depreciate the value of the land sold, and the line of defence adopted by the defendant, as well as his mode of conducting such defence, I am of the opinion that there should be an order that the contract be specifically performed, and that the defendant pay the balance unpaid of his purchase money with interest thereon; and that if the plaintiffs have received rents and profits from the lands in the meantime that these be set off *pro tanto* against the interest. And the defendant will pay the plaintiffs' costs of suit.

Judgment accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE BRITON MEDICAL AND GENERAL LIFE ASSOCIATION (LIMITED.)

Winding up Acts—Evidence of insolvency—Insurance company—Debt due—45 Vic. c. 23, secs. 9, 10, 11 (D.)—47 Vic. c. 39 (D.)—Pleading—Acknowledgement of insolvency—Manager of company—Agreement as to winding up proceedings—Ultra vires.

C. F. S. applied for an order for the winding up of the B. company under 45 Vic. c. 23 (D.) and amending Acts, and as evidence of the insolvency of the company shewed that, being entitled to the beneficial interest in a certain policy on the life of her deceased husband, she had demanded payment thereof from the company, but it had been refused; that the suspension of the company had been announced in the papers, and that the manager of the head office in Canada had stated that he was instructed from the head office in England not to make any payments on behalf of the company. It appeared, however, that the policy provided for payment in three months after proof of the death of the insured had been received by the company, while the above demand for payment was made a fortnight after the death, and no other demand had ever been made.

Held, that the debt was not due when the demand was made, and therefore non-payment was not evidence of insolvency within the meaning of 45 Vic. c. 23, secs. 9, 10, 11 (D.), nor would the fact that the company had not paid claims amount to an acknowledgement of insolvency within s. 9 (*d*) of that Act, nor otherwise was there sufficient evidence here of the insolvency of the company, and the petition must be dismissed.

Held, also, that as a matter of pleading, if it had been intended to rely upon the acknowledgement of insolvency, it should have been stated in the petition.

Semble, that even if a general manager of a company positively agreed that any winding up proceeding that should be necessary should be taken in Ontario rather than elsewhere, this would not bind the company, for the business of the manager is to manage a going concern. It is no part of his duty nor within his power to arrange about putting an end to it.

THIS was a petition presented by one C. F. Small under 45 Vic. ch. 23 (D.), for the winding up of the above company.

The petition set out that the company was a life insurance company incorporated in Great Britain, carrying on business in Canada under the Dominion Statutes, pursuant to which it had made a deposit with the finance minister at Ottawa: that by a policy of insurance the company had insured the life of J. T. Small, M.D., in the sum of seven hundred pounds sterling: that the claim papers had been

filed shewing the death of the insured and that the payment of the amount of the policy had been demanded by the petitioner, who was entitled thereto; but the same had not been paid.

Affidavits were filed verifying the statements in the petition, and shewing that the suspension of the company had been announced in the daily papers: and that subsequent to such announcement the manager of the company in Montreal, which is the head office for Canada, had stated that owing to instructions which he had received from the head office in England he was unable to make any payments on behalf of the company. These statements were verified by affidavits filed by several policy holders in the company.

The manager of the company at Montreal filed his affidavit in answer stating that the head office for the Dominion of Canada was in Montreal; and was under his sole charge and direction, and stating that he had referred the question of the payment of the said policy to the company's board of directors in England: that an actuary of the company in England had died, and that that would account for a portion of the delay which had taken place in the payment of the policy in question, and further that he had not received any instructions regarding the payment of the said policy particularly, but he did not deny that he had stated that owing to instructions received from the company he was unable to make any payments on behalf of the company.

The remaining facts of the case and the evidence adduced to prove the insolvency of the company appear from the judgment.

The petition came up for argument on February 23rd 1886, before Proudfoot, J. (*a*.)

(*a*) Some interesting points of law arose in this case and were fully argued by counsel, viz., whether the 47 Vic. ch. 39 (D.), was *ultra vires*, and if so in what respects, and as to what is the meaning of "chief place of business" of a company, and whether the same company can have more than one "chief place of business" in the Dominion, within the mean-

Moss, Q.C., and *Osler*, Q.C., for the petitioner.

J. Maclennan, Q.C., and *Francis*, for the company.

Beverley Jones, *G. F. Harman*, and *R. S. Kingston*, for various creditors of the company.

February 26th, 1886. PROUDFOOT, J.—This is a petition by Catharine Frances Small on behalf of herself and all other creditors of the company in Ontario, for the winding up of the company.

I think the plaintiff has sufficiently shewn her title to the policy and the money secured by it.

But it seems to me that the evidence fails to shew that the company is insolvent.

The 45 Vic. ch. 23, (D.,) secs. 9, 10, and 11, determine what is to be the evidence of Insolvency. The clause (*a*) of sec. 9, says, "If it is unable to pay its debts as they become due."

Sec. 10 declares what is the meaning of being unable to pay its debts as they become due, as follows:

"(*a*) Whenever a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding $200, then due, has served on the company in the manner in which process may legally be served on it in the place where the service is made, a demand in writing requiring the company to pay the sum so due, and the company has for the space of time hereinafter mentioned, neglected to

ing of 45 Vic. ch. 23 (D.) and reference was made on these points to *The Merchants Bank of Halifax* v. *Gillespie Moffatt & Co.*, 10 S. C. R. 312; *In re Lake Superior Native Copper Co.*, 9 O. R. 277; *Rhodes* v. *Salem Turnpike & Chelsea Bridge Corporation*, 98 Mass. 95; *National Bank of Barre* v. *Hingham Manufacturing Co.*, 127 Mass. 567; *McMahon* v. *Irish North Western R. W. Co.*, 19 W. R. 212; *Adams* v. *The Great Western R. W. Co.*, 6 H. & N. 404; The Insurance Acts, 41 Vic. ch. 21 sec. 2 (D.); 34 Vic. ch. 9, sec. 4 (D.); 40 Vic. ch. 42, sec. 1, sub-sec. 3 (D.) It was suggested by the learned Judge on the argument that even if 47 Vic. ch. 39 (D.), was *ultra vires* in some respects, it might be *intra vires* as to the winding up of the assets in the Dominion, while invalid so far as it extends to assets outside the Dominion. As the judgment shews, however, the case went off entirely on the question of the sufficiency of the evidence of insolvency within the meaning of the Winding up Acts.—REP.

pay such sum or to secure or compound for the same to the satisfaction of the creditor."

And sec. 11 specifies that time as applicable to such a company as the present at sixty days next succeeding the service of the demand.

The policy in this case provided for payment in three calendar months next after satisfactory proof of the death of the assured shall have been received at the office of the company.

The assured, Dr. Small, died on April 15th, 1885. On the 29th of April, the proofs required by the company's conditions were duly furnished to the agent in Montreal, with a request for the payment of the amount of the policy.

This was the only demand made in writing. When the statute speaks of the demand being made in respect of a debt *then due*, it clearly means a debt that was not only owing but payable, as it proceeds to declare the consequences of default in payment for sixty days. But the statute could never have intended to shorten the period of credit to which the company was entitled by the policy itself, which was three months.

But it was contended that section 9 (*d*) was complied with, "if it has otherwise acknowledged its insolvency," because the company had not paid claims, but this does not seem to me to amount to an acknowledgment of insolvency. Nor does the statement in the annual report of the meeting in 1884 that the company was doing no new business, prove insolvency, indeed that same report speaks hopefully of the position of the company, and that the time was rapidly approaching when the company would be able to pay a bonus. But there was some uncertainty manifested as to the exact position of the company till the quinquennial valuation should be made at the end of 1884. What the result of that quinquennial valuation was, does not appear, unless it may be inferred from the statement in Mr. Small's (*a*) affidavit that the suspension of the

(*a*) This was a son of the petitioner and of the deceased.

company had been announced in the daily papers, and that on January 28th last, he applied personally to the general manager in Montreal for payment, who informed him that owing to instructions from the head office of the company in England he was unable to make any payments on behalf of the company. The manager swears on February 6th, 1886, that he has never yet received instructions from the chief office regarding the payment of the policy (in question) particularly, and that such instructions would necessarily come through him. This language of the general manager is not so precise as it might be, but I think it must be taken to assert that he had no instructions regarding the payment or non-payment of the policy. I do not think this sufficient to prove insolvency.

The evidence of otherwise acknowledging insolvency depends upon the interview Mr. Small had in Montreal on the 28th of January last, with the general manager, Mr. Chipman, and Mr. Cross, the solicitor of the company for the Province of Quebec, and Mr. Francis, the solicitor of the company for Ontario. Mr. Small says the question of winding up the company was discussed at great length, and the statutes regarding the winding up of companies and the Insurance Acts were carefully perused and considered by them in his presence, and in private conference between the said Chipman and his two legal advisers as he was then informed. But Chipman told him that up to that time he had only been advised of the then position of the company by cable; and as a result of that conference it was agreed that *if it became necessary to* wind up the company it should be wound up in Ontario.

It does not seem to me that this was a final agreement, it was contingent upon further information to be received, and there is nothing to shew that this further information which would make it become necessary to wind up the company, had been received.

But even if the general manager had positively and finally arranged for proceedings to be taken as mentioned above, I do not think the company would be bound. The

business of the manager was to manage a going concern, it was no part of his duty or within his power to arrange about putting an end to it.

The papers and affidavits strongly incline one to believe that the company is insolvent, and ought to be wound up, but they do not amount to legal evidence of it, and as a matter of pleading if it had been intended to rely upon the acknowledgement of insolvency it should have been stated in the petition: *In re Wear Engine Works Co.*, L. R. 10 Ch. 188; *Re British-Canadian Lumber Co.*, per the Chancellor, not reported. (c) In this last case the Chancellor says: "I am not to assume anything in favour of the application. It is the duty of the petitioner to make a clear case for the intervention of the court."

Taking this view of the evidence I do not delay to consider the other questions which were argued, which raise some important matters for consideration.

It is said that the only assets of the company available for policies issued in the Dominion consist of the deposit with the Government of $106,000, this sum cannot be disposed of for any purpose, but for the benefit of those holding policies, so that the refusal of this petition does not involve the loss of the claim upon that fund: 40 Vic. ch. 42, sec. 15 (D).

I must refuse the winding up order asked for, but without costs. The petitioner has been misled by the officers of the company, and she ought not to pay costs.

A. H. F. L.

(c) Decided April 9th, 1884.

[CHANCERY DIVISION.]

DAWSON v. MOFFATT.

Creditors' Relief Act of 1880—Execution creditors—Priorities—Stop orders—Simple contract creditors—Ratable distribution.

Since the coming into force of the "Creditors' Relief Act of 1880" March 25th, 1884, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors they must have the same right with regard to funds in court as they would have with regard to funds in the sheriff's hands and in any case where an execution creditor obtains a stop order there must be a reference to the Master to ascertain if any other creditors desire to ask a share of the fund.

THIS was a motion made on December 21st, 1885, before Boyd, C., in Chambers for distribution among the solicitors and execution creditors of the defendant Moffatt of the fund in court to which he was entitled.

There was no dispute as to the solicitors' claims for costs. The following execution creditors had lodged stop orders in the order given: (1) The Bank of Toronto, (2) George Moffatt, (3) Hoyles, (4) Covert, (5) McLellan, (6) The Bank of Ottawa. The fund was insufficient to pay all the claims upon it. It was admitted that the claim of the Bank of Toronto must be paid in full, because their stop order was lodged before the "Creditors' Relief Act, 1880, (O.)" came into force.

Shepley, for the execution creditors Hoyles and Covert; *Ruttan*, for the execution creditor McLellan; and *Arnoldi*, for the Bank of Ottawa, contended that the residue of the fund, after payment of the solicitors and the Bank of Toronto, should be distributed ratably among the other creditors, upon the principle introduced by the "Creditors' Relief Act, 1880."

J. H. Ferguson, for the execution creditor George Moffatt, contended that his client should be paid in priority to the creditors who had lodged their stop orders after his.

January 7, 1886. BOYD, C.—A practice has obtained for many years in the Court of Chancery in this Province of granting stop orders in favour of execution creditors against funds in court, the property of the execution debtors. Though at first this relief was refused in *Lee* v. *Bell*, 2 Ch. Ch. 114, that case was over-ruled and a contrary practice established in *Wilson* v. *McCarthy*, 7 P. R. 132. This practice is justified by such cases as *Courtoy* v. *Vincent*, 15 Beav. 486, and may indeed be rested upon the inherent jurisdiction of the court to award equitable execution in respect of assets not otherwise available for the satisfaction of creditors. *Courtoy* v. *Vincent* is referred to by Cotton, L. J., in *Widgery* v. *Tepper*, 6 Ch. D. at p. 370, in these terms: "There the party applying was in a position to enforce his right against any property of the debtor which could be seized, but he could not take the cheque in question because it was in the hands of the accountant-general, and the court gave him something like an equitable execution by staying the accountant general from parting with the cheque." In such cases the stop order is granted because the applicant has the status of an execution creditor. The function of the order is to prevent the withdrawal or alienation of the fund without notice to the creditor. As expressed by Pearson, J., in *Mutual Life Assurance Soc'y.* v. *Langley*, 26 Ch. D. at p. 691: "A stop order is an order of a peculiar kind, and it is well settled that it does not alter any rights." In the case of judgment or execution creditors priority of payment out of the fund arrested was determined by the order of time in which the stop orders were obtained. In popular parlance it was "first come, first served." In England that practice was adopted apparently in analogy to the like order of priority in cases of a trust fund, in respect of which incumbrancers gave notice to the trustees of their charge: *Re Holmes*, 29 Ch. D. 786. The reward of first payment was accorded to the most diligent, if there was nothing else by which to regulate the priorities: *Thomas* v. *Cross*, 2 Dr. & Sm. 423. But it would be more satisfactory to account for that priority in

this Province on the ground that such was the order of payment of executions at law, and equity aiding the law conformed to the legal order of administering the fund. To adapt to executions the words of Bacon, V.C., in *Pinnock* v. *Bailey*, 23 Ch. D., at p. 499, the obtaining of the stop order was the most effectual mode of perfecting the execution. He who first took that step was accorded the precedence, as in the case of the creditor who first placed his writ to levy in the hands of the sheriff.

But as this principle of priority of and amongst execution creditors has been abolished by the "Creditors' Relief Act of 1880," it is no longer reasonable or seemly to preserve the analogous system of priorities in awarding equitable execution as the outcome of stop orders. Without seeking to employ in practice all the machinery of that Act, it is enough to recognize the leading principle of equality in dealing with funds in Court covered by a succession of these orders. This, after all, is but resorting to the ancient rule of the Court, which declared that equity delighteth in equality,—a rule which was always resorted to in the distribution of equitable assets: *Story's* Equity Jurisprudence sec. 641. This Act came into force on 25th March 1884: see 47 Vic. ch. 10, sec. 2 (O). The debtor's interest in the fund was first ascertained in September, 1884, but the precise sum was not finally settled till 21st October, 1885. The stop orders which had been lodged since the 25th March and up to the date of the order to pay out are entitled to share ratably in the fund. Priority was claimed for an execution creditor who had a stop order in May, 1884, and for two amounts due to solicitors, and they were not disputed.

Costs to be added to claims.

AFTER this judgment was given, a motion was made before Boyd, C., on behalf of George Moffatt, who was a simple contract creditor to a large amount in addition to the amount due him as a judgment creditor, to allow the simple contract creditors to share in the fund with the

execution creditors, which motion was enlarged to come on before the Divisional Court at the same time as the appeal from the above mentioned judgment of Boyd, C., which came on and was argued on February 19, 1886, before Boyd, C., and Proudfoot, and Ferguson, JJ.

J. H. Ferguson, for the appeal. The fund should be distributed according to the priorities in point of time of the stop orders. The "Creditors' Relief Act" does not in terms apply to this case, and the Court should not change a well settled rule of practice merely by analogy to a statutory provision. If the "Creditors' Relief Act" does apply then the simple contract creditors should all be allowed to come in, and share in the fund within a limited time the same as if the matter was in the sheriff's office under the Act, and there should be a reference to the Master to give them the opportunity.

Arnoldi, *Shepley*, and *Ruttan*, for other creditors contra. The stop orders are grounded upon and in furtherance of the executions, and as priority is abolished among execution creditors by the "Creditors' Relief Act" priority is also abolished as between the holders of stop orders. Proceedings under a stop order are in the nature of an execution or of garnishee proceedings, and in either case priority is abolished. All the provisions of the statute subsequent to sec. 4 constitute a code of procedure for the sheriff's office merely, and do not in any way apply to a fund in Court, so no simple contract creditor can participate.

March 6, 1886. PROUDFOOT, J.—I concur in the judgment pronounced by the Chancellor, that execution creditors, obtaining stop orders on funds in Court, have no other priority than they had as execution creditors.

"The Creditors Relief Act, 1880," by its 4th sec. enacts that subject to the provisions thereinafter contained, there shall be no priority between or among creditors by execution from Superior or County Courts. And the 28th sec. provides that subject to any insolvency laws that may come

into force the Act is to apply to all debtors whether solvent or not.

There cannot be a stronger declaration of the intention of the legislature that execution creditors shall share equally in the assets of the debtor. And simple contract creditors by proving their claims in the manner provided by the Act may become in fact execution creditors, sec. 7, sub-sec. 9. And I do not see that it can make any difference in the right of the execution creditor that the fund is in Court, and cannot be directly seized by the sheriff. In both cases the funds belong to the debtor, and may be made liable to satisfy the creditor. If there be any rule of the Court that would conflict with this right to equality established by the statute, the rule must give away, whether it is founded on analogy to the former rule at law or on priority regulated by notice to trustees.

If the statute applies, another question arises which was not presented to the Chancellor, viz., whether simple contract creditors are to have the power conferred on them by the statute of establishing their claims, and thus attaining the position of execution creditors The 4th sec., it will be noticed, establishes equality among execution creditors subject to the provisions of the Act thereinafter contained. Some of these provisions are to enable simple contract creditors to come in. And I think they must have the same right with regard to funds in Court as they would have with regard to funds in the sheriff's hands. The Court might divest itself of the funds by placing them in the sheriff's hands where they would be liable to the simple contract creditors proving their claim. But it is not the practice of the Court to entrust the management of money in its hands to any other tribunal. The inquiry as to those creditors may be as effectually made by the Master as by the sheriff. I think, therefore, the Chancellor's order should be modified by referring it to the Master to notify creditors so that they may establish their claims.

In the result this construction may have the effect of seriously embarrassing the Court in the transaction of

business, as in every case where an execution creditor obtains a stop order there will have to be a reference to ascertain if any other creditor desires to ask a share, and there may also be a similar proceeding going on in the sheriffs office, but that is a matter for the legislature to consider.

FERGUSON, J.—I also concur in the opinion that execution creditors obtaining stop orders in respect of funds in Court do not by reason of the stop orders gain any priority other than such as they had as execution creditors.

After a perusal of a very large number of the English cases in addition to those that were mentioned in the argument, as well as the cases in our own Courts, I have arrived at the conclusion that when an execution creditor, basing his application upon the fact that he is an execution creditor, applies for and obtains a stop order, what he is granted is in the nature of aid in the execution of the writ, and that he does not by obtaining the order gain any new priority over other execution creditors. The cases in which there were assignments of, or agreements in respect to the fund, or charging orders made under the statute in England, (which orders have been decided to have the same effect as charges created by the debtors,) V. C. Page-Wood in *Scott* v. *Lord Hastings*, 4 K. & J. at p. 636, appear to be upon a footing entirely different from that on which cases such as the present one rests, and it may, I think, fairly be said that there is difficulty in reconciling all the statements that appear in the judgments of various Judges on the subject.

"The Creditors Relief Act, 1880," appears to me to declare that there shall be no priority between or amongst creditors by execution from Superior or County Courts. Whatever difficulty would at first seem to be in the way of this interpretation by reason of the words "subject to the provisions hereinafter contained," occurring in the fourth section of the Act, seems to vanish upon a perusal of the provisions referred to, and reading (as I think one may

under such circumstances) the title of the Act, which is "An Act to abolish priority of and amongst execution creditors." I am therefore of the opinion that the conclusion, in respect to priorities arrived at by the Chancellor is right, but I am also of opinion that the order should be modified as stated by Mr. Justice Proudfoot in his judgment, and on this subject I do not desire to add anything to what the learned Judge has said.

I think that none of the parties should have costs against any other or others of them, but that all parties should have costs out of the fund.

BOYD, C.—The point as to the admission of creditors to share in the fund in Court was not argued before me in Chambers, but I am entirely in accord with the other Judges as to the form of the order to be made. Indeed, if priority between execution creditors aided by stop orders as against money in Court is gone because of the Act, I see no escape from the conclusion that effect must be given to all the provisions of the Act so far as sharing ratably is concerned among all creditors who come in. But according to the usual practice in cases of administration of funds the Court will use its own machinery for the purpose in the absence of other suitable provision in the statute.

G. A. B

See 49 Vic. ch. 16 sec. 37 (O).—REP

[CHANCERY DIVISION.]

RATTÈ V. BOOTH.

Riparian proprietor—Reservation in patent of rights of navigation—Ownership of land covered with water—"Navigable waters"—Nuisance—Damages—Injunction—48 Vic., c. 24. (O.)

The judgment of PROUDFOOT, J., reported *ante* 10 O. R., p. 351, reversed.

Per BOYD, C. The effect of the patent is to convey the dry land and the land covered by water two chains out, subject to the rights of the public in the Ottawa as a navigable river. As to the land bordering on the water the plaintiff is a riparian proprietor, and has the right to have the water in front of him open for all navigable purposes, and to enjoy it free from extraordinary impurities. Even if the land under the water is vested in the plaintiff's grantor he could not derogate from his grant to the water's edge by polluting, filling up, or otherwise cutting off his grantee from the beneficial enjoyment of the river, still less can the defendants be protected in their wrong-doing.

The grant to the patentee of the river-bed two chains out, carries, as parcel of it, the water thereon so that the bed, the bank, and the water are vested as private property in the patentee, subject to the servitude of a common public right of way for the purposes of navigation.

The term "navigable waters" in the patent is to be construed as referring to water of such a depth and situation as is, according to the reasonable course of navigation in the particular locality, practically navigable. The patentee may rightfully use and occupy the land covered by water, but only so much as will not interfere with the public easement; but every encroachment on the water will be at his peril if it is proved that he is guilty of a public nuisance.

There was no evidence to show that the plaintiff's structure (boat-house) is a nuisance; and whatever may be the nature of the plaintiff's title or occupancy of the water, it is enough that his possession and business are, as against the public, legitimate in order to entitle him to recover as against a wrong-doer.

Even if the plaintiff's place of business was proved to be a nuisance because it invaded the navigable waters of the river, it does not follow that that disposes of the plaintiff's claim for an injunction and damages, as he might well invoke the maxim, *Injuria non excusat injuriam.*

Per FERGUSON, J. There is nothing either on the face of the conveyance to the plaintiff, or in the surrounding circumstances at the time of its execution, to indicate that the grantor intended, if intention could now be of any consequence, to reserve to himself the part of the lot under the water, or any right or title to it. The contrary would rather appear, from his being in possession at the time, and having a boat-house situated as the present one is.

By the conveyance to the plaintiff he obtained title to the lands in the stream embraced in the two chains from the bank, but subject to the right of navigation expressed in the patent.

What the plaintiff has done is no nuisance, nor is it shown that he has caused any injury to navigation, and he is entitled to redress for the grievances of which he complains. Even if the plaintiff is not the owner of the land under the water, he is entitled to redress for the injuries he has sustained as a riparian proprietor, merely.

THIS action, reported 10 O. R. 351, came on by way of appeal to the Divisional Court from the judgment of

Proudfoot, J., and was argued on February 20th, 1886, before Boyd, C., and Proudfoot and Ferguson, JJ.

Maclennan, Q.C., for the plaintiff, who appealed. The question here is: Has the plaintiff a right to complain? The patent to Aumond covered the plaintiff's land and ran out two chains into the river, and reserved all rights over navigable waters. The plaintiff got his conveyance from the grantee of the patentee, but the deeds, subsequent to the patent, only went to the water's edge. The plaintiff has a floating structure on the water used as a boat house, moored close to the shore by chains, and has built a dwelling house on the land. The plaintiff being injured by the acts of the defendants is entitled to damages. The learned Judge who tried the action decided that he was not. Even if the plaintiff is not entitled to the two chains in the river, he is a riparian proprietor and is entitled to access to the water and to have it pure, &c. I contend that he is entitled to the patentee's two chains in the river. *Lyon* v. *The Wardens, &c., of the Fishmongers Co.*, L. R. 1 App. Cas. 671, settles that a man is a riparian proprietor whether he owns the land under the water or not. See also *In re McDonough*, 30 U. C. R. 290. [FERGUSON, J.—Did Aumond, when he conveyed by the lesser description, own any land above or below that granted?] None that went to the water's edge, the plaintiff got the whole of his water front. In *Kains* v. *Turville*, 32 U. C. R. 17, a description to the "water's edge" was held to extend to the middle of the stream. A conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land: *Marquis of Salisbury* v. *Great Northern R. W. Co.*, 5 C. B. N. S. 174, cited by Richards, C.J., in *Robertson* v. *Watson*, 27 C. P. at p. 594. Here the two chains belonged to the land conveyed. The deed to the plaintiff was made under our own Short Form Statute, and carries all appurtenances to the fullest extent. The plaintiff's structure was not an unlawful one and was

no nuisance. A boat might be used in the day time to fish from, and could be anchored at night time if proper lights were displayed. The plaintiff's structure was a floating one and was anchored or moored. [BOYD, C.—But would it not prevent any one landing there?] No one had the right to land there without the plaintiff's permission. A steamer has the right to be anchored in navigable waters while not in actual use. In the Thames, in England, there are several men-of-war anchored, used as training ships and reformatories, and the Crown has no more right to obstruct navigable waters than a subject has. It even required a statute, 23 Vic. ch. 2, sec. 35, in this country to enable the Crown to authorize a subject to build upon navigable rivers. The judgment appealed from should be reversed, and a reference directed to ascertain the plaintiff's damages. I refer to *Lord* v. *The Commissioners of Sidney*, 12 Moo. P. C. 473 at 498; *Minor* v. *Gilmour*, *ib.* 131; *Bickett* v. *Morris*, L. R. 1 Sc. Ap. 47; *Kensit* v. *Great Eastern R. W. Co.*, 23 Ch. D. 566; *Wood* v. *Waud*, L. R. 2 Ex. 748; *Embrey* v. *Owen*, L. R. 6 Ex. 353; *Attril* v. *Platt*, 10 S. C. R. 425.

McCarthy, Q. C., and *Gormully*, for the defendants. The plaintiff's rights must depend upon his position as a riparian proprietor. If the river was not navigable the grant would go to the middle of it. We must accept the doctrine laid down in *Lord* v. *The Commissioners, &c., of Sidney*, 12 Moo. P. C. at 485. It is a question of intention gathered from the words and surrounding circumstances. If the Crown grant had only gone to the bank the plaintiff would not be a riparian proprietor for the Ottawa is a navigable river. The Crown made the grant in 1850, and the description covers two chains out in the water, but not to the middle of the river; then the owner laid out his plan and sold parts of the property. There is no presumption that when he sold to the plaintiff and stopped the description at the bank that he intended to give him the part covered by the water. The description raises a contrary presumption. There is access to the plaintiff's part by two streets. If a riparian proprietor or an owner of property

near a road sells his right to the river or the road because it is no use to him why should any presumption be raised against him? Here the owner of the part excepted could build on it and that fact would rebut the presumption. The reservation in the patent is a mere stereotype form, it was not intended to apply to the two chains granted; even if it was intended it would be a condition repugnant to the grant and would be treated as void: *Furnivall* v. *Coombes*, 5 M. & G. 736. [BOYD, C.—Do you argue that the patentee could have filled up the two chains?] Yes. [BOYD, C.—What do the words "to the water's edge" mean, then?] That is mere matter of description. If the owner claims by description to the water's edge, and that by virtue thereof he is entitled to the two chains, the answer would be, he has no such right, as the patentee can build there, and even if we could not build, he, as a riparian proprietor, on a navigable stream, cannot complain of anything we have done: *Omerod* v. *Todmorton, &c., Mill Co.*, 11 Q. B. D. 155; *Lyon* v. *The Wardens, &c., of the Fishmongers' Co.*, L.R. 1 App. Cas. 662, does not go so far as to say that a riparian proprietor on a navigable stream has the same rights as one on a non-navigable stream. If the two chains are public property he cannot complain, because his business is interfered with: *Giles* v. *Campbell*, 19 Gr. 226; *Cockburn* v. *Eager*, 24 Gr. 412. The plaintiff is not a riparian proprietor, as the two chains did not pass to him. The cause of action does not arise in respect to the land, but because there is no access to the boathouse which is not on the land: *Leigh* v. *Jack*, 5 Ex. D. 264. The water is not an appurtenance, and does not pass under the deed of the land to the plaintiff. The boathouse is an obstruction. The right to anchor any vessel is only for a reasonable time: *Coulson & Forbes'* Law of Waters, 72. A grant from the Crown in the St. Lawrence or Ottawa rivers or any of the great lakes would not go further than the water's edge: *Dixson* v. *Snetsinger*, 23 C. P. 235.

Maclennan, Q.C., in reply. What the plaintiff got was all the land on the river, and the water is of no use to

any one else. The *Warin Case, supra,* only applies where there is no restriction, but the statute permitting this grant provided for restrictions, and the restriction was actually made. The plaintiff has had possession for over twenty years, and ten years is sufficient to give him a title by possession: *Watson* v. *The City of Toronto Gas-light, &c., Co.,* 4 U. C. R. 158.

March 6, 1886. BOYD, C.—The evidence very clearly establishes that the defendants are wrong-doers who from their mills allow saw-dust, blocks, chips, bark and other refuse to fall into the river Ottawa, and thereby pollute the water and impede navigation. This refuse accumulates in great floating masses, substantial enough occasionally for a man to walk upon, and the tendency of the currents and the prevalent direction of the wind bring these masses in front of the plaintiff's property, up to his boat house and wharf and to the banks of his lot. Depositions of saw dust are thus by degrees formed before his property; and they result not only in fouling the water, making it offensive both to taste and smell, but produce from the gas generated underneath the surface frequent explosions which are disagreeable and sometimes dangerous. It is thus proved that the plaintiff sustains special injury beyond the rest of the public by this unauthorized interference of the defendants with the flow and purity of the stream. He is injured in the personal enjoyment of the property and the river, and he is injured in the business which he follows of hiring and housing pleasure boats.

The defendants seek to protect themselves by alleging that the plaintiff has no title as riparian proprietor. To further this contention they object to that part of my brother Proudfoot's judgment, which deals with the effect and construction of the patent from the Crown under which the plaintiff claims. The patent gives to Aumond water lot No. 1, between Metcalfe and Cathcart streets, extending into the river two chains from the shore, with a reservation as to the navigable waters thereon. The effect

of it is in my opinion to convey the dry land and the land covered by water two chains out subject to the rights of the public in the Ottawa as a navigable river. By virtue of this Crown grant Aumond became a riparian proprietor both by lateral and vertical contact, according to the doctrine of *Lyon* v. *The Wardens, &c., of the Fishmongers Co.*, L. R. 1 App. Cas. 662. Under derivative title from Aumond through Prevost the plaintiff holds by deed of 23rd January, 1867, part of the water lot embracing all that abuts on the river, and described as bounded by a course along the waters edge down the stream from one street to the other.

As to the land bordering on the water the title of the plaintiff is indisputable, and in respect to that he is a riparian proprietor, who, by the fouling of the water is specially damaged beyond the rest of the public. His right is to have the water in front of him open for all navigable purposes, and to enjoy it free from extraordinary impurities. Even if the land under the water is vested in Prevost, the latter could not derogate from his grant to the water's edge by polluting, filling up, or otherwise cutting off his grantee from the beneficial enjoyment of the river: *Crossley* v. *Lightowler*, L. R. 3 Eq. 279. And if even Prevost has not the right to do this as against the plaintiff, still less have these defendants any claim to be protected in their wrong-doing. This much is the clear right of the plaintiff, even as owner to the water's edge only.

But the plaintiff claims damages also for injury to his business, and this presents another field of inquiry. First of all it becomes needful to examine more minutely the effect of the Crown grant of the water lot to Aumond. The reservation as to navigable waters is the point where it differs from the patent in the *Warin Case*, 7 O. R. 706. If there had been no such reservation the patentee's right would have been to fill up and appropriate as land any part or the whole of the water lot to the extent of two chains from the bank, and no question could have arisen

as to this being an encroachment upon navigation. But in this case the reservation makes the difference.

What then is this reservation and what its effect? It is not a reservation of the water itself, as in *Kirchhoffer* v. *Stanbury*, 25 Gr. 413, nor of the water course or flow of water as in *Egremont* v. *Williams*, 11 Q. B. 700. It is restricted to the free use, passage, and enjoyment of, in, over, and upon navigable waters which are upon any part of the parcel conveyed, and such a reservation is not of a proprietary but of a usufructuary enjoyment. This clause is intended to preserve that right of the public to navigate which is paramount to any right of property in the Crown: *Williams* v. *Wilcox* 8 A. & E. 314. The effect of the grant is to pass all the right of property possessed by the Crown in the land and water subject to the public easement. The grant of the river bed two chains out carries as parcel of it, the water thereon, so that we have to this extent the bed, the bank, and the water vested as private property in the patentee, subject to the servitude of a common public right of way for the purposes of navigation. In brief, the use of the river *quoad* this locality is public, but the property therein is private.

These co-existing, public, and private rights are clearly pointed out in the more modern decisions. Thus in *Lyons* v. *Fishmongers*, L. R. 1 App. Cas. Lord Cairns says, at p. 674: "A riparian owner in a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by the public right of navigation." To like effect, Lord Chelmsford, in the same case, at p. 678, says: "Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the view affords him, provided they occasion no obstruction to the navigation, I am at a loss to comprehend."

In substance, therefore, the effect of the grant was to bring this portion of the river Ottawa within the category

of private navigable rivers which are open to free navigation on the part of all who require to use them, while the soil thereunder is of private ownership. One of such rivers was under consideration in *Orr Ewing* v. *Colquhoun*, L. R. 2 App. Cas. 839. The correlative rights therein, public and private, are referred to particularly by Lord Gordon. He says, at p. 871, "The rights of the public are of a limited nature. They possess no right of property in the water itself. They have a right to the use of it only for the purpose of navigation. They have no rights as regards the flow of the water, or the withdrawing of water, if the right of navigation is not affected. If that right is not interfered with, they are not entitled to complain of operations by proprietors for the beneficial use and occupation of their properties." He afterwards refers to the principle applicable to such cases in words borrowed from an earlier Scotch case to this effect. The right of navigation is not so absolute, though it be the chief and primary use of the river, as not to be subject to equitable restrictions when in competition with other rights, p. 873. In the same case Lord Blackburn (basing his views upon the proposition that the public who have the right of navigation have no right of property) thus adverts to the extent of the public easement. "The public have a right to pass as fully and freely, and as safely as they have been wont to do, but unless there is a present interference with that right, or it can be shewn that what is now done will necessarily produce effects which will interfere with that right, then there is no *injuria*, and if no *injuria*, the foundation of the right to have the thing removed, fails," p. 854.

I am disposed to think that the term "navigable waters" found in the patent is to be construed not as including every inch or foot of shoal or shore water in the river, but as referring to water of such a depth and situation as is according to the reasonable course of navigation in the particular locality practically navigable. The granting of a "water lot" is with intent that it may be beneficially

used for business or other purposes in connection with the water, and it is but reasonable to hold in such a patent as this that some intrusion into the water was contemplated, although not to such an extent as to sensibly affect its navigability. That is, I conceive, the proper construction of this grant, as distinguished from that under consideration in the *Warin Case*, because here the patentee may rightfully use and occupy land covered by water, but only so much as will not interfere with the public easement. He may or may not, according to circumstances, be able to occupy to the limit of his grant, but every encroachment on the water will be at his peril if it is proved that he is guilty of a public nuisance.

In the *Warin Case supra* the terms of the patent justified an appropriation of the whole water lot to its extreme boundary, exempt from question as to the effect upon navigation. Under this patent the owner may erect on the bed of the river some structure which is not at the time detrimental to the public right of way, but if from the changing conditions of the stream or other cause it should subsequently turn out to be a nuisance, no lapse of time would legalize what he had done. As suggested in *Williams* v. *Wilcox*, 8 A. & E. 314, there is nothing unreasonable or unjust in supposing the right to erect, subject to the necessities of the public when they should arise. By this reading of the grant, one reconciles the right of the patentee to utilize his property as a "water lot" with the predominating reservation of a right of way for the public.

According to my view of this case, it is not needful to determine whether rules of law such as regulate the enjoyment of riparian property in the neighbouring country are to govern the use of like property in this Province. But these rules do, beyond doubt, amply vindicate the plaintiff from any charge of infringing the law in using, as he did, the land abutting on the river.

That law is stated in a very late case which defines certain riparian rights as incident to the ownership of land

bordering upon a navigable stream, of which the bed is vested in the State for public uses. Among these are the right to enjoy free communication between the land and the navigable channel of the river; to build and maintain suitable landings, piers, and wharves on and in front of the land, and to extend the same therefrom into the river to the point of navigability, and to this extent to occupy for such and like purposes the bed of the stream, subordinate only to the public right of navigation:" *Union Depot Co.* v. *Brunswick*, 47 Am. R. 790, (1883.) In *Dutton* v. *Strong*, 1 Black, (S. C.) 32, Mr. Justice Clifford traced back the origin of this state of affairs to colonial times. He says, "Our ancestors, when they immigrated here, undoubtedly brought the common law with them as a part of their inheritance; but they soon found it indispensable, * * to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects. * * No reason is perceived why the same general principles should not be applicable to the lakes, although these waters are not affected by the ebb and flow of the tide; * * But the lakes are not navigable in any proper sense, at least in certain places, for a considerable distance from the margin of the water. Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases."

In another and more recent case in the Supreme Court of the United States, Mr. Justice Miller thus speaks for the Court. "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of

his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public:" *Yates* v. *Milwaukee*, 10 Wall. 504. Without saying that such is clearly the English law if the ownership goes merely to the waters edge, and the bed of the river is reserved to the Crown, yet these decisions do appear to be in harmony with the law as recognized in our own courts.

In *Regina* v. *Perry*, 38 U. C. R. 431, the matter arose upon the trial of an indictment for nuisance. The evidence shewed that the defendant had filled in a portion of the river Scugog in front of his lot, and had erected a wharf in length forty feet by ten feet in width in front of Kent street. The depth of water at the place filled in was from six to seven feet. The river was navigated by steam boats. This obstruction prevented the private prosecutor from landing with his skiff, but no vessel going up or down could navigate the river at the place where the wharf was built. Other evidence shewed that it was not in the navigable channel of the river, and that there was no difficulty in navigating by reason of the wharf. Gwynne, J., directed the jury upon the evidence to render a verdict of "not guilty." This was upheld in term, Harrison, C. J., saying, at p. 433, "It is not every obstruction in a river which is to be deemed a nuisance * * Although there be an obstruction in fact, yet if it do not materially interfere with navigation, the defendants must be acquitted." See also *Attorney General* v. *Perry*, 15 C. P. 331, *per* Richards, C. J. In the present case the plaintiff constructed a floating wharf and boat house, in size sixty feet along shore by sixteen feet wide, and moored it to the bank for the purposes of his business. This was done over twenty years ago while he occupied the place before his conveyance. Some eleven years ago he increased the size to 140 feet by 40 feet in width. It draws four or four and a half feet of water, and floats, chained at each end, near a little bay formed at Nepean Point. There

is no evidence as to the depth of water at the side or in front of this wharf. It is not pleaded that it is a nuisance, nor do I perceive any evidence tending to such a conclusion. Now it is to be observed that there is no question in this case as to other riparian owners being injured; the sole point is, whether public rights have been prejudiced by this structure. In the latter enquiry it is always a question of fact whether an apparent obstruction in navigable water has so impeded, or is so likely to impede, navigation as to be a nuisance. As pointed out by Wilson, C.J., in *Warin's Case*, 7 O. R. p. 724: "The erection of a wharf may to some extent limit the navigation, but it does not do so necessarily to any appreciable extent; *i. e.*, if it does not interfere with it, and it may be an erection beneficial to the public and not a nuisance to be complained of and abated."

Here all the tendency of the evidence as to the position of the plaintiff's bank, the bay there formed at a distance of some 700 feet from the main channel, the great width of the Ottawa, its ample facilities for shipping, apart from the comparatively narrow strip where the plaintiff's wharf is moored, the fact that the plaintiff has thus occupied the property unquestioned for over twenty years: all strongly suggest that he has done nothing detrimental to river navigation, but that on the contrary his wharf has been rather a benefit to the boating public.

Had the patentee thus used the land and the river in connection with the land for the purposes of business, I see no escape from the conclusion that he could recover damages for such interference as the defendants have been guilty of. The question is: Does the plaintiff stand in as favorable a position? I think he does, whatever may be the nature of his title or occupancy of the water lot. I am not concerned to adjudge accurately as between him and Prevost upon this point: it is enough that his possession and business are, as against the public, legitimate, in order to entitle him to recover as against a wrongdoer: *Corporation of Hastings* v. *Ivall*, L. R. 19 Eq. 558; *Graham* v. *Peat*, 1 East. 244;

Kenrick v. *Taylor*, 1 Wils. 326. It may be that the view taken by my brother Ferguson is the right one, and I incline to that opinion, viz., that the conveyance by Prevost to the water's edge carries the boundary of what was conveyed to the limit of the land under water owned by Aumond If so the absolute title subject to the rights of the public is in the plaintiff, and he can recover just as the patentee might have recovered in like circumstances. I do not dwell upon this aspect of the title, as my brother Ferguson has discussed it at length.

But again it may be that the soil under water did not pass to the plaintiff, and then if I am right in holding that the water as parcel of and pertaining to the land passed as property to the patentee, the result would be that the plaintiff would have as against Aumond and Prevost a parliamentary title to the part occupied by his wharf. It would be a case not merely of easement as in *Griffith* v. *Brown*, 26 Gr. 503, and in appeal 5 A. R. 303, but of possession and appropriation of so much of the water lot. If however, the water did not pass as property to the patentee, then the erection of the floating wharf would be to create an easement on so much of the land covered by the water as it affected, in manner similar to the effect of an eave-trough on one man's house overlapping the property of an adjoining proprietor. But in this view of the case it is to be noted that this easement to the extent of 60 feet by 16 originated before the plaintiff got his conveyance. His deed being drawn up in pursuance of the Act to facilitate the conveyance of real property would therefore include this privilege or easement as appurtenant to the land granted: *C. S. U. C.*, ch. 91 sec. 3; see also *Francis* v. *Hayward*, 30 W. R. 744, and afterwards 31 W. R. 488. The subsequent extension of the easement to its present dimensions, must, in the absence of evidence, be attributed to the license or permission of the patentee, so that *quâcunque viâ*, the conclusion is reached that the plaintiff is lawfully in occupation of the land and water lot, and is entitled to recover for all the injury done to his property and business of which he complains in this action.

Hitherto I have dealt with this branch of the action as if it was essential for the plaintiff to establish that his place of business, as and where it is, does not constitute *per se* a nuisance. But granted that it has been proved to be a nuisance because invading the navigable waters of the river, it is by no means a proper or necessary conclusion that this disposes of the plaintiff's claim for an injunction and damages. It occurs to me that the plaintiff in such circumstances might well invoke the maxim, "*Injuria non excusat injuriam.*" *Giles* v. *Campbell*, 19 Gr. 226, and *Cockburn* v. *Eager*, 24 Gr. 409, which followed it, were greatly relied on by the defendants. But as at present advised I am not prepared to accept the broad view of the law there acted on. No cases were cited, and there appear to be English authorities which conflict in principle with those decisions. Thus it was said by Lord Denman in *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339, at p. 377, that it was important for the sake of the public peace, and to prevent oppression, even on wrongdoers, that they should not be regarded as without the pale of law when their property had been negligently injured by others. The property in that case consisted of an oyster bed so situate in a navigable tidal river as to be a public nuisance, but that was held to be no excuse for a vessel owner running his ship upon it negligently.

Dimes v. *Petley*, 15 Q. B. 276, was another case of injury to a wharf so constructed as to be a nuisance to navigation in the Thames, and it happened that a wind heedlessly damaged it. Lord Campbell, C. J., in giving judgment said that the defendant could not justify in doing any damage to the property of the person who has improperly placed the nuisance in the highway, if avoiding it, he might have passed on with reasonable convenience.

To such an action as this Kent, C. J., was of opinion that a defence of nuisance to the public was not relevant: *Palmer* v. *Mulligan*, 3 Caine's R. 819; other cases in the States may be consulted, such as *Stiles* v. *Hooker*, 7 Cow. N. Y. 266; *Larson* v. *Furlong*, 50 Wis. 681; *Clark* v. *Lake St.*

Clair, &c., Ice Co., 24 Mich. 508, bearing on this and the other points of this action. See also 1 *Hilliard* on Torts, 2nd ed., pp. 573, 653, 667; *Woolrych* on Waters, 2nd ed., pp. 388, 390; *Thriscutt* v. *Martin*, 3 Exch. 454.

There was some understanding at the trial in view of the late statute 48 Vict. ch. 24 (O.), that the plaintiff would not press at present for an injunction, but would rest content with damages.

This being so, let the action be entertained and let it be referred to the Master at Ottawa to compute the amount of damages sustained by the plaintiff which, with costs of action and appeal, are to be paid to him by the defendants.

Many of the points discussed before us in the Divisional Court were not presented to the Judge of first instance, but this should not affect the general costs of the cause, as the defendants were altogether in the wrong.

FERGUSON, J.—The plaintiff is the owner of a part of water lot number 1 in lot letter O. in the City of Ottawa. The lot number one was granted by the Crown by a patent dated 24th December, 1850, to one Joseph Aumond. The part of the water lot owned by the plaintiff fronts on the Ottawa river and embraces the whole front along the river of water lot number one. The plaintiff has constructed a floating boat house and wharf upon the water in front of the bank of his land. This is moored to the bank by means of two chains, one at each end. It is some 140 feet long and about 40 feet wide, extending this forty feet, and perhaps a few feet more, outwards from the bank into the stream, there being, as I understand, a few feet between it and the bank. In this place and by means of this boat house or wharf the plaintiff, as the evidence shews, has for many years been doing a very considerable business as a boatman and a letter or hirer of boats, &c. This action is brought for alleged injuries to the plaintiff's business, and to him as a riparian proprietor, by the defendants who are mill owners, and are and have been working saw mills upon the river above the plaintiff's lot, the alleged injuries

having been occasioned as is said by the deposit of slabs, saw-dust, and other refuse material from the defendants' mills in the water in front of the plaintiff's land, hindering and preventing access from the wharf or boat house to the actually navigable part of the river, and by material of a like character coming from the defendant's mills fouling the waters of the stream as they pass over, by, or in contact with the plaintiff's land. The grievances of which the plaintiff complains are more fully and at large set forth in his pleadings, but the foregoing short statement is probably sufficient for the present purposes.

A question has arisen which seems to be one of much importance, namely: Whether or not the plaintiff has any right or title to the land situated and lying under the waters of the river in front of the bank on his lands? The defendants contend that he (the plaintiff) has no such right or title, and that without this he cannot maintain the action for injury to his business, and that because (amongst other reasons) another person has the title to the land immediately in front of the plaintiff's bank, under the water, and has the right to build upon it close to the line between the land and the water, the plaintiff has not the ordinary rights that a riparian proprietor on the banks of a navigable stream has, and cannot maintain the action even for the fouling or polluting of the water.

It is said that the Crown in this country has long exercised the right of granting water lots, but that such right being doubted, the Act 23 Vic. ch. 2, sec. 35, was passed, whereby it was enacted that "Whereas doubts have been entertained as to the power vested in the Crown to dispose of and grant water lots in harbors, rivers and other navigable waters in Upper Canada, and it is desirable to set at rest any question which might arise in reference thereto, it is declared and enacted that it has been heretofore and that it shall be hereafter lawful for the Governor in Council to authorize sales, or appropriations, of such water lots under such conditions as it has been, or it may be deemed requisite to impose," and in the R. S. O. ch. 23,

sec. 47, there are the additional words, "but not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river, or other navigable water."

It was not disputed on the argument that this Act of Parliament removed any such doubts that might have existed before the passing of it. The patent of this water lot No. 1 was issued to Joseph Aumond. In the patent the description of the lot is as follows: "being composed of water lot No. 1 in letter O. in the aforesaid town of Bytown being butted and bounded as follows, that is to say: "Commencing where a stone monument has been planted on the west side of Metcalfe street at the south-east angle of the said water lot, then north 23° 30' west, three chains more or less to where a monument has been planted at the north-east angle of the said water lot, then south 66° 30' west four chains ten links more or less to a point in the Ottawa River two chains distant from the shore, then southerly parallel to the general course of the said shore to a point on the northern limit of Cathcart street, produced on a course of south 66° 30' west, distant two chains from the aforesaid shore of the River Ottawa, then north 66° 30' east six chains, ninety-six links more or less to the place of beginning."

The water lot together with a large number of other lots was mortgaged by the patentee Aumond, and the equity of redemption finally released after which the title seems to have been in one Prevost, and, after a perusal of the release and the recitals it contains, I do not see that the position of the title, so far as regards the property in question, is anything different from what it would have been if the patentee had, after obtaining his patent, made to the plaintiff such a conveyance as was made to him by Prevost, although some parts of the lot (not however upon or touching the water) had meantime been sold and conveyed.

In this conveyance from Prevost to the plaintiff (which bears date the 23rd day of January, 1867,) the description is as follows: "Being composed of that part of water lot

No. 1, in lot letter O in the city of Ottawa aforesaid (which said water lot No. 1 in lot letter O was by the Crown, by patent bearing date the 24th December, A.D. 1850, granted to Joseph Aumond), described as follows: Commencing at a point thirty-nine feet from the boundary stone on the north-west side of the said water lot, then in a southerly direction, parallel to Sussex street, a distance of ninety-nine feet to the intersection of the line between lots No. 3 and 4, as laid down on the plan of the sub-division of the said water lot No. 1 filed in the registry office for the city of Ottawa, thence along the said sub-division line produced in a westerly direction one hundred and thirty-two feet, thence southerly parallel to Sussex street aforesaid ninety-nine feet to the line of Cathcart street, thence along the northerly line of Cathcart street in a westerly direction to the edge of the river Ottawa, thence along the said water's edge down the stream in a northerly direction to the line of Bolton street, and thence in an easterly direction to the place of beginning."

In *Addison* on Torts, 5th ed. p. 248, it is said: "A riparian owner on a navigable river has superadded to his riparian rights, the right of navigation over every part of the river; and, on the other hand, his riparian rights are limited in this respect, that, whereas in a non-navigable river all the riparian owners might combine to divert, pollute, or diminish the stream: in a navigable river the public right of navigation would intervene, and would prevent this being done. The soil of a navigable river may be the private property of the riparian owners; but, even where the soil is in the Crown, the riparian owner has the right to have the river come to him in its natural state, in flow, quantity, and quality, and go from him without obstruction, just as he is entitled to the support of his neighbour's soil for his own in its natural state." The author referring to *Lyon* v. *The Wardens, &c., of the Fishmongers' Co.*, L. R. 1 App. Cas. 662.

Referring to the same case the author says: "The owner of a wharf on a river bank has, like every other

subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occcupier of any lands on the bank; nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But, when this right of navigation is connected with an exclusive access to and from a particular wharf, it ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages, or restrained by an injunction."

In *Coulson & Forbes'* Law of Waters, 72, it is said that the right of navigation is paramount to the right of property of the Crown and its grantees in the bed of the river, and such property cannot be used in any way so as to derogate from or interfere with the public right of navigation; and any grant by the Crown which interferes with the public right is void as to such parts as are open to such objections, if acted upon so as to effect nuisance by working injury to the public right. The public right can only be abridged by Act of Parliament, by writ *ad quod damnum* followed by an inquisition, or, by natural causes.

On page 73 the author, speaking of erections in the beds of navigable rivers which obstruct navigation says, "but it would now seem settled that such erections are not illegal in themselves, if they cause no actual or probable injury either to the public right or to the adjoining riparian proprietors.

In *Warin* v. *The London, &c., Loan, &c., Co.*, 7 O. R. at p. 724, Wilson, C. J., delivering the judgment, said: "And nuisance or no nuisance is a question of fact and not of law," referring to *Rex* v. *Russell*, 6 B. & C. 566, and *Regina* v. *Betts*, 16 Q. B. 1022. To the same effect appears to be the case *Regina* v. *Port Perry and Port Whitby R. W. Co.*, 38 U. C. R. 431, where the defendants were indicted for obstructing a navigable river by the erection

of a wharf, and there was no evidence that the part covered by the wharf had ever been navigated by any vessels of any size; but it was shown only that the prosecutor was prevented by it from landing there with his skiff, and the wharf was proved not to interfere with the navigation. It was held that the jury were rightly directed, that on this evidence the only verdict which could be rendered, was "not guilty," and it was remarked that such a direction was not so much a direction on the law as a strong observation on the evidence.

In *Attorney-General* v. *Perry*, 15 C. P. 331, Richards, C. J., delivering the judgment of the court, said: "In this country the practice has obtained in towns and cities for the Crown to grant land covered with water, and generally to the owner of the bank, when adjacent to a navigable stream, and grants so made have never been cancelled for want of power in the Crown to make the grant. The right of the grantee to build wharves and warehouses for the more convenient and profitable enjoyment of the water lots so granted, has never been successfully contested so far as I am aware of."

The Act of Parliament above referred to, having (so far as the same may have been necessary) authorized the granting by patent of the lands embraced within these two chains from the bank into and towards the middle line or thread of the river, and the grantor to the plaintiff being, so far as this land as well as the part of the lot on the bank that was conveyed by metes and bounds to the plaintiff are concerned, in the same position as to title as was the patentee, he was at the time of the grant to the plaintiff the owner in fee of the land on the bank, and of this land extending two chains into or under the waters of the stream, subject to the reservation in the patent, which reservation, so far as is of any importance here, may be called the right of navigation by the public upon the river, and the conveyance to the plaintiff embraces the whole of the water front of the water lot granted by the Crown. There is nothing, so far as I am able to perceive, either on

the face of the conveyance or in the surrounding circumstances at the time of the execution of it to indicate, to any degree, that the grantor intended (if intention on his part could now be of any consequence) to reserve to himself the part of the lot under the water or any part of this or any right or title in regard to it, or any part of it. The contrary of this would rather appear from the fact that before and at the time of the execution of this conveyance the plaintiff was in possession in pursuance, I apprehend, of his agreement for purchase, and had a boat house or wharf situated as, or nearly as, his present one is, but of much smaller dimensions.

Such being the facts I am unable to see why the part of the water lot covered by the water did not, subject to the right of navigation by the public upon the river, pass to the plaintiff by the conveyance to him as parcel of the lands that he purchased, if by a like conveyance (containing a like description by metes and bounds) of a lot or parcel of land upon a non-navigable stream, the grantor being the owner of the land to the middle of the stream, the title to the land to the middle of the stream would pass to the grantee.

True, it has not been shewn that these two chains extended to the middle of the stream. I apprehend, and it was, I think, assumed that the two chains do not extend nearly so far out as the middle line or thread of the river, and it may be said and urged against the view that I have taken, that the leading feature of the reason why in the cases of non-navigable streams the conveyance of the lands on the bank or to the water's edge under so many various forms of descriptive words as one finds in the books, has reference to boundaries between lots, municipalities, &c. Yet supposing the owner of lands upon the bank of such a stream, had, for any reason, conveyed away a part under the water lying immediately along the thread of the stream to say the neighbouring proprietor upon the opposite side of the stream, and afterwards made a conveyance of his lands the description in which extended to the

stream, Could it be said that the purchaser and grantee would not take by his conveyance so much of the lands covered by the water as had not been before granted by the vendor? Or, supposing the same person to be the owner of the land on both sides of the stream, and that he made a conveyance of the lands upon one side of it expressly granting by metes and bounds the lands under the water to a line beyond the middle line of the stream, and that he afterwards made such a conveyance of the lands on the other side of the stream as would in the ordinary case, according to the authorities, have the effect of transferring to the grantee the lands under the water to the middle line of the stream, Could it be said that the grantee would not take by his conveyance the land under the water that had not been before granted? I think that in either of these cases (which are perhaps really only one case) the grantee would take by his conveyance the part of the lands under the water of the stream that had not been before granted, and if so I do not perceive why, in the present case, the two chains under the water did not pass to the plaintiff, (subject to the reservation) if the conveyance to him is such in form as would in the ordinary case of a conveyance of lands on the bank of a non-navigable stream give to the grantee title to the lands to the middle of the stream.

The American case *Watson* v. *Peters*, 26 Mich. 509, deals, as it appears to me, with this immediate subject, the case being in respect to a conveyance of lands on the bank of a navigable stream. Cooley, J., in delivering the judgment, said: "The owner of city lots bounded on navigable streams, like the owner of any other lands thus bounded, may limit his conveyance thereof within specific limits, if he shall so choose, but when he conveys with the waters as a boundary, it will never be presumed that he reserved to himself proprietory rights in front of the land conveyed, which he may grant to others for private occupation, or so occupy himself as to cut off his grantee from the privileges and conveniences which appertain to the shore of navigable water. Such privileges and conveniences

constitute a part, and in many cases the principal part, of the value of the grant; and it is precisely in these cases of city lots that they are of most value, and generally constitute the chief inducement to the purchase; and the chief, or at least a very important element, in determining the price. These cases, therefore, of all others, are those in which the reason of the rule which infers an intent to convey the lands under the water, is most apparent and forcible. And the rule itself is too valuable, and too important, to be varied by so immaterial a circumstance as that the boundary on the water is defined by a line, instead of making use of words which to the common understanding would convey the same meaning. * * If, on the face of the plan, by reference to which the defendant bought, there was anything which distinctly indicated an intent on the part of the proprietors to make this case exceptional, and to reserve to themselves any rights in front of the water lots marked on it, after they should have been sold the case would have been different."

Then: Is the conveyance to the plaintiff such a conveyance, as would in the ordinary case of a conveyance of land on the banks of non-navigable streams give to the grantee title to the lands to the middle of the stream? The description of land in the conveyance, I have before set forth. It is a subject in respect to which there has been much litigation and the cases respecting it are numerous. It will be necessary, I think however, to refer to only one of these cases, *Kains* v. *Turville*, 32 U. C. R. 17. In that case a person owning land on both sides of a stream conveyed a piece on the south side, described as extending "to the water's edge of the creek, then keeping along the water's edge of said creek with the stream until" &c., reserving a road fifteen feet wide along the bank, and this was held to have passed the title to the land to the middle line of the stream. So far as material here the description in that case seems precisely the same as the description in the present case, and the late Chief Justice Draper in delivering the judgment of the Court,

said that the law on the subject was two well settled to require any extended reference to authorities to establish the rule, and the holding was that such a description will extend to the middle or thread of the stream, unless there be some words forming part of the description or introduced by way of exception which clearly exclude whatever may lie between the water's edge or the bank and the middle of the stream. In the present case as I have already said, there appears to be nothing whatever excluding the lands embraced in these two chains out into the river.

It appears to me that the judgment in the American case *Watson* v. *Peters*, already referred to, is precisely in point, the water there being a navigable water, as in the present case, and although it is not binding as an authority here, it is deserving of great weight. The view taken by the Court and the reasons given for it commend themselves to one's understanding, and I think the conclusion is one that should be adopted.

For the reasons that I have endeavored to state, I am of the opinion that by the conveyance to the plaintiff he obtained title to the lands in the stream embraced in the two chains from the bank mentioned in the description in the patent, but subject to the reservation expressed in the patent. And I think that the alleged rights of the plaintiff that he says the defendants have injured are not rights held by him as one of the public, but that they are private rights, in respect of which he may maintain an action, and I do not think it any answer to this to say that each one of several riparian proprietors has the same character of rights and interests, for in such a case each one would have the right to maintain an action against any one wrongfully injuring such rights or interests. It seems clear to me that any number of riparian proprietors along the bank of an individual stream cannot constitute the public.

Assuming then that the plaintiff is the owner of this land under the water, (the two chains from the bank), his right to succeed against the defendants appears. I do not

think that it is right to say that what he has done and is doing is *per se* a nuisance. It is not shewn by any evidence that what he is doing or has done has caused any actual or probable injury to the navigation of the river or, so far as I have been able to discern, to any of the rights or things that are reserved by the patent, or to any adjoining riparian proprietor; and the authorities seem to me to show that the question, nuisance or not, is a matter resting in evidence, and "for the jury" so to speak. Then the plaintiff is rightfully carrying on his business upon his own land, and it is not, as I understand, disputed that the refuse matter, to which I have before referred, has been sent down upon him by the defendants to his injury; and I am of opinion that he (the plaintiff) is entitled as against the defendants to redress for the grievances of which he complains, and I think his ground of complaint is a substantial one. I think he is entitled to succeed both in regard to the injurious interference with his rights as a riparian proprietor simply, and also with respect to the injurious interference with his business occasioned by the refuse and materials mentioned in the pleadings sent down upon him, or sent down so as to injuriously affect his rights or interests and the business that he is and has been carrying on. Perhaps it is better to say the business that he was carrying on, for I am not certain that the business has not been stopped by the causes before alluded to. I understand that, in view of the late Act of the Legislature, an injunction is not pressed for. I think the plaintiff is entitled to a reference as to his damages.

If it be assumed that the plaintiff is not the owner of the land under the water, (which I need not again particularly describe), then I think he would be entitled to redress for the injuries that he has sustained as a riparian proprietor simply. In that case he would be the owner of the land to the edge of the water, and I cannot see that the argument that his grantor could, as against him, build upon the land under the water up to the line between the land and water, and thereby cut him off from access

to the water and deprive him of the right to have the water flow past his land, as in the course of nature, can prevail. I think so to do would be a derogation from the grantor's own grant, and, besides, I think, as I have already said, that the reasoning in the case *Watson* v. *Peters*, *supra*, fully answers the argument and this reasoning, as I have said, is such as commends itself to the understanding and should be adopted as sound, and standing and resting on a good foundation.

Then, there appears to be no reasonable doubt that the water of the river has been polluted by the acts of the defendants that are complained of, and by reason of this does not flow by and against the land of the plaintiff in such a manner as he is entitled to have it flow, for it does not make any difference whether the line or plane of the contact of the water with the land of the riparian proprietor is horizontal, or vertical, or even oblique, he nevertheless has the right as such proprietor. In the ordinary case the plaintiff would be entitled to an injunction on this ground alone; but here the Act 48 Vic. ch. 24, (O.,) intervenes, and although the evidence is by no means full upon the subject, in weighing the matters mentioned, to be weighed against one another in the concluding part of the first section of the Act, I cannot think that the plaintiff is as a riparian proprietor, if he is the owner of the land only to the water's edge, entitled to an injunction, but only to a reference as to the damages he has sustained

PROUDFOOT, J.—I cannot say that I regret that the Chancellor and my brother Ferguson have seen their way to reverse my judgment given at the trial. There is no doubt that the plaintiff's business has been hurt, and that he has suffered damage. I must remark, however, that the argument on the appeal took a much wider range than at the trial, for there it was conceded that the plaintiff's remedy depended on his ownership of the two chains in the river covered by the water.

G. A. B.

[CHANCERY DIVISION.]

LATTA V. LOWRY ET AL.

Will—Construction—Vesting liable to be divested to let in new members of a class.

A testator devised certain land to E. T. "during his and M. A.'s natural life, then and after that to be given to M. A.'s children to them, their heirs and assigns forever."

Held, that the children of M. A. in existence at the testator's death forthwith took vested interests, subject to be partially divested in favour of children of M. A. subsequently coming into existence during the life of M. A., and that the representatives of any child dying before the period of distribution were entitled to claim the share of that child.

Paradis v. *Campbell*, 6 O. R. 632, distinguished.

THIS was a special case on the construction of the will of Francis Van de Bogart.

The case set out that the testator died in December, 1829, leaving a will dated February 26th, 1825, the fifth clause of which was as follows: Fifthly. "I give and bequeath unto my son-in-law Emanuel Treadway that part of my real estate commonly known" etc., (setting it out) "during his and my daughter Mary Ann's natural life then and after that to be given to her children to them their heirs and assigns forever": that Edmund Treadway died on May 11th, 1871: that Mary Ann, daughter of the testator named in the above clause of the will, was, at the date of the will, the wife of Emanuel Treadway, and died on June 20th, 1885, without having again married and leaving her surviving five children: that at the date of the testator's death she had six children living and two children were born after the testator's death: that at the date of her own death she had only five children living: that the three children who died between the date of the testator's death and the death of Mary Ann Treadway all left issue: that the questions submitted for the opinion of the Court were whether the five children of Mary Ann Treadway who were living at the time of her death were entitled to the

lands in the above clause of the will mentioned, as tenants in common to the exclusion of the descendants of her three children who predeceased her; or whether the descendants of the said three children were entitled to share in the said lands as co-tenants in common with the said children of Mary Ann Treadway who survived her; and whether if the descendants of the three deceased children of the said Mary Ann Treadway were entitled to share in the said lands, they took the share of their deceased parent, or took *per capita* as a class.

The case came up for argument on March 10th, 1886.

W. Cassels, Q.C., and *S. Gibson*, for children who survived Mary Ann Treadway. We say that only the children who survived their mother take. The words "then and after that" to be given to her children shew the intention is that the property shall vest at that period. The cases which seem to govern this are: *Paradis* v. *Campbell*, 6 O. R. 632, which seems exactly similar; *Tyrwhitt* v. *Dewson*, 28 Gr. 112; *McIntosh* v. *Bessey*, 26 Gr. 496; *Stevenson* v. *Gullan*, 18 Beav. 590; *Moor* v. *Raisbeck*, 12 Sim. 123.

J. Hoskin, Q.C., for children of those children of Mary Ann Treadway, who, though alive at the testator's death, predeceased their mother. Those children who were living at the death of the testator took vested interests, subject only to be divested *pro tanto* in case other children were born after the death of the testator, and before the period of distribution: *Hawkins* on Wills, p. 68-71; *Theobald* on Wills, 2nd ed. p. 400; *Jarman* on Wills, 4th Eng. ed. vol. 2, p. 156; *Webster* v. *Leys*, 28 Gr. 475; *Browne* v. *Hammond*, 1 Johns. Ch. 212*a*.

C. Moss, Q.C., for parties in the same interest. This is not like a bequest to certain persons upon their attaining a certain age, or on some such contingency. Here there is no such contingency. The death must happen. Therefore "then and after that" are to be taken as in *Campbell* v. *Harding*, 2 R. & M. 390, 410. It merely means here that the estate goes to the children at that time: *Ferguson*

v. *Stewart*, 22 Gr. 364, shews the rule is the same as to realty and as to personalty: *Theobald* on Wills, 2nd ed., p. 543. In *Paradis* v. *Campbell*, 6 O. R. 632, there was a direction to *divide*, *i.e.*, to do something at a particular time.

O'Brien, *Hoyles*, and *Middleton*, for the parties.

March 17th, 1886. BOYD, C.—The rule laid down in *Hawkins* on Wills, at p. 72, appears to be substantiated by the authorities and is in these words: "If real or personal estate be given to A for life, and after his decease to the children of B, all the children in existence at the testator's death take vested interest subject to be partially divested in favour of children subsequently coming into existence during the life of A." See *Browne* v. *Hammond*, 1 Johns. 212a; *Middleton* v. *Messenger*, 5 Ves. 136. The Court has arrived at this rule of construction impelled by the operation of two principles, *one* in favour of the early vesting of estates, and the *other* in favour of including all who come into being before the period of division: *Hutcheson* v. *Jones*, 2 Madd. 129. By the terms of the will in this case the estate in remainder vested forthwith upon the testator's death in the six children of his daughter then living and from time to time in the two subsequently born. The death of any child before the period of distribution does not affect the right of that child's representatives to claim the share of the one deceased. My opinion is therefore in favour of the estate being divided into eight parts and going to the living children and the representatives of the deceased children on that footing, and I so answer the case submitted.

Paradis v. *Campbell*, 6 O. R. 632, strongly urged for the plaintiffs, is not inconsistent with my conclusion. In that case the facts were different, for the child Henrietta had died not only before the period of division, but before the testator, so that the estate never vested in her, and could not therefore pass to her descendants.

A. H. F. L.

[CHANCERY DIVISION.]

MUNSIE v. LINDSAY ET AL.

Mistake of title—Occupation rent—Enhanced value—Allowance for improvements—Interest on money expended—Mode of taking account—Will—Construction—Charge on reversionary interest operating from death of testator—Interest on legacies paid under mistake of title—R. S. O. c. 95, s. 4—Evidence as to value.

In fixing an occupation rent to be charged against one who had been occupying land under mistake of title, and at the same time an allowance to be made to him for improvements, if such occupation rent is charged on the full increased value (as it should be in such case) then interest should be allowed on the actual costs of proper outlay for lasting improvements as an offset.

Manner of taking the account and contra account in such cases pointed out.

A testator made his will as follows:—"I leave to M. the W. ½ of lot 9 during her natural life. I leave to my son A." (an imbecile) "his board and lodging with £5 per year during his natural life, to be given as hereinafter mentioned. I leave to B." (certain other lands) "under the following restriction: *i. e.*, he is to pay A. £3 every year during his natural life. I leave to R. the W. ½, lot 9, after his mother's death, on the following condition: *i e.*, £2 in each year to be paid by him to A., and to keep A. in board and lodging during his natural life."

The devise to R. failed, he being an attesting witness.

Held, that Adam's maintenance as from the death of the testator, and not as from the death of M., was a charge on the W. ½ lot 9 in the hands of the heirs; and the land having, for some time after the testator's decease, been occupied under mistake of title by R. and his assigns, who had paid for Adam's maintenance, the heirs could not enjoy the land without making good the charge thereon to those who had thus exonerated them.

In this action it was referred to the Master to take an account of the rents and profits received by one who had occupied land under mistake of title, viz., as assignee of a devisee the devise to whom was void, and to fix an occupation rent to be paid by him, and also to fix the sum to be allowed to him in respect to improvements, and to certain legacies charged by the will on the said land and which he had discharged, and also of payments made by him on account of taxes, and it appearing that in discharge of some of the said legacies less than the face value thereof had been paid.

Held, that in computing interest on the sums so paid in respect of the said legacies, it should only be computed on the amounts actually paid, and not on the face value of the legacies, and further that the account should be taken together so that on one side would appear the disbursements for improvements, legacies, and taxes, and on the other the occupation rent.

It is not as a general thing the best rule, in cases of varying opinion as to value, to reject one set of witnesses *in toto* and to adopt the figures of an opposing set. It is rather to be supposed that neither is exactly to be followed, and that truth lies somewhere between the extremes.

THIS was an appeal from the report of the Master in Ordinary, made pursuant to the reference contained in the judgment as reported, 1 O. R. 164.

The judgment as issued contained the following clause:

The Master is also to take an account of the rents and profits received by the defendant William Lindsay from the said lands and premises or to charge him with a proper occupation rent therefor since the death of the widow of the testator. And is also to take an account of the amount by which the said lands and premises have been enhanced in value by lasting improvements, if any, made thereon by the said defendant William Lindsay, under the belief that the said lands and premises were his own, and also to allow the said defendant William Lindsay all moneys properly expended by him in payment of taxes upon the said lands and premises since the death of the widow of the said testator, and also what is due to the said William Lindsay in respect of the valid charges made upon the said lands by the testator which have been satisfied by the said William Lindsay, or James Munsie or Robert Munsie, through whom the said William Lindsay claims title, and on taking such account the said William Lindsay is to be allowed in respect of the legacies so paid or satisfied as if the amount due to such legatees has been paid in full.

On October 21st, 1885, the Master made his report, which, so far as is material, was as follows:—

6. The occupation rent chargeable against the defendant Lindsay in respect of the lands and premises in question since the death of the widow of the testator, and wherewith he is chargeable, amounts to the sum of $1,588.08, being at the rate of $150 per annum from September 15th, 1874, to April 20th last. In arriving at this sum I have not taken into consideration the amount by which the said lands have been enhanced in value by lasting improvements made by the said Lindsay, nor have I allowed him interest on his said improvements.

7. The lands in question herein have been enhanced in value by lasting improvements made by the said defendant Lindsay to the amount of $3,200, and he has properly expended for taxes upon the said lands the sum of $212.94, these two last-mentioned sums together make the sum of $3,412.94, from which is to be deducted the sum of $1,588.08 mentioned in the last preceding paragraph leaving a balance of $1,824.86 due to him on this account.

8. There is also due to the said defendant Lindsay in respect of the legacies referred to in the said judgment the sum of $1,800, for interest thereon to the said 20th of April, 1885, the sum of $766.14, for the board and lodging of Adam Munsie to the date of his death in 1880, made a charge upon the said lands and premises by the testator's will, the sum of $2,052.

The written reasons of the Master are to be found reported in 10 P. R. 173, and 432.

The plaintiff, William Munsie, and the defendants, other

than William Lindsay, who were the co-heirs with the plaintiff of the testator, now appealed from the report on the following grounds:

1. Because the amount allowed by the said Master as that by which the lands in question herein have been enhanced in value by lasting improvements made by the defendant William Lindsay is excessive.

2. Because the said Master has charged the said defendant Lindsay with an occupation rent for the said premises calculated upon the basis of their unimproved value only whereas the said Master should have charged the said defendant with occupation rent, taking into consideration the value of the improvements allowed the said defendant.

3. Because the said Master has erred in allowing to the said defendant Lindsay any sum for the annuity payable to and maintenance of Adam Munsie the son of the testator in the pleadings mentioned, as the maintenance of the said Adam Munsie, and the annuity payable to him are not valid charges on the lands in question herein, or only became a charge on the lands upon and after the death of the tenant for life of the said lands, and the allowance therefor should be calculated from that date, and because in any event the rate of maintenance allowed is upon the evidence before the said Master excessive.

4. Because the said Master should not have allowed to the said defendant Lindsay interest on the legacies charged upon the lands in question herein, or in any event, should not have allowed more than six years' interest on the said legacies, and should if interest is allowed upon the said legacies, have set off the occupation rent chargeable against the defendant Lindsay, against the said interest allowed to him.

It may be added that the portions of the testator's will (which was dated August 24th, 1854,) material to the questions raised in respect to Adam Munsie were as follows:

I leave and bequeath to my beloved wife Margaret the farm I now reside upon, being the west half lot nine, concession three, township of Albion, during her natural life * * I leave and bequeath to my son Adam his board and lodging with £5 per year during his natural life to be given as hereinafter mentioned. I leave and bequeath to my son Alexander the west half lot ten, concession four township of Albion under the following restrictions, that is to say he is to * * pay to his brother William the sum of £250 currency, and to pay to Adam £3 currency each and every year during his natural life, that is to say Adam's natural life * * I leave and bequeath to my son Robert, the west half of lot nine concession three of township of Albion after his mother's death on the following conditions, that is to say * * £2 in each and every year to be paid by him to Adam my son and to keep him my son Adam in board and lodging during his natural life."

The appeal came up for argument on March 11th, 1886, before Boyd, C.

W. Cassels, Q. C., and *R. S. Cassels*, for the appellants. As to the amount of the enhanced value, the Master erred in his method of estimating it. In 1864 Lindsay purchased for $4,400. Yet the Master fixes the value at that date at $3,500. The evidence shews that he came to a wrong conclusion, and we refer to the following cases: *Sanders* v. *Wilson*, 34 Verm. 318; *Moore* v. *Cable*, 1 Johns. Ch. R. 385; *Paul* v. *Johnson*, 12 Gr. 474. Then he has erred in law in estimating the proper occupation rent on the basis of the unimproved value only. On this subject we refer to *Skae* v. *Chapman*, 21 Gr. 534; *Bevis* v. *Boulton*, 7 Gr. 39; *The Governor and Company of Undertakers, &c., in York Buildings* v. *Mackenzie*, 8 Bro. P. C., at p. 70; *McGregor* v. *McGregor*, 5 O. R. 617; *McCarthy* v. *Arbuckle*, 31 C. P. 405; *Carroll* v. *Robertson*, 15 Gr. 173; *In re Brazill, Barry* v. *Brazill*, 11 Gr. 253; *Constable* v. *Guest*, 6 Gr. 510; *Kerby* v. *Kerby*, 5 Gr. 587; *Walton* v. *Bernard*, 2 Gr. 344; *Bright* v. *Campbell*, 54 L. J. Ch. 1077; *Eyre* v. *Hughes*, 2 Ch. D. 148; *Fisher* on Mortg., 4th ed., p. 872; *Jones* on Mortg., secs. 1128, 1140, 1149; *Bright* v. *Boyd*, 1 Story, (C. C.) 478, 2 *Ib.*, 605. And as to tenants in common, *Rice* v. *George*, 20 Gr. 221; *Buchanan* v. *McMullen*, 25 Gr. 193. As to the maintenance of Adam, and the sum allowed in that respect, the devise to Robert was on condition. This devise failed because of his being a witness. It is, however, only where such a devisee accepts the benefit on the condition for maintenance that the maintenance could be considered a charge: *Perry* v. *Walker*, 12 Gr. 370; *Clifton* v. *Ryan*, 26 U. C. R. 9; *Robson* v. *Jardine*, 22 Gr. 420; *Dougherty* v. *Carson*, 7 Gr. 31. There is no charge on the land unless the devisee accepts. Then again *Turner* v. *Probyn*, 1 Ans. 66, and *Stevens* v. *Dethick*, 3 Atk. 39, shew there was no charge on the land until the estate became vested. If the charge is a charge

on the land from the death, how is it to be worked out? How the Master could make out that by taking a devise which never was made, Robert became charged, it is impossible to understand: *Hopkins* v. *Hopkins*, 3 O. R. 223. As to Robert there was no devise. As to the interest on the legacies, being the fourth ground of appeal, we say interest on the legacies should not be allowed, or if allowed should be set off against the rents. The decree does not give interest, and there is no legal right to interest. A person allowed for improvements is not in the position of an unpaid legatee. In any event the amounts paid should have been set off from time to time against the amounts received, the rents from time to time. The Master gives him interest on moneys which he never paid. Then again, the Master allowed more than six years' interest on sums paid. This, however, cannot be permitted unless amounts are set off as we contend they should be.

C. Moss, Q.C., and *Barwick*, contra. As to the occupation rent, many cases have been cited relating to mortgagor and mortgagee, but this is not such a case. Here Lindsay was tenant in common, having acquired from two of the heirs their interest in the land, long before the commencement of this action. He was tenant in common before the death of the mother. He had acquired the interest of Robert, who, besides the devisee was an heir at law, and on failure of the devise, became tenant in common. His position then is this: he being allowed an allowance to the extent of enhanced value, he is also to be charged with an occupation rent. As a tenant in common, however, he would not have been charged any occupation rent, except for the allowance for improvement: *Fawcett* v. *Burwell*, 29 Gr. 445. It is only because he claims for improvements, that, being a tenant in common, he could be charged with an occupation rent. He then should not be charged upon what he himself has created upon the land, and if he is, he should be allowed interest. *Fawcett* v. *Burwell*, *supra*, shews the rule on which the Court acts in such matters.

McGregor v. *McGregor*, 5 O. R. 617, is a case something like this. There no interest was charged on the rents, although interest was charged on the improvements. As to the third ground of appeal, the maintenance of Adam Lindsay, the will clearly shews that the testator intended the land should be burdened with the maintenance of Adam. The testator intended Adam's board and lodging should be paid from the time of his death. The parties taking the land could take it only on that condition. Could the heir take the land and say he would take it free from the condition? The failure of a prior estate does not destroy the charge.—[BOYD, C.—No, it only accelerates it.]—We go further and say that even if Roberts had had a perfectly valid estate by virtue of the devise, and if he had after the testator's decease declined the gift, Adam could at once have come and had it declared he was entitled to the charge against the remainder: *Carter* v. *Carter*, 26 Gr. 232; *Swainson* v. *Bentley*, 4 O. R. 572. We have done what these parties could not take the land except subject to; we have satisfied the charges, and should be allowed to say that, having satisfied these valid charges, and these persons coming in and claiming our title, they should make good to us these amounts. As to the interest on the legacies, we become subrogated to the rights of the legatees. We are entitled to these legacies; we hold them as charges against the land; we paid them upon our becoming entitled to the land—within two or three years after we got the land. We are the legatees now. There was nothing to set off against this. The occupation rent does not satisfy the enhanced value, so there was nothing to set off against the legacies in respect to that. If the legacies had been paid to the original legatees, interest would have had to be paid to them. So then it should also to us.

March 23rd, 1886. BOYD, J.—In arriving at the amount by which the farm has been enhanced in value by the lasting improvements made thereon by Lindsay, the Master has not given sufficient weight to the governing

fact that this defendant bought the place in 1864 for $4,400; and in view of this evidence, he should have endeavoured in some measure to harmonize or have treated as flexible the conflicting opinions honestly given, I suppose, on both sides, as to the value of the land in its then unimproved state. It is not as a general thing the best rule in cases of varying opinion as to value to reject one set of witnesses *in toto* and to adopt the figures of an opposing set. One might rather suspect that neither was exactly to be followed, and that truth lay somewhere between the extremes. The very fact that juries arrive at values by some such path of compromise, indicates that it commends itself to the ordinary mind as a rough and ready mode of solving a difficult question. And even legally trained intellects have resorted to this expedient in despair of finding any more precise method of arriving at a conclusion. I recall the language of Sir Anthony Hart in *Scott* v. *Dunbar*, 1 Moll. at p. 457, where he says, "There is nothing which raises such difference of opinion as the value of land. Surveyors vary so widely, that I know of no mode less unsatisfactory than the rough approximation by taking a mean of all their estimates." A like method of arriving at the average was adopted by Lord Lyndhurst, and is worked out by him in *Pott* v. *Curtis*, Younge R. at p. 555 and 559.

I think it is well found that the farm in its improved state is worth $7,000. That is what it has been sold for, (or rather for $7,020) since the Master has reported. It is also sufficiently proved that the land, as in its former state, would not be worth less now than in 1864. Some $300 of increased value has resulted from the construction of a railway in the neighbourhood. This would reduce the improved value, arising out of the defendants' improvements to that extent. I am satisfied that the price given by the defendant in 1864, was somewhere about the real value of the farm in its then condition, and the further you get away from the figure of $4,400, the more likely are you to be wrong: *Attorney-General* v. *Green*, 6

Ves. 452; *Waters* v. *Thorn*, 22 Beav. at pp. 556, 557. It may be correct that as the defendant purchased on favourable terms by getting time and giving a mortgage, he paid more than he otherwise would have done. Conceding this, I think that $400 is an ample allowance on that score, so that I am induced by all the circumstances of the case to fix the unimproved value at $4000, which would allow $2,700 for the defendant's permanent improvements instead of $3,200 as fixed by the Master. As a test of this result, it will be found that the details of the actual cost of permanent repairs and improvements made by the defendant, deducting for wear and tear during the life-tenancy, and for such matters of general amelioration as would be the consequence of proper husbandry, will not exceed this figure. It is also within $100 of the result arrived by applying Lord Lyndhurst's method.

The next ground of appeal relates to the occupation rent from 1874, when the life-tenancy determined. The Master has charged occupation rent on the unimproved value, and has allowed no interest on the value of the improvements The appeal is because the Master should have estimated the rental on the full improved value. He has proceeded on this principle: that the occupation rent should be based upon the rental value of the farm unimproved, unless interest is allowed on the expenditure for improvements: 10 P. R. 180. None of the cases referred to justifies this broad conclusion. Some expressions in *Morley* v. *Matthews*, 14 Gr. at pp. 556, 557 (which refer, however, only to a provisional arrangement) do appear to point in this direction, but with that exception I have seen nothing which supports, as of right, this mode of taking the accounts. As to these expressions it will be found difficult to reconcile *Morley* v. *Matthews* with the decision in *Rice* v. *George*, 20 Gr. 221.

While the authorities differ in some details, owing perhaps to special circumstances, there is yet a general accord upon the chief principles which regulate the manner of accounting under this head of equity. I speak thus,

because this claim for improvements under mistake of title was long recognized as a valid equity, before the statute gave it the sanction of a legal right (R. S. O. ch. 95, sec. 4.) See cases in *Viner's* Abr. Tit. Purchaser I., vol. 18, p. 124, one of which is relied on in *Gummerson* v. *Banting*, 18 Gr. 516. Now apart from the statute, when lasting improvements were the subject of compensation whether in favor of a mortgagee, or a part owner, or a stranger, the rule was to make him account for profits of the whole property improved. It is difficult to refer to express decisions because the matter has been very much taken for granted as in *Carroll* v. *Robertson*, 15 Gr. at p. 177, where it is assumed that if improvements are allowed to a person he should be charged with the enhanced rental owing to them. But *Marshall* v. *Cave*, 3 L. J. Ch. O. S. 57, more fully noted by Mr. Coventry in his edition of *Powell* on Mortgages vol. ii. p. 957*a*, is a clear case as to a mortgagee, and *Gibbons* v. *Snape*, 1 DeG. J. & S. 622, 626, 627, and 633, is an equally clear case as to a part owner. See also *Attorney-General* v. *Balliol College, Oxford*, 9 Mod. at p. 412, and *Paul* v. *Johnson*, 12 Gr. at p. 482.

The next point to be observed is that when lasting improvements were not allowed to the person in possession he was not charged with any increase of rent attributable thereto. This is so laid down by Mowat, V.C., in *Carroll* v. *Robertson*, 15 Gr. 173, and it is also the subject of a late decision in the English Court of Appeal: *Bright* v. *Campbell*, 54 L. J. Ch. 1077.

There is more uncertainty, however, touching the next step in accounting, and that is whether, charging increased rental, interest should on the other side be computed upon the value of the improvements. Notwithstanding what is said in Seton on Decrees, 4th ed. vol. ii., p. 1080, I think the usual and the better practice in mortgage cases is to allow such interest when the expenditure overtops the rents, issues and profits. Even as a general rule it is said that interest is allowed in the text of the last editions of *Fisher* on Mortgages, 4th ed., sec. 1474, and *Coote* on

Mortgages, 5th ed., p. 815. The decree is settled in that way in a case of some pertinence to the present: *Webb* v. *Rorke*, 2 Sch. & Lef. 661, 676, wherein a transaction between mortgagor and mortgagee was set aside as savouring of fraud. Many of the later cases are referred to by my brother Proudfoot in *Fawcett* v. *Burwell*, 27 Gr. 445, and he there directed interest to be allowed on the improvements for which there was a lien, following the analogy of the mortgage decisions. Interest was also awarded on the outlay for such improvements in *The Governor & Company of Undertakers &c., in York Buildings* v. *Mackenzie*, 8 Br. P. C. at p. 70, though being a Scotch appeal it is not necessarily an authority. But it shews what was deemed the fair and reasonable practice, and in that respect applies to all cases of a kindred character. See also *Murray* v. *Palmer*, 2 Sch. & Lef. at pp. 490, 491. The reason of the allowance in mortgage cases appears to be justified in a way applicable to this case, as explained by Sir Thomas Plumer in *Quarrell* v. *Beckford*, 1 Mad. at p 281. He says the Court of Equity in this relation considers itself competent to go beyond the contract, and to consider what is just and equitable between the parties. Now the effect of the statute creating this lien on the land is to assimilate the condition of the untitled improver to that of a mortgagee in possession. See *Bernard* v. *Davies*, 9 Jur. N. S. at p. 36.

No doubt a difficulty as to interest on the expenditure for improvements, arises from the terms of the Act by which the lien is limited to the amount of enhanced value at the date of action. The question then is not what the improvements have cost, but what are they worth at the time of recovery. That value defines the measure of the lien which cannot be exceeded. But the statute does not interfere with the manner of accounting as to the occupation rent having regard to the improvements. That remains to be settled so that equitable restitution shall, as far as possible, be awarded on each side. When the possessor makes lasting improvements and thereby in-

creases the occupation rent, and the owner seeks to charge him with this rent, he should do equity by allowing interest on the cost or value as the case may be at that time. If money is spent on permanent works, that means the loss of interest to the possessor for which he expects to be recouped out of the fruits and profits of the land: if he is called upon to account for these to the true owner it is no compensation to give the former a lien at some future period for part of his expenditure. The manner of taking such an account is well and clearly indicated in *Paul* v. *Johnson*, 12 Gr. at p. 479, seq.

The claim for the full rent of the improved land and the counter-claim for interest on the outlay appear to be reciprocal and entitled to equal respect. Money or moneys worth produces the improvements; the improvements help to produce the rent, and if increased rent is given on one side the interest of the money should be received on the other. This interest may be less or more than the rent, but however this results, it appears to me that the rule should be, if the owner seeks to charge full occupation rent against the possessor he thereby submits to have the whole expenditure and interest taken into account as an offset. Assuming that the outlay is greater than the rental and that the rental is more than the interest the strictly correct way to take the account, in view of expenditure from time to time, would be thus; at the end of the first year ascertain the fair rent based on the improved value and apply this to reduce the actual cost of proper outlay for lasting repairs and improvements, with interest from the date of doing or paying for the work. The balance will represent the amount of principal expended, which is to bear interest for the next year. Add any other expenditure in that year, and so carry on the account to the end. Then in order to satisfy the statute, ascertain how much principal money has been paid from time to time by the overplus of the rents, and so find how much has been paid in respect of the enhanced value, for which alone a lien is given. If the total of these repayments of principal equals the amount

of the enhanced value the lien has been fully satisfied. If less there should be a lien for the difference. If, in the aggregate, the lien has been overpaid, yet so long as the cost of improving has not been fully recouped, it cannot be said that the result is any hardship to the real owner, who need not have invoked this manner of accounting.

In many cases, and perhaps in the present, it will be found that there is no substantial difference between the interest on the outlay for improvements and the increased occupation rent arising therefrom, and in such cases it will be a convenient working rule to set off one against the other. But the Master does not appear to have applied this test, or to have reached in this way the result which he reports. In view of the great expense and uncertainty arising from the investigation of these details of past transactions of which no record is kept, it would be a merciful interposition on the part of the legislature to cut the knot by declaring that the increased rental should be set off as of course against the interest of the money expended on improvements, unless a special case is made to justify further enquiry.

The farm in question is devised to Robert on condition that he is to keep his brother Adam in board and lodging during his life. Robert sold to James subject to that condition, and James did observe it from 1861 till 1879 when he transferred the care of Adam to his brother Alexander, and paid him at the rate of $100 for this service for ten years till Adam died. The Master has allowed $1,900 for the whole period, and this is not seriously questioned as to the last $1,000. But as to the first $900 the objections are that the maintenance is not at all charged on the land, or if so charged not operative till the death of the tenant for life, and that the rate allowed is excessive. The judgment allows the defendant all that is due to him in respect of valid charges made on the land by the testator which have been satisfied by James or Robert Munsie or by the defendant Lindsay. The evidence shews that Adam was imbecile, a person requiring to be cared for, though he was

at times able to work. The testator evidently considered that he could not take care of property and could not provide for himself as the only bequest he gives him is that he have his board and lodging with £5 a year during his life, and directs that this be furnished by Robert as one of the conditions on which he gets the land after his mother's death. If the meaning of the will is not that the maintenance is to be furnished forthwith by Robert, then no provision is made for this imbecile till after his mother's death. This cannot be, and the will means that Robert is to supply maintenance continuously after the testator's death, as a condition of enjoying the land. This is as much a charge upon the land as the legacies to the daughters, and it was intended to be and is embraced in the language of the reference to the Master. If it was a matter of strict accounting on the footing of contract between Adam and James it may be that the Master has allowed a large sum for these nine years from 1861 to 1870. But the transaction is not to be viewed in that way. James was not hiring Adam, and had no right to command his services. On the other hand he was under obligation to carry out fully what the testator intended, and see after the well-being of one who was not able to care for himself. Adam had peculiar and disagreeable habits, and though strong and able bodied he had to be watched and directed as if he were a child. Upon the whole circumstances of this allowance I do not feel disposed to interfere with the Master.

The point of law made upon the construction of the will strikes me in this way. The testator intends that Adam shall be supported, and he indicates that such support shall be furnished by Robert, and on this condition he devises the estate in remainder to him. That under *Robson* v. *Jardine*, 22 Gr. 420, would form a valid charge on the land if Robert was competent to take. But being incompetent, the land descends to the heirs, but in equity subject to this charge according to the view I endeavoured to set forth in *Yost* v. *Adams*, 8 O. R. at p. 414. The heirs therefore

should not enjoy the land, without making good the charges thereon to those who have thus exonerated them. I certainly viewed this as one of the charges to be borne by the plaintiff on the original hearing, and I think the judgment as drawn up is sufficiently explicit on the point.

As to the last ground of appeal the Master was wrong in not bringing the money paid for legacies at once into the account, instead of keeping it separate for the purpose of interest. He erred also in computing interest on the face value of the legacies, as it appears that less than that was paid for some or all of them (See S. C. 1 O. R 166.) Interest should run only on the sums actually disbursed, or values actually given to the legatees. The account should be taken together so that on one side would appear the disbursements for improvements, legacies, and taxes, and on the other the occupation rent from 1874. The propriety of this is obvious because the fruits of the land supply the primary means of defraying all these charges on the land, and these disbursements should be set off against the receipts periodically in the one account with interest on the balances.

The Master has not, I observe, brought the maintenance into the account for interest. There is no appeal in this head, and I suppose there are good reasons for so treating it as not interest-bearing.

In the result neither party has gained decided success, and instead of apportioning it will be better to withhold the costs of this appeal.

A. H. F. L.

[CHANCERY DIVISION.]

DOBBIN v. DOBBIN.

Dower in equity of redemption—Mode of computing—Husband and wife—Mortgage.

D. being owner in fee of certain lands, on March 4th, 1884, mortgaged the same, to secure payment five years after date, of certain moneys. On March 15th, 1884, he married the plaintiff, and died intestate on August 16th, 1884. He left no other estate.

Held, that the plaintiff could only claim dower in the equity of redemption, unless she contributed ratably to the amount of the mortgage incumbrance.

Method of arriving at the amount of dower in such cases pointed out.

Reid v. *Reid*, 29 Gr. 372, commented on.

THIS was an action brought by Elizabeth Ann Dobbin against John Dobbin, claiming dower in certain lands.

In her statement of claim, she set up that on February 22nd, 1876, W. F. Dobbin, deceased, became the owner in fee simple of the lands in question: that on March 4th, 1884, he executed a mortgage to one Mary Elizabeth Claxton, on the said lands, which mortgage was registered on March 5th, 1884, and was still outstanding, and would mature on March 4th, 1889: that on March 15th, 1884, W. F. Dobbin married the plaintiff, and died intestate on August 16th, 1884, leaving the defendant his sole heir-at-law and the plaintiff, his widow, him surviving, and she claimed dower in the said lands free from any claim by reason of the said mortgage, and further relief.

In his statement of defence, the defendant admitted the above facts, but claimed that the plaintiff was bound to contribute her share of one-third toward payment of interest accrued and payable on the said mortgage, which she had refused to do; and stated that he had offered the plaintiff a lump sum in lieu of dower based upon the value of the equity of redemption only, but that the plaintiff claimed that he was bound to pay off the entire principal of the mortgage, so as to let her in for her dower on the entire value of the property regardless of the mortgage.

The action was tried on April 21st, 1886, at Cobourg, before Boyd, C.

A. P. Poussette, Q.C., for the plaintiff. The plaintiff is willing to contribute one-third of the interest on the mortgage until the principal is due, when that should be paid by the heir-at-law. I refer to R. S. O. ch. 126, *ib.* ch. 106, s. 33; *Lindsay* v. *Lindsay*, 23 Gr. 210; *Sheppard* v. *Sheppard*, 14 Gr. 174; *Re McMorris*, 8 C. L. J., N. S. 284; *Reid* v. *Reid*, 29 Gr. 372; *Re Percy, Percy* v. *Stewart*, 22 C. L. J., N. S. 104; *Doan* v. *Davis*, 23 Gr. 207; *Re Estate of Donald Robertson*, 24 Gr. 442; *Re Robertson, Robertson* v. *Robertson*, 25 Gr. 276; *Carrick* v. *Smith*, 34 U. C. R. 389; *Martindale* v. *Clarkson*, 6 A. R. 1.

Dumble, for the defendant. We claim that the widow should pay her share of the mortgage: *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334; *Jones* v. *Jones*, 4 K. & J. 361; *Smith* v. *Smith*, 3 Gr. 451; *Heney* v. *Lowe*, 9 Gr. 265; *Thorpe* v. *Richards*, 15 Gr. 403; *Re Hopkins, Barnes* v. *Hopkins*, 8 P. R. 160; *Macqueen's* Husband and Wife, 2nd ed. p. 182. If a lump sum is fixed for the dower, it must be based on the value of the property as reduced by the mortgage.

May 5th, 1886. BOYD, C.—The plaintiff claims dower against the heir-at-law of the intestate who created a mortgage on the lands prior to his marriage, which is still unsatisfied. He died possessed of no other property. The mortgage is paramount to the wife's dower, which attached only upon the equity of redemption. No question of suretyship, therefore, arises in virtue of her relinquishing her dower for the husband's benefit by joining in the mortgage. She cannot found any claim, therefore, to have the heir's estate onerated with the payment of this mortgage in order to give her the full measure of her dower at law. She never had more than dower in the equitable estate, *i. e.*, dower subject to the payment of the mortgage in question. The death of her husband does not extend her rights, and if she seeks more than dower in the value of the estate after deducting the amount of the mortgage, she must contribute ratably to the payment of that

incumbrance. That is to be worked out in this way: getting one third of the rents and profits for life, she must keep down the one-third of the interest attributable to the mortgage debt for the like period. The yearly value of the dower is to be ascertained by deducting from one-third of the rents, issues and profits of the whole estate one-third of the yearly interest of the mortgage: with that basis, compute the value of an annuity to produce that sum during her life according to the tables and methods usually employed in fixing a gross sum for dower. *Reid* v. *Reid*, 29 Gr. 372, supports the argument of Mr. Poussette, to some extent, though I think the head note goes beyond the language of the judgment. But taking the language used at p. 374 in an absolute sense as exonerating the dowress from making any contribution to the principal of a mortgage existing before the marriage, it appears to be at variance with the views of the same judge in *Heney* v. *Lowe*, 9 Gr. 265, and *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334. I am not prepared to apply such a rule to a case of this kind when there is no property available for the payment of the paramount mortgage but the land itself. *Re Percy, Percy* v. *Stewart*, 6 C. L. J. 195, cited by the plaintiff is really against him for there the question was simply as to *arrears* of equitable dower: the dower itself was allotted in the surplus only after discharging the principal and interest then due of the mortgage. This I take to be the correct rule in the present case. There is a valuable collection of authorities on this point in Mr. Cameron's book on Dower, and it will be found by referring to p. 251, that the United States' decisions are in accord with my conclusion, secs. 39, 40.

The result I have reached follows from the line of reasoning adopted in *Heney* v. *Lowe*, and *Campbell* v. *Royal Canadian Bank*, as well as from the older English decisions: *Banks* v. *Sutton*, 2 P. W. 700; *Squire* v. *Compton*, 9 Vin. Abr. 227, pl. 60.

If the parties prefer it, perhaps a more direct plan is to deduct the principal of the mortgage from the value of the

land, and fix the dower upon the one-third yearly return from the thus diminished value of the estate, or in other words, on the annual return from the value of the equity of redemption.

As the point appears not to be expressly decided in the courts of this Province, it will be not unreasonable to allow both parties to abide their own costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE GILCHRIST AND ISLAND.

Short form mortgage—Power of sale—Departure from symbolical short form of power—Inability of assignee of mortgage to sell—R. S. O. ch. 104.

A mortgage deed, purporting to be made pursuant to the Short Form Act contained the following: "Provided that the said mortgagee on default of payment for two months, may, without giving any notice, enter on and lease or sell the said lands." The mortgage was assigned to G. and K., who assumed to sell under the above power.

Held, that they could not confer a good title upon the purchaser, for that in construing the above power resort could not be had to the long form in the Act, inasmuch as notice was dispensed with, which was not a mere exception from nor qualification of the short form given in the Act, but an abolition of one of its most important terms; and the power thus being left to its own force, no one but the *persona designata*, the original mortgagee, could exercise it.

A transfer of the estate does not involve the transfer of trusts or powers necessarily as inseparable incidents of the estate.

THIS was an application under the Vendor and Purchaser Act, in the matter of John Gilchrist and William Reid Kent, vendors, and George Island, purchaser.

On December 20th, 1883, one Alexander M. Huston by mortgage, purporting to be made in pursuance of the Act respecting short forms of mortgages, granted to James H. Huston the west half of lot 3 in the 2nd concession of the township of Mono, to secure the payment of $600 and interest. The power of sale in the mortgage was in the following words: "Provided that the said mortgagee on

default of payment for two months, may without giving any notice, enter on and lease or sell the said lands." The mortgagee afterwards, on December 1st, 1884, assigned the mortgage to the vendors, and default having been made for two months, they took proceedings to sell the land under the power of sale, and on March 6th, 1886, sold the same under the power to the purchaser at public auction. The purchaser now took the objection that inasmuch as the power of sale provided for a sale without notice it could not be construed under the extended form given in the Act, as the form provided by the Act contemplated a sale only *after* notice, and that the power of sale being thus left to its own wording for its interpretation did not extend to the assignees of the mortgage so as to enable them to exercise it, they not being named in it.

The matter came up for argument on March 24th, 1886.

Howell, for the vendors.

W. L. Walsh, for the purchaser. The power of sale does not extend to assigns unless named, but is personal to the mortgagee: *Leith's* Real Property Statutes, p. 373, and cases there noted; and therefore the vendors being assigns cannot exercise the power unless the interpretation given by the Short Forms Act applies. That interpretation does not apply for the form given in column one of the schedule to the Act, provides only for a sale *after* notice, whereas this power of sale permits a sale *without* notice. This is such a deviation from the statutory form as to place this power of sale without the act: *Lee* v. *Lorsch*, 37 U. C. R. 262; *Brown* v. *O'Dwyer*, 35 U. C. R. 354, and therefore the vendors cannot make a title under it.

The following cases were also referred to on the argument: Article on Power of Sale in Mortgages, vol. 5, C. L. T. p. 10; *Robertson* v. *Hamilton Provident and Loan Society*, 4 C. L. T. 121; *Leith's* Real Property Statutes, pp. 102, 418; R. S. O. ch. 104, Sch. B. No. 14.

March 31st, 1886. BOYD, C.—To get the benefit of the extended form of words in column two of R. S. O. ch. 104, pp, 992–999, it is necessary to use the abreviated forms of words in column one. Having used these literally or in substance, it is permissible to annex to them or introduce into them exceptions or qualifications by Direction 3 of Sched. B., p. 992. See *Crozier* v. *Tabb*, 38 U. C. R. 54. But resort cannot be had to the exponential clause unless there is first found in the instrument the symbolical clause of which the former is the parliamentary equivalent. Here the form of words in column one, No. 14, is not used. The parties to this mortgage make provision for a sale on default of payment for two months without any notice, whereas the statute contemplates that before the power is exercised, written notice shall be given to the mortgagor either personally or at his usual or last place of residence: See p. 997. This deviation from the statute is neither an exception from nor a qualification of the form there given, but an abolition of one of its most important terms. It is deemed oppressive to be able to sell without notice to the mortgagor: *Miller* v. *Cook*, L. R. 10 Eq. 647, and the form in the statute is so expressed as to require some notice to be given. If the parties dispense with notice, the proviso for sale ceases to be operative under the Act, and must derive virtue solely from its force as a contract or covenant which is to be construed according to the ordinary rules: R. S. O. ch. 104, sec. 3.

The power of sale then in this mortgage, is thus expressed: "The said mortgagee on default of payment for two months may, without giving any notice, enter on and lease or sell the said lands." That is no more than a power personal to the original mortgagee, which can be exercised only by him. The assignment of this mortgage conveys the land and transfers the debt to the assignee, but does not convey the right to sell in this summary way: *Emmett* v. *Quinn*, 7 A. R. 306; *Bradford* v. *Belfield*, 2 Sim. 264. A transfer of the estate does not involve the transfer of trusts or powers necessarily as inseparable

incidents of the estate: *Cole* v. *Wade*, 16 Ves. at p. 46, and cannot do so where the power is limited to *persona designata*: *Chance* on Powers, Sec. 688.

This is a case of power in which the construction has been more strict than in cases of trust. But so far as the devolution of a trust for sale is concerned: *Cooke* v. *Crawford*, 13 Sim. 91, is against the right to sell by the assignee of the mortgage. Though that case was not regarded as any longer of authority by *Jessel*, M. R., in *Osborne* v. *Rowlett*, 13 Ch. D. 774, it was re-established by the observations of the Lord Justices, in *In re Horton* v. *Hallett*, 15 Ch. D. 143, who said they were not prepared to dissent from *Cooke* v. *Crawford*, or to consider it as over-ruled.

My decision is, that a good title cannot be made by the assignee of the mortgage, by virtue of his attempted exercise of the power of sale therein.

A. H. F. L.

[COMMON PLEAS DIVISION.]

SCOTT V. CRERAR.

Libel—Circumstantial evidence—Sufficiency of evidence—Rejection of evidence—Style of composition—Practice.

Action for libel contained in anonymous circulars written on a type writer imputing unprofessional conduct to the plaintiff in sending "bummers" round "touting" for business, and inducing other solicitors' clients to leave them and employ plaintiff's firm. The evidence, which was circumstantial, was that on the 13th October, P., M. and McK., members of the legal profession in Hamilton, received through the post the above circulars all of the same import though not copies, marked with the 2 p. m. post mark, and must have been posted between 2 and 3 p. m. as the practice was to change the post mark as the hour struck. The defendant and a firm of C. & W. had their office in the same building, the latter having a caligraph which the defendant, who was an expert writer thereon, was in the habit of using. About 12.30 on the day in question the defendant borrowed the caligraph and had it away long enough to write the circulars. About 2.30 after the defendant had returned the machine, he came back with a piece of paper in his hand which looked like foolscap with the edge torn off and similar in appearance to one of the circulars, which he put into the machine and wrote something on. He then went out, and returned in about three minutes and got an envelope, which resembled an envelope enclosing one of the circulars, which he put into the machine. It appeared, however, that the envelope was one of a job lot which a clerk in M's office had disposed of amongst the profession. In the typewriter there were peculiarities, namely, in certain of the letters being blurred, which were found in the circulars. The circular also contained expressions similar to those used by defendant in speaking about plaintiff. After C. had been supœnaed to produce the machine, the defendant advised him not to do so; and a brother of C's, of whom the defendant was legal adviser, wrote to C. also advising him not to produce it, but he said he did not write at defendant's request. The plaintiff also tendered evidence as to the defendant's style of composition, which was rejected.

Held, ROSE, J., dissenting, (1) that the evidence was not sufficient to be submitted to the jury and it was therefore properly withdrawn from them; and (2) that the evidence of style of composition was properly rejected.

In moving against the ruling of the judge at the trial with respect to the reception or rejection of evidence or on the ground that he has misdirected the jury, it is still necessary to state the grounds in the notice of motion or rule.

THIS was an action for libel, the libel being contained in certain caligraphic circulars or anonymous letters written on a typewriter, sent to several members of the legal profession in the city of Hamilton, imputing unprofessional conduct to the plaintiff, in sending "bummers" round "touting"

for business, and inducing the clients of other solicitors to leave them and employ his firm.

The case was tried before Galt, J., without a jury, at Hamilton, at the Winter Assizes of 1886.

The evidence, so far as material, is set out in the judgments.

The learned Judge was of opinion that there was no evidence to go to the jury in support of the plaintiff's claim, and he entered judgment by way of nonsuit, dismissing the action.

In Hilary sittings, *McCarthy*, Q. C., moved on notice to set aside the judgment of nonsuit, and for a new trial.

During the same sittings, February 17, 1886, *McCarthy*, Q. C., supported the motion. There are two grounds on which a new trial should be granted; 1, because there was sufficient evidence to go to the jury; and 2, for rejection of evidence.

Robertson, Q. C. The last ground now taken is not taken in the motion, and cannot now be taken. The practice is that not only must the ground be stated in the motion, but the specific evidence rejected must be stated.

McCarthy, Q. C. The practice now is that on a motion for a new trial the whole matter is open. This is the practice that always prevailed in the Court of Chancery on notice of motion. It was only under the C. L. P. Act that it was necessary to specifically state the objection and the evidence objected to. This has all been done away with by the O. J. Act. In any event, an amendment should be allowed, if necessary.

Robertson, Q. C., contra. The practice has always been to state the fact of rejection, and the particular evidence tendered and rejected. This was not only the practice under the C. L. P. Act; but also prior thereto under Rules of Court. The O. J. Act has made no difference in the practice.

The Court directed the argument to proceed subject to the objection.

McCarthy, Q. C., then proceeded with the argument on the merits. There was clearly evidence to go to the jury in support of the libel charged. [The learned counsel then went through the evidence, and pointed out the various circumstances tending to show that the defendant wrote the libel.] All the circumstances taken together conclusively shew that the defendant was the writer of the circulars. The defendant attempted to explain away each suspicious circumstance, but failed to do so; but even if the circumstances were capable of explanation, this is still a matter for the jury: *Starkie* on Evidence, 4th ed., p 841; *Wills* on Circumstantial Evidence, 4th ed., p. 241; *Taylor* on Evidence, 8th ed., p. 83-9. Then as to the other point. The evidence as to the style of composition should not have been rejected. This in the nature of expert evidence: *Doe d. Devine* v. *Wilson*, 10 Moo. P. C. 502; *Corbett* v. *Kilminster*, 4 F. & F. 490; *Greenleaf* on Evidence, 14th ed., vol. i., p. 678, sec. 581; *Brookes* v. *Tichborne*, 5 Ex. 929; *Jones* v. *Richards*, 15 Q. B. D. 439.

Robertson, Q. C., and *MacKelcan*, Q. C., contra. There was no sufficient evidence to submit to the jury. The rule laid down in the cases is that there must be reasonable evidence to go to them; that the evidence must be such that the jury can judge and not conjecture. From the evidence here the jury could only conjecture, and the case was, therefore, properly withdrawn from them: *Redmond* v. *Redmond*, 27 U. C. R. 224; *Ryder* v. *Wombwell*, L. R. 4 Ex. 32, 38; *Metropolitan R. W. Co.* v. *Jackson*, 3 App. Cas. 193, 197, 207; *Henwood* v. *Harrison*, L. R. 7 C. P. 606. The evidence tendered as to style of composition was properly rejected. It would be carrying the rule too far to allow witnesses to speak as to what they may consider a man's style of composition, and from what he considers his knowledge, to say such a particular document is his. This is a very different matter from evidence as to handwriting.

March 6, 1886. CAMERON, C. J.—The motion in this case raises two questions for determination by the court: 1. Was there evidence to go to the jury? 2. Was the evidence rejected at the trial admissible? The latter question, if answered in the affirmative, raises the further questions, is it open to the plaintiff to take advantage of such rejection of evidence under the form of his notice of motion? And, secondly, would the evidence, if admitted, materially affect the case on the merits?

The evidence disclosed that Mr. Parkes, Mr. E. Martin, Q. C., and Mr. MacKelcan, Q. C., had each received a circular of the same import through the post office, though not each a counterpart or copy of the other. The evidence to connect the defendant with the alleged publication, was purely circumstantial, and consisted of the facts and circumstances following: On the 13th October, Mr. F. MacKelcan received one of the circulars. On the same day Mr. Martin received one, also bearing the post mark, 2 p.m.: that a letter so marked would in the ordinary course of business come to the post office sometime between two and three o'clock on the day of date, it being the practice to change the hour in the stamp as soon as the hour struck: that the offices of Mr. Parkes, Messrs. Cameron & Witherspoon, and the defendant, were near together in the same building: that Messrs. Cameron & Witherspoon had a caligraph which the defendant sometimes borrowed and sometimes used in their office: that the defendant was in the office of Cameron & Witherspoon on the 13th October, 1885, about half-past 12, according to the evidence of A. D. McLaren, and said he wished to use the machine, (caligraph), but did not wish to use it when the boy was using it, and so came in while the boy was at dinner, and said he would bring it back before the boy came. He took the machine out. It was not brought back before the boy returned from dinner. The same afternoon when McLaren returned about three o'clock, the defendant was working the machine in the office writing something. He then went away, returned in two or

three minutes, and asked the witness for an envelope, which he got, and, as witness thought, went to the caligraph and put the envelope in. The envelope was like in size, make and appearance the one received by F. MacKelcan, enclosing the circular to him. The envelope, of which this was one, was obtained from a young man who had been in Mr. E. Martin's office, and got a job lot of stationary which he disposed of among the profession.

Another witness, Arthur White, a boy in the office of Cameron & Witherspoon, said that on the afternoon of the the 13th October, he saw the defendant working the machine, about half past one or two o'clock, after witness returned from dinner. The witness usually went to dinner at twelve and returned at one. When he came back on that occasion from dinner the machine was out. After the machine was returned the defendant came in with a piece of paper, which he put in the machine, and wrote on it in Mr. Cameron's room. The paper resembled a piece of foolscap with the margin torn off. The witness looked at papers shewn him, and said it was a piece like Exhibit 6, one of the circulars. It was longer than Exhibit 3, not as wide as Exhibit 6; it was just about the width of Exhibit 4. It looked like Exhibit 4; but it appeared a little longer.

This witness also said that the defendant got an envelope from him, the witness, and put it in the machine and pretended to write on it, or did write on it. It was then, the witness thought, after two—half past; would not say it was later than two. The circulars in evidence were all of different sizes on foolscap, but narrower, as if a part had been torn off each piece.

In conversation with the plaintiff, when discussing a requisition which the plaintiff had got up for signature by members of the bar, to have a meeting of the law association of the county to consider the relationship of the Judge to the bar, the defendant said: "There is too much of this '*I am determined to do*' *about you Scott.*" In the circular received by Mr. Martin was the sentence: "It is notorious that this Mr. Scott is sounding it far and wide '*what I am*

determined to do.'" And in conversation with Mr. Walker, a partner of Mr. Scott, before the 13th of October, the defendant, according to the evidence of Mr. Walker, said: "I have heard or, I understand, that Scott has been telling about the city, using the expression: '*I am determined to do this and I am determined to do that.*'" He said there was too much "I," I think he said "ego," according to his usual style. He complained "*that Scott was blowing his own horn too much:*" that he was giving the people the impression that it was a fight between Scott, himself, and the Judge, and that it was not on behalf of the general bar, and the effect of that would be injurious on the meeting.

In the circular received by Mr. Parkes, was this sentence: "Scott et al., have several bummers touting for law business. I can only tout my own horn."

A day or two before the circulars were received by the parties to whom they were addressed, a Mr. Howard, a client of the defendant's, was in the plaintiff's office, and while so there the defendant entered, and seeing Howard, immediately turned round and went out without saying anything. The plaintiff thought his manner abrupt; but the plaintiff at the time was writing, and as he looked up to see who entered, the defendant, as the plaintiff expressed it, wheeled round suddenly and went out. Two or three days before the defendant had said to plaintiff: "I am told that Edward Martin is going to attack Mr. Justice ———. If he does he will make an ass of himself, and besides he will have the whole outside profession laughing at us. In the circular received by Mr. Parkes there was also this sentence: "It is whispered you have a personal grievance to tout against some Superior Court Judge. I have a complaint to make against another Judge in a neighbouring county. There seems to be a chance of getting a hearing on individual troubles embracing the whole judiciary. There also seems a chance of some people making asses of themselves, and getting the outside bar to laugh at us."

About a year before the publication of the libel the defend-

ant went into the plaintiff's office and said: "what in hell do you mean by preparing papers for my clients." This was in consequence of the plaintiff having acted for a Captain McLean, a client of the defendant in a matter in which he was interested with several clients of the plaintiff. After this action was brought the defendant said to Mr. Cameron, who had been subpœned to produce his caligraph in Court that he did not think Cameron was bound to produce it: and Mr. Cameron—a brother of the lawyer—who is manager of a Loan Company to which defendant is the solicitor, wrote the lawyer urging him not to produce the caligraph.

In the circulars there were some peculiarities, such as the loop of the "e" being blurred, and the position of some letters with reference to others; but nothing but what might have occurred in other machines, of which it appeared at least a dozen were in use in Hamilton.

The answer to the first question depends upon, whether, assuming all the above facts and circumstances to have been satisfactorily proved, do they fairly and reasonably tend to the conclusion that the defendant wrote and published the alleged libel? Taking the subject, tenor, and object of the several circulars into consideration, it would be fair to draw the inference that they were all written or dictated by the same person; but that does not bring us at all to the person and to the fact, which the plaintiff by his action has undertaken to establish by reasonable evidence, that the person was the defendant. In leaving a question to the jury, we must know and understand what the question is.

As Mr. Justice Brett, puts it in his judgment in *Bridges* v. *Directors &c. of North London R. W. Co.*, L. R. 7 H. L. 230, "before determining whether there is or is not evidence fit to be left to a jury in support, one must know what the questions are which are to be so left."

The plaintiff has undertaken in support of his action to establish, either by direct evidence, or by a concatenation or linking together of circumstances, which may by reasonable intendment be taken to form a chain leading from the defendant to the act. In other words connecting him with

the act. And, if in this case the circumstances fairly do make such chain or amount to such demonstration of the fact, that a reasonable and fairly just and unbiassed man might accept, as established thereby, that the defendant published the libel, the case ought to have been left to the jury. Whether they ought to so find the fact being matter for them, and not the Judge, to say.

I cannot, to explain what I mean, do better than quote at length the observations and rule laid down by the court in *Ryder* v. *Wombwell*, L. R. 4 Ex. 32, 38, as to the duty of the Judge in such cases; and endeavour in this case to follow the rule prescribed.

The judgment of the court was pronounced by Mr. Justice Willes, and was the embodiment of the opinions of himself and Justices Byles, Blackburn, Montague Smith, and Lush, and was subsequently referred to with approval in the House of Lords in *Bridges* v. *Directors, &c., of North London R. W. Co.*, 7 H. L. Cas. 213, 221, by Chief Baron Pollock; and, as far as I am aware, it is still regarded as a true exposition of what is the rule to guide the Court in determining when a case should not be submitted to the arbitrament of the jury.

The language in *Ryder* v. *Wombwell*, L. R. 4 Ex. at p. 38, is as follows: "In the present case the first question is whether there was any evidence to go to the jury that either of the above articles was of that description" (necessaries). "Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the

onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the Judge (subject of course to review) is, as stated by Maule, J., in *Jewell* v. *Parr*, 13 C. B. 916, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey* v. *London and Brighton R. W. Co.*, 3 C. B. N. S. 150, Williams, J., enunciates the same idea thus: 'It is not enough to say that there was some evidence * * A scintilla of evidence * * clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude the fact that there was negligence'—the fact in that case to be established. And in *Wheelton* v. *Hardisty*, 8 E. & B. 262, in the considered judgment of the majority of the Court, it is said: 'The question is whether the proof was such that the jury would reasonably come to the conclusion' that the issue was proved. 'This,' they say, 'is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have in our opinion so properly put an end to what had been treated as the rule, that the case must go to the jury if there were what had been termed a scintilla of evidence.'"

The facts here are that the defendant may have supposed that the plaintiff was trying to get his clients away from him, and so had a motive for and was interested in making his conduct the subject of enquiry at the meeting of the bar then about to be held; and the object of the letters was to obtain such enquiry as well as to reflect on the conduct of the plaintiff. At most, however, this would only give a probability to the suggestion the defendant might have been prompted to write the circulars, and would make acts done by him, having a tendency to connect him with the publication, more suspicious than the same acts done by one not having the same supposed motive. And the acts he did may not unreasonably be scrutinized with that

stamp, so to speak, upon them. It cannot for the purpose of considering whether there was evidence for the jury be properly extended further. Then the acts he has done are to be considered. These are, that on the day the circulars were posted, and shortly before the time they were posted, he used a machine that was capable of writing the circulars, and, in so using it, he wrote on a piece of paper that a witness, sitting about eight feet away from him, thought resembled one of the circulars, and, for the purpose of the present question, I shall assume the one it resembled was the one Mr. MacKelcan received, as that assumption is stronger against the defendant than its resemblance to any of the others would be, for the reason that the envelope in which it was enclosed was more like the envelope obtained from the boy White than the others.

Then there are the further circumstances that there are expressions in the circulars, if not exactly the same, much like expressions used by the defendant in speaking to the plaintiff and others about the plaintiff and the contemplated meeting of the bar. These are in the circular: "It is notorious that this Mr. Scott is sounding it far and wide 'what I am determined to do,' not what the bar is going to do." What the defendant said to the plaintiff was: "There is too much of this, 'I am determined to do' about you, Scott." Also in the circular to Mr. Martin: "It is whispered you have a personal grievance to toot against some Superior Court Judge. I have a complaint to make against another Judge in a neighbouring county. There seems to me a chance of getting a hearing on individual troubles embracing the whole judiciary. There also seems a chance of some people making asses of themselves and getting the outside bar to laugh at us." In the conversation with plaintiff, a few days before the issuing of the circular, the defendant said: "I am told that Edward Martin is going to attack Mr. Justice ————. If he does he will make an ass of himself, and we will have the whole outside profession laughing at us;" and, lastly, in the circular received by Mr. Parkes is the expression: "I can only toot my own

horn: and you generally blow a pretty loud blast. Will you kindly blow your usual blast on this occasion." And in his conversation with Mr. Walker the defendant said: "I have heard Scott has been telling about the city: 'I am determined to do this, and I am determined to do that;'" and that Scott was blowing his own horn too much and giving the people the impression it was a fight between himself and the judge and not on behalf of the general bar.

Undoubtedly there is a similarity of sentiment between the defendant's oral utterances and the circulars; and in some instances the language is very nearly the same. "I am determined to do" is the same; and "blowing his own horn" may be implied in the expression, "I can only toot my own horn."

Left here it seems to me the most that is established is room for the suspicion or conjecture that the defendant wrote the circulars; but it cannot be placed higher and falls very far short of demonstration. If the piece of paper that the defendant wrote upon when using the caligraph of Cameron & Witherspoon had been of a peculiar or unusual kind, or if the envelope borrowed at the time had anything about it to make it at all improbable that other persons in Hamilton would have such envelopes—though there was no one capable of positively identifying the paper or envelope, and no one saw the defendant take or send such envelope to the post—there would be circumstances from which a jury, dealing with the strong probability created by the peculiarity of the paper and envelope, or either, might draw the inference that it was the defendant who wrote the libel. But as it is manifest the same kind of paper and envelopes were likely to be in the possession of many persons, the resemblance—which would not enable the witness who saw the paper and envelope in the defendant's hand to do more than to say the circular and envelope that Mr. MacKelcan received were like those he saw with the defendant—would not be sufficient with the other facts established to enable the jury to reasonably pronounce a more decided opinion. But the plaintiff has

made, as part of his case, the declaration on oath of the defendant, that he did not use the envelope received in Messrs. Cameron & Witherspoon's office for the purpose of enclosing the circular to Mr. MacKelcan, which must, it seems to me, entirely deprive the plaintiff of the right to take the opinion of the jury, for there is nothing upon which the jury could reasonably find that the defendant did write and publish the libel, the burden to prove which rested entirely on the plaintiff.

There remains the further question: Was the evidence of the defendant's style tendered by the plaintiff properly rejected? I think under what took place at the trial it must be assumed in the consideration of this branch of the motion that the plaintiff wished to prove, not merely that the defendant spoke or wrote in a way to resemble the style of the circulars, but that in fact he had a style peculiar to himself, from which those familiar with it would, after the manner of experts, be able to say, as far as their belief and opinion went, they could identify the plaintiff's composition, no matter by what pen the composition was made visible.

It was admitted by Mr. McCarthy at the trial, and afterwards on the argument of this motion, he was unable to find any authority that went the length of sanctioning such evidence. It would be difficult to say to what head or class it could be assigned. It would come nearer to expert testimony than to any other. But it would not be expert evidence. It would be mere matter of opinion by one who would have made no special study of the subject; and so except through the assumption of greater ability on his own part of one who could not know more about it than any one else who might have conversed with the defendant.

The nearest case to the present that Mr. McCarthy could refer the Court to, is that of *Brookes* v. *Tichborne*, 5 Ex. 929. That case in truth is no authority for the proposition. Letters written by the plaintiff were held admissible to establish as a fact that the plaintiff spelt the name

Tichborne, Titchborne, *quantum valeat*; and in the libel charged against the defendant the name was spelt Titchborne, with two T's. The fact that the plaintiff spelt the name thus might be proved was not disputed; but it was contended that that fact could not be proved by letters written by the plaintiff; and when it is remembered that before the law was changed permitting comparison of handwriting to prove a document, such comparison was not admissible, there can be no analogy between what was allowed in that case and what was rejected here. Surely if comparison of hand-writing for the purpose of shewing the general style and character of hand-writing was not admissible, the style of a man's speech or thought is not to be invoked to establish a writing was written by him.

The distinction between admitting evidence of the way in which a man spells a word and evidence of his style of writing is drawn by Baron Parke in *Brookes* v. *Tichborne*. He said, at p. 931: "But we think this is not like the case of the general style and character of hand-writing. The object is not to show similarity of the form of the letters and mode of writing a particular word or words, but to prove a peculiar mode of spelling a word which might be evidenced by the plaintiff having orally spelt in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater value of the evidence."

That the defendant in the present case had used all or any of the expressions used in the circulars, it was competent for the plaintiff to prove; and this he was permitted to prove, and the time and manner of their use. If these expressions so proved furnished evidence from which the publication of the libel, the fact to be established, might be reasonably inferred by the jury, then the case should have been submitted to the jury; but the evidence was, I think, properly rejected, of the opinion of witnesses that the circulars were written by the defendant. There is perhaps a greater inclination on the part of Courts

to allow doubtful evidence to go to the jury at the present time than formerly; but still it is the function of the Court to exclude it wherever it is clearly inadmissible; and, with the sole exception of expert testimony, opinions by witnesses are not admissible; and in many cases, especially with regard to hand-writing, nothing can be more unreliable than the opinion of so-called experts. I am not prepared to enlarge the field for the admission of such testimony. Writing is a thing that is, so to speak, tangible, and almost every man who can write has a character that those who are acquainted with it can readily recognize, and though it may by expert penmen be imitated, as a general rule its individuality is easily established. A man has a peculiar voice and may be identified by it—it is its own; and, though like the features of the human face, there is a general resemblance in the voices of all mankind, there are marked differences which indicate its possessor very clearly; but in style there cannot be that certain indication confining it to one individual. Every one using the same language in constructing his sentences uses words which any other may use, and the use of them will vary according to the subject in reference to which they are applied. Though it may be possible that an author's style in an extended work may be guessed at with some assured degree of correctness by one who has been a close and attentive reader of his works, it would be most unsafe to permit the opinion of casual or even intimate acquaintances to fix criminality upon a person by the hazard of an opinion of the identity of such person with the writer of a libel from its supposed resemblance to his style.

I am therefore of opinion there was no miscarriage on the trial of this case either by the rejection of evidence or its withdrawal from the consideration of the jury.

I am of opinion it is still essential in moving against the ruling of the Judge at the trial with respect to the reception or rejection of evidence, or on the ground that he has misdirected the jury, to state the ground in the notice of motion or rule.

It is true the Judicature Act and the rules under it are silent and do not expressly provide for this, but it is convenient that the practice should be continued; and although we had no such procedure before the Judicature Act as a motion otherwise than by rule *nisi* to question a verdict, or ruling of the judge at the trial, section 52 of the Act will not be unreasonably stretched by the interpretation, that, in the absence of a special rule on the point, the notice of motion should contain the essentials of the former rule *nisi* in this respect. If the rejection of evidence had been improper I think the plaintiff should under the circumstances, not be deprived of the objection by the form of the rule, but should have leave to amend; and, if he desires to proceed further with the case, the amendment may be made to remove any obstacle the form of his notice of motion might place in his way.

ROSE, J.—I am unfortunately unable to agree. I regret this the more as, so far as I know, this is the first case in which a member of the legal profession has found it necessary to resort to the public courts against a professional brother in an action for defamation; and I am of the opinion that the institution of these proceedings was neither in the best interest of the parties nor of the profession. There may be circumstances, not appearing on this record, which warranted the course taken; but it seems to me, even a young solicitor might well throw himself upon the generous sympathy of a most kindly disposed bar to protect him from the attacks of an anonymous writer who had not the manliness to write over his own signature.

Did I entertain any grave doubts as to the views I have formed I should withold them in the hope that by a unanimous judgment possibly this litigation might be terminated.

I, however, have a strong opinion, and to it the parties are entitled.

It seems to me there was evidence which should not have been witheld from the jury; and

2. That the evidence as to style of composition should have been admitted.

The writer of the circulars produced may on the internal evidence and the facts sworn to at the trial be presumed to have been a member of the profession practicing in Hamilton. As he conceals his name, it may be presumed to preserve the same secrecy, he used the typewriter to avoid disclosing his handwriting. To do this he must have been reasonably expert in the use of the typewriter. The defendant was both a solicitor and an expert writer on the caligraph. Mr. Witherspoon, a solicitor, stated that the defendant used the machine with "very good facility," &c.; could finger it quickly; and that he did not know of any member of the profession who used that kind of an instrument other than the defendant.

The boy Arthur White said that Mr. Crerar wrote twice as rapidly as he could.

The defendant had expressed himself as annoyed by the plaintiff endeavouring, as he supposed, to take away his clients; and also had expressed his dislike of the plaintiff's undue activity in promoting his own interests and of his egoism.

The plaintiff was actively and prominently engaged in convening a meeting of the Hamilton Bar, and the defendant had expressed the view that the undue prominence given by the plaintiff to his own grievances would prevent the success of the meeting, and was a violation of good taste on the part of the plaintiff.

A motive, or rather motives thus were shewn which might have led the defendant to have written the circulars. In fact there was evidence, more or less strong, tending to shew an active feeling of dislike in the defendant's breast towards the plaintiff.

On the 13th of October the defendant borrows the typewriter of Cameron & Witherspoon. After having it in his own office for about an hour, during which time he could easily have written three of the four circulars produced, he brings it back again, as the boy who used it would about

that time return from lunch, and in the office writes on a paper, similar to one produced, a quantity of matter about equal to that printed upon the circular produced sent to Mr. MacKelcan. White, in his evidence, said, p. 33, "that he, White, would have taken about fifteen or twenty minutes to write that quantity, and that the defendant could do it in about ten minutes, and that he was in the office about ten minutes." The paper was peculiar foolscap, with the edge torn off. The circular referred to is of the same description. Having completed the writing the defendant returned to his own room, and came back in about two minutes, about sufficient time to look for an envelope in the usual place for keeping them. On his return he asks for an envelope. He was told by the boys in the office that they did not think they had one without the firm's name stamped on it. "Then," says White, "I went into the vault to get an envelope. I tried to get one that had not a stamp upon it." This, the boy says, he did without special instructions, but he did it after hearing McLaren's observation as to the stamp. When he produced one without a stamp, the defendant said, "Oh, that will do." The boy said the defendant was able when he said this to see that the envelope was unstamped. Having produced an unstamped envelope, he took it to the typewriter, apparently wrote upon it, and took it away.

The enquiries naturally arise, why he wished to borrow an envelope at all; why wait until he could write the address, if he did write it, on the typewriter?

The envelope was of a kind similar to the one produced, and the one produced had the address written with a typewriter.

The typewriter had some peculiarities which are found in the circulars produced. It may be these may sometimes be found in others, but they existed in this at that time. One was that the letters "e," "a," and "m" were blotted, and were cleaned after the defendant left the office on the occasion in question. The last paper written upon in the typewriter before the defendant left the office was an

envelope. The envelope produced, similar to the one given to the defendant and which he took to the machine, has three of each of the letters "e" and "a," and each of these is blotted; and this peculiarity may be found in all the circulars, and the envelopes produced, and also in many instances the letter "m" is blotted.

Four circular letters were produced and three of the envelopes in which they were sent, one being to the defendant himself—all postmarked with the hour "2 p. m.," which, according to the evidence, meant any time during the hour from 2 to 3 p.m., of the 13th of October.

If the defendant wrote these letters and mailed them he could conveniently have done so during that hour.

The letters contain expressions similar to those used by the defendant in conversation. The learned Chief Justice has instanced some of them. A close comparison would entail the copying of the letters and much of the evidence. I do not think it is desirable to preserve either in our reports.

The trial began on the 14th of January, a Thursday. The Court opened some days previously. Previous to the trial the usual examination took place before a Master, and the defendant was no doubt well aware what would be the issues, and the question as to the type-writer had been brought to his notice, as appears from the plaintiff's evidence, even before the suit began. On the Friday or Saturday preceding the trial, Mr. Witherspoon having been subpœnaed to produce the machine at the trial, the defendant went to him, entered his office somewhat abruptly, and said, "I do not see how you can be compelled to produce this machine."

Mr. Cameron was subpœnaed on the 6th of January to produce the same typewriter, and the defendant told him he should not do it: that he was not bound to do so; and, if he were he, he would not do it. On the Saturday or Monday preceding the trial, not having had the typewriter out of the office, according to Mr. Cameron, since the 15th of October, and according to Mr. Witherspoon not within a

month, he asked for the loan of it for a night, saying he wished to prepare a long document. Mr. Witherspoon thought the request so improper in view of the fact that he had been subpœnaed to produce it (of which the defendant was aware) that he made him no answer, and that the defendant left the office without receiving any reply.

One H. D. Cameron was manager of the Hamilton Loan and Provident Society, of which the defendant was the solicitor. He is also brother of the solicitor already named. He wrote a letter to his brother, as I understand the evidence, requesting him not to produce it; and although he denied having written at the defendant's request when he was asked, "Why did you interest yourself to tell him not to bring it?' answered, "That is just a matter for you to draw your inference from." Q. "Who told you about the machine?" A. "I do not remember." Q. "Mr. Muir, Mr. Crerar's partner?" A. "No." Q. "Why should you undertake to write a letter asking him not to produce the machine under any circumstances?" A. "That is a matter for you to infer?"

And the able and learned counsel for the defendant left the evidence at this point without cross-examination or explanation, left the court to draw inferences such as should in fairness to the plaintiff as well as the defendant be drawn where the defendant's friend actively interferes to request his brother to disobey the subpœna of the court, and refuse to produce evidence such as he was required to do.

I confess this attempt to interfere with the evidence has much impressed me, and, coupled with the other evidence, renders it absolutely impossible for me to concur in the opinion that there was no evidence on which the jury, in absence of any explanation, might find against the defendant. It is not my province to say whether they should so find.

Whatever knowledge and experience I have gathered in criminal matters, have led me to regard most seriously any attempt on the part of the prisoner to interfere with the evidence for the court.

In a case at the last Toronto sittings, I felt bound to tell the jury, that it was a strong circumstance which they must consider in weighing the evidence.

In the account of the somewhat famous trial of William Palmer for the poisoning of his friend John Parsons Cook in 1856, which may be found in Sir James Fitzjames Stephen's "History of the Criminal Law of England," 3rd vol., at p. 389, there is recorded the fact stated in evidence of the prisoner's attempt to induce the post-boy to over turn the fly in which were to be carried the jars containing the viscera, &c.; the prisoner's purpose being no doubt to remove the evidence. This is noted as one of the main facts of the case.

In the 1st vol. of the same work, at p. 438, the learned author in commenting on the saying, that it is better that ten guilty men should escape them than one innocent man should suffer, and questioning the universal truth of such a saying, said: "Everything depends on what the guilty men have been doing, and something depends on the way in which the innocent man came to be suspected." The meaning no doubt is that justice must be administered along well known lines. If an innocent man, sadly lacking in discretion, acts as a guilty man, he must in the weakness of human judgment, and with the limited knowledge given to man, be adjudged according to his deeds, and though his professions of innocence be ever so great he must be judged by what he does rather than by what he says. And while no doubt a Judge's duty is clearly not to allow a case to go to the jury unless the evidence is of such a character as would warrant a jury in acting upon it, that is, such as they might act upon; yet, when a case for the plaintiff raises suspicion added to suspicion, and which a defendant by going into evidence may clear away, if innocent; or, if guilty, may turn from suspicion into demonstration, it seems to me the administration of justice will be advanced by not withdrawing the case from the jury until in the light of uncontradicted explanations the jury and public will be warranted in not feeling that by the rigid

application of strict rules of evidence a guilty man has escaped or an innocent man has left the Court loaded with suspicion.

I have had vivid illustrations of the evil in the experience of the past two years, and have resolved, until better advised, so far as practicable, to adopt the above suggested rule.

While the change in the law allowing a defendant to give evidence in his own behalf, has not deprived him of the right to rest upon the want of evidence on the part of the plaintiff, it seems to me that there is not much cause of complaint if a Judge refuse to non-suit even upon a weak case when there exist strong suspicions which perhaps do not amount to demonstration.

It was pressed upon us that the plaintiff having put in evidence the statement of the defendant in which he denied the writing of the circulars and the sending of the envelope, he was practically precluded from asking to have the suspicious circumstances, or the circumstantial evidence, submitted to the jury.

No doubt under the old rules when a plaintiff called a witness, even the defendant, he accredited him, and on his statement might be non-suited; but I understand that is not now the rule. In many cases, such as fraudulent conveyance suits and the like, the plaintiff is compelled to rely entirely upon the evidence of the defendant. If in such suits evidence of denial served to wreck the plaintiff's case, the possibility of success would in most cases be taken away.

In the present case the denial is given with such accompanying statements as led the plaintiff's counsel to comment on the whole answer as shewing want of ingenuousness and affording evidence of guilt.

The questions and answers were as follows:

Q. "Did you get an envelope of any one in the office of Cameron & Witherspoon on the 13th of October last?—A. Can't say as to the date, but I do recollect getting an envelope in that office about that time from a clerk in the office." Q. "Is this the envelope marked "E"? A. It

is not to my knowledge, because I do not know what I used the envelope for, and some one else might have taken the envelope after I used it, sponged out the address, and readdressed it; but this is altogether improbable. I say that I cannot recollect what I used the envelope for positively, because I used the caligraph so frequently about that time. I do say positively that I did not use the envelope 'E' for the purpose to which it has been applied."

When one remembers that the plaintiff called upon the defendant within two days, as I understand it, after the letters were written and charged him with being the author: that the defendant in the ordinary course of business would keep a blotter in which would be entered all his daily transactions, and a letter-book in which would be copied all his business letters, and that the circumstances surrounding the obtaining of the envelope were at least sufficiently unusual to fix them upon an ordinary memory, it cannot be said that the answers contain such clear and distinct denials and explanations as free them from adverse comment.

I come now to consider the rejected evidence. Before the change in the law admitting evidence of comparison of handwriting, it was allowable to call a witness to testify to handwriting, his evidence being merely opinion, evidence founded upon having seen the man write—not the particular writing in question, but some other writing—or upon his having received letters from him in ordinary course of correspondence or otherwise. I am unable to distinguish in principle between such opinion evidence, and the evidence of style of composition, forms of expression, &c.

One often becomes confused in an endeavour to formulate a rule under which evidence may be received, and to classify it under headings that have been adopted for convenience. It must be remembered that the classification could only be after it had been determined in the interests of justice that certain kinds of evidence were admissible and certain kinds inadmissible: that arbitrary headings were not first decided upon under one of which

all evidence must be arranged ere it could be admitted. The varying circumstances and needs of mankind must be met by an equal varying of rules tomeet the exigencies, else the substance will be strangled by the form.

I venture by illustration to endeavour to prove that such evidence, as was here rejected, should have been received.

If a writer, for say, thirty years, had written articles monthly for a magazine, and an editor of such magazine for that period of time had revised the articles so written, and if the writer had a pronounced style, peculiar forms of expression, delighted in antitheses, interspersed poetical quotations, felt happy in the use of the ancient classics, at most times indulged in a vein of irony or cynical expressions, never omitted an opportunity to rail at certain weaknesses or bewail the desuetude that seemed to him to take away many of life's pleasures, in a word stamped his individuality upon each page of his writings, and if such a writer in a moment of weakness, in order to correct a friend, or punish an enemy, or remedy some evil, or put down some abuse, should write an article anonymously, and if the editor should come forward among a group of gentlemen who knew his words were always words of truth, and say, "Why, this article is from my old contributor. Here are the characteristics which reveal his authorship as plainly as if his well known signature were appended. Would not such a statement be taken as evidence of the fact, and unless answered by weightier evidence be acted upon as proof? Must not proof be such evidence as will convince the mind of a reasonable man who fairly and dispassionately weighs and determines?

It seems to me such statement would clearly be evidence, opinion evidence, of greater or less weight according as reasons might be given for the statement of opinion.

And has not evidence the same in principle been admitted in this case? Why allow evidence that expressions were found in the circulars similar to those used orally by the defendants? Was it not to shew that the writer of the circulars had adopted certain forms of expression which were in a sense peculiarly his own, and revealed his identity?

If evidence could be given of a particular conversation in which peculiar forms of expressions were used, why might not evidence be received from a man who may have been acquainted with the defendant for years, and who may be prepared to say "I have conversed daily with him for the past five and twenty years, and he cannot converse for five minutes at a time without using one or more of the expressions found in these letters;" or why may not one be called who might say: "For many years past I have kept up a correspondence with the defendant, and in every line of these circulars I can point out the peculiar forms of expressions used by him?

It may be that phrases may be fraudulently used, style of correspondence fraudulently imitated, and a wicked man may seek to forge another's style as well as his name. But so with the evidence as to handwriting.

Why in the present case have the circular letters been compared each with the other, and why is the conclusion not disputed that they had the same author? It may be said the subject matter is largely the same. So it is, but can any one doubt, looking at the phraseology alone, that they were children of the same brain?

It may be that the evidence in this case, sought to be adduced, would have been of the weakest character, and could not safely have been relied upon. We cannot, however, shut our eyes to the fact that one of Hamilton's leading counsel at once came to the conclusion, from the internal evidence of the letter, that the defendant was the author; and it may be that good reasons could have been given for his belief. I know not; but in my opinion the evidence should have been received.

I think there should be a new trial, with costs to the plaintiff, in any event of the cause.

I have not considered the question of practice, as the authorized amendment renders it unnecessary.

GALT, J., concurred with CAMERON, C. J.

Motion dismissed.

[CHANCERY DIVISION.]

HUGGINS ET AL. V. LAW ET AL.

Infants—Executors—Guardian—Payment of infants' legacies to Guardian.

One L., by her will, gave her real and personal property to her brothers and sisters, share and share alike, and appointed L. and E. executors. L. and E. converted the estate into money, and invested the proceeds on mortgage security, and afterwards as certain of the legatees came of age paid them over their shares, but paid the plaintiffs' shares, they being infants, to one F. who, with the concurrence of their parents, had been appointed their guardian by the Surrogate Court. F. absconded with the money.

The infants now suing L. and E. by their next friend for the amount of their shares,

Held, that by the actions of the executors the moneys in their hands had become trust funds of which they were trustees, and that the plaintiffs were entitled to judgment.

THIS was an action brought by certain infants by Maria Catharine Huggins, their next friend, against James Law and Margaret Jane English, executor and executrix under the will of Eliza Jane Lee, deceased, for administration and payment of legacies. One of the plaintiffs came of age pending the action.

In their statement of claim they set up that Eliza Jane Lee, by her will, dated August 26th, 1874, appointed the defendants executor and executrix and devised her real and personal estate to her half-brother and sisters, the children of her mother Elizabeth Huggins to be divided equally amongst them, share and share alike, after the payment of her just debts, funeral and testamentary expenses, the said half-brothers and sisters being named in the will, and being the plaintiffs, and Mary Ann Huggins, Sarah Huggins, and Henry Blakely Huggins; that the testator died on March 26th, 1875, and the will was proved by the defendants on April 15th, 1875, who took upon themselves the executorship and possessed themselves of the estate of the testatrix: that the shares to which the plaintiffs were entitled amounted to a sum of $500 for each of them, with interest from March 26th, 1875: and they claimed to have

the real and personal estate of the testatrix administered by the Court, and to have their shares or legacies paid to them with interest, and for further relief.

By their statement of defence the defendants admitted the will as stated by the plaintiffs, and that they had assumed probate and possessed themselves of the estate: and alleged that the estate amounted to $3,336 after deducting debts and funeral and testamentary expenses: that they, the defendants, upon getting in the said estate invested the same on good mortgage security, and afterwards paid to Mary Ann Huggins, Sarah Huggins, and Henry Blakeley Huggins, their respective shares according as they arrived at twenty-one years of age, and were desirous of keeping the said estate invested and paying the plaintiffs their respective shares as they became of the age of twenty-one years: that the plaintiffs' parents were unwilling that the defendants should retain and manage the said estate any longer, and at their request, and with their concurrence and the consent of the plaintiffs, one Fennell, a solicitor, was appointed guardian by the Surrogate Court of Wellington, letters being issued out of the said Surrogate Court on December 7th, 1881, in the usual form: that Fennell thereupon demanded an account of the said estate from the defendants and payment over to him forthwith, and in default threatened legal proceedings to compel the same: that thereupon defendants rendered a full account, and under advice of counsel, paid over all moneys belonging to the estate and to which the plaintiffs were entitled to the said Fennell as such guardian, who, by deed of March 17th, 1882, released and discharged the defendants as executor and executrix as aforesaid from all legacies, claims, accountings, dues, and demands whatsoever to which the said plaintiffs were entitled under the said will or against or out of the said estate: and the defendants submitted that under the circumstances they were not liable to account to the plaintiffs in this action, nor were they liable to pay again the moneys so paid to the guardian.

The action came up for trial at Guelph on April 8th, 1886, before Ferguson, J.

It appeared at the trial that the guardian had absconded, and it was stated that his sureties were men of straw.

The facts were proved as stated in the pleadings so far as material to this report.

Guthrie, Q.C., and *Watt*, for the plaintiffs. The principal question is as to whether the defendants were warranted in paying Fennell, and whether the payment discharged them. We say it did not, and refer to R. S. O. c. 132, s. 4; *Mitchell* v. *Ritchey*, 13 Gr. 445; *Blake* v. *Blake*, 2 Sch. & L. 26; *Flanders* v. *D'Evelyn*, 4 O. R. 704; *Galbraith* v. *Duncombe*, 28 Gr. 27. The statement of defence shews that the defendants were trustees with the money set apart: *Townsley* v. *Neil*, 10 Gr. 72; *Switzer* v. *McMillan*, 23 Gr. 538.

Bain, Q. C., and *Scanlon*, for the defendants. The share to which each of the plaintiffs was individually entitled was small, and such as might have been paid over for maintenance. The case seems within the exception referred to in *Mitchell* v. *Ritchey*, 13 Gr. 445. That case and *Blake* v. *Blake*, 2 Sch. & L. 27, are distinguishable. The rule is that when there is litigation before the court on the fund in Court it will not be ordered to be paid out to a trustee or guardian or even an executor: *Williams* on Executors, 8th ed., 2052. Thus in *Flanders* v. *D'Evelyn*, 4 O. R. 704, there was a suit for the money. An action at law before the Judicature Act by Fennell against the defendants would have succeeded, and the equitable rule does not destroy the legal right of the guardian. In *Flanders* v. *D'Evelyn*, the action was not dismissed, but the money was directed to be paid into Court. In *Galbraith* v. *Duncombe*, 28 Gr. 27, the liability of the surety only was considered. The money never got into the hands of the guardian at all. The question is not whether the Court would direct the money to be paid to the guardian, but were the executors right in paying, there

being no proceedings at the time? The executors were entitled to pay over the income in any case, so that all that they would be liable for would be the principal in any event. The guardian here was appointed at the instance of the parents of the children.

Guthrie, in reply. We deny that before the Judicature Act the guardian could have maintained an action at law for the money. The only ground on which the Court refuses to order payment to the guardian must be that he has no legal right to the money. I refer to *Cameron* v. *Campbell*, 7 A. R. 361. If the amount here is small, in *Flanders* v. *D'Evelyn*, 4 O. R. 704, it was only $300. There is no evidence that the father was unable to maintain the plaintiffs, and even the interest could not have been properly paid.

April 16th, 1886. FERGUSON, J.—The defendants, in their statement of defence, say that upon getting in the estate they invested the same on mortgage security and afterwards paid each of three of the legatees their shares as they respectively attained the full age of twenty-one years.

In the case of *Cameron* v. *Campbell*, 7 A. R. at p. 366, the then Chief Justice in delivering the judgment, speaking of the fund in that case, said: "It had assumed the character of a trust fund if the executors had assented to anyone having become entitled who was named as a legatee in the will. Their investment of the moneys in pursuance of the will was not necessary in order to its becoming a trust fund."

It appears to me that the executors did, and have in their defence stated, what is ample to justify the conclusion that the moneys that were in their hands, and, as to which the dispute is, were or had become a trust fund in their hands of which they were to all intents and purposes trustees.

In the case of *Galbraith* v. *Dunscombe*, 28 Gr. 27, the bill was dismissed as against the surety for the guardian.

In that case, as in the present case, the moneys had apparently been lost by misconduct of the person into whose hands they had been paid. The learned judge, in delivering judgment, said: "I think, as the money in question had been set apart by one of the executors to answer the trusts of the will, the same thereby became stamped in his hands as trust money, and he accepted the office of trustee in respect thereof. He could not therefore properly pay this money, nor could the guardian properly receive this sum."

In the case of *Flanders* v. *D'Evelyn*, 4 O. R. 704, a guardian appointed by the Surrogate Court in the State of Minnesota, sought to recover from executors in this country, by action, the moneys that belonged to the infant wards who were resident in Minnesota. Evidence was given to shew what were the powers and duties of guardians appointed in that country as the plaintiff was. The learned judge, in giving judgment, says: "The duties and powers of guardians, under the statutes of Minnesota, do not seem to be greater than those of testamentary guardians under the statute 12 Car. 2, ch. 24, sec. 9, or of guardians appointed by a Surrogate Court, who are to have the care and management of the ward's estate real and personal;" and after a reference to some cases on the subject, it was held that the plaintiff was not entitled to recover the moneys, but that they should be paid into court. In that case the decision does not seem to rest in any degree upon the fact that the plaintiff was resident in a foreign country, and appointed guardian there according to the foreign law.

These cases are, as a matter of law, and under the proper rule of decision as I understand it, binding upon me sitting here, and I am unable so to distinguish the present case, from the effect of them, as to enable me to arrive at a conclusion in favour of the contention of the defendants.

The other cases referred to, in which either the money was already in court or the application was to have it paid into court, may stand with relation to a case of the char-

acter of the present one in a different position. If the conclusion against the defendants' contention is correct (and sitting here, I can see no escape from saying that it is), there is a very great hardship indeed upon the defendants. They seem to have acted with honesty, entire good faith, and not rashly, or without some apparent reason for doing the act of paying over the money to the guardian. It was not suggested that there was the slightest want of good faith on their part.

An argument in the defendants' favour was based on the smallness of the respective amounts going to each of the plaintiffs, and also on the ground that the money might have been applied for the purposes of maintenance of the infants, but it was not asked or paid for any such purpose, and I think the sum is sufficiently substantial to apply the ordinary rule and none other to it, nor do I accede to the argument in the defendants' favour respecting the interest upon the money. The father of the infants is still living. The legacies came from their half-sister.

The judgment must, I think, be for the plaintiffs with costs. What they specifically ask is administration and to have their respective legacies with interest paid to them. To these the plaintiffs are entitled, but from the evidence it rather appears that the administration is in fact not necessary as there does not seem to be any dispute as to the amount of or the dealing with the estate, except the single act of paying the money to the guardian.

Counsel can perhaps agree upon waiving the administration, and let the order go for payment of the money. (*a*)

A. H. F. L.

(*a*) It may be worth remarking that as to such of the plaintiffs as were infants at the time of judgment, the judgment asked and granted was, that the amount of the legacies might be paid into court.

[CHANCERY DIVISION.]

BOYER V. GAFFIELD.

Fraudulent conveyance—Lapse of time no bar.

One G. in 1873 made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance, brought this action to have the said conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors.

Held, that the plaintiff was entitled to the relief asked.

A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years.

THIS was an action brought for the purpose of setting aside a certain conveyance as voluntary and void as against the plaintiff, who was administrator of the estate of Joseph Keeler deceased. The defendants were Jonathan Gaffield, Jane Gaffield, William Gaffield, Nathaniel S. Gaffield, Ida Gaffield, James G. Webb and Hudson P. Gould.

In his statement of claim the plaintiff set out that he was administrator as aforesaid of the estate of Joseph Keeler; that as such administrator on July 14th, 1882, he recovered judgment against Jonathan Gaffield for a sum of $349.04, and placed writs of *fi. fa.* against the goods and lands of the said defendant in the hands of the sheriff, which had been returned *nulla bona*, and were still in the sheriff's hands in full force, but there was no property of the said defendant available for payment thereof, save the lands and premises thereinafter mentioned; that on September 4th, 1873, said Jonathan Gaffield, having become the owner shortly before of the said lands and premises, with the defendant Jane Gaffield his wife, conveyed them to the defendants James G. Webb and Hudson P. Gould in trust for the use of the grantors for life, and afterwards to be divided between the other defendants: that no consideration passed, but the said conveyance was voluntary: that at the time of the said conveyance Jonathan Gaffield was

largely in debt, and the plaintiff's debt was still unpaid, and the plaintiff claimed that the said conveyance might be declared voluntary and void as against him, and the lands declared liable to satisfy his judgment, and that in default of payment of the said judgment the lands might be sold.

The defendants, other than Jonathan Gaffield, put in a statement of defence wherein Webb and Gould claimed to be merely trustees, and asked for the direction of the court, and the other defendants, besides denying the material allegations in the plaintiff's claim, further said that if the said Joseph Keeler, deceased, or the plaintiff ever had any right to resort to the said land for the recovery of the debt the right had become extinguished and lost by the great laches and delay, and by their (the defendants) dealings with the land since the date of the deed, and they pleaded such laches, delay and dealings as a defence to this action.

The action was tried at Cobourg before Boyd, C., April 16th, 1886.

N. W. Hoyles and *Riddell* for the plaintiff. The transaction was voluntary, and that being so we should get equitable execution against it.

W. Cassels, Q.C., and *J. W. Kerr* for the defendant. There is no proof that the debt existed at the date of the impeached deed. Moreover, the Statute of Limitations is a complete answer. If Gaffield conveyed to a third party by way of donation, and the grantee enjoyed it, how can it be attacked by a judgment creditor?

Hoyles in reply. It is well established that the debt existed prior to the trust deed. There was here no adverse possession causing the statute to run. The right of the creditor only arises when he can attack.

May 15th, 1886. BOYD, C.—The evidence is sufficient to show that the defendant Jonathan Gaffield (the settlor) was indebted to Keeler (in whose behalf the plaintiff has recovered the judgment sued on) prior to the settlement now attacked. That settlement was made in September, 1873,

when the settlor was considerably involved in debt, and it was of an entirely voluntary character. It is objected that the plaintiff cannot succeed because the Statute of Limitations has rendered the deed of 1873 under which possession was taken indefeasible by creditors. For that no authority was cited, since *Re Madden*, 27 Ch. D. 527, does not go in that direction. The expression of Baggallay, L.J., "I do not see how the right can be lost by mere delay to enforce it unless the delay is such as to cause a statutory bar," refers to such delay on the part of a plaintiff as would bar his right to a judgment for the debt. It does not imply that a deed which is by the statute fraudulent as to creditors is validated because it may not be attacked for ten or twenty years. If it is a fraudulent deed, it remains so to the end of time, though it might not be effectively impeachable because of purchasers for value without notice having intervened or because the claims of all creditors have been barred, or extinguished by lapse of years.

Neither of these elements obtains in the present case. There is a valid judgment, and the present owners are volunteers, the debtor himself and members of his family. The facts of the case, besides, disclose no extraneous circumstances connected with the property or the manner of dealing therewith, which render it in any sense inequitable now to interfere for the benefit of the plaintiff. It is not a case, therefore, for permitting an amendment of the pleadings by setting up the statute, because if such a plea were on the record, my judgment would be the same and as prayed by the plaintiff with costs (except as against the trustees.)

Under the former law as to avoiding a voluntary settlement by a subsequent deed for value, such relief was given after a lapse of twenty-two years in *Willatts* v. *Busby*, 5 Beav. 193.

A. H. F. L.

[CHANCERY DIVISION.]

WALLACE ET AL. v. WALLACE ET AL.

Mortgage—Right to rents after default—Appointment of receiver—Administration proceedings.

In an action by *cestuis qui trustent* against executors and trustees of a certain will, a decree had been made for the general administration of the testator's estate real and personal, a portion of the real estate being at the time under mortgage made by the executors. The conduct of the proceedings having been given to certain creditors, a receiver was, at their instance, appointed to collect the rents of the real estate. Afterwards the mortgagees commenced an action upon their mortgage (see 8 O. R. 539), making the executors and trustees and the tenants of the mortgaged property defendants, asking payment, possession, and foreclosure, when finding the receiver in possession, they, after some delay, applied for and obtained leave to proceed with their action, a defence, however, being made thereto, at the instance of the receiver, contesting the validity of the mortgage. The mortgagees having succeeded in establishing their mortgage and their right to possession, then applied to be added as parties to the reference in the administration proceedings, claiming to be entitled to all rents collected by the receiver between the commencement of the action on their mortgage, and their obtaining possession from him. They were accordingly added as parties in the Master's office, who subsequently made his report, finding them entitled to the rents as claimed.

Held, on appeal, that the mortgagees were only entitled to the rents from the date of the application for the order allowing them to proceed with their action, notwithstanding the appointment of the receiver.

THIS was an action brought by beneficiaries under the will of Robert Wallace deceased against the executors and trustees under his will for an account of their administration of the trust property, and a decree had been made for the general administration of the testator's personal and real estate, with a reference to the Master of this Court at Cobourg, the conduct of which had been given to certain parties who had sent in claims under the Master's advertisement for creditors.

By an order dated the 20th day of April, 1880, upon the application of the parties having the conduct of the cause, a receiver was appointed to receive the rents and profits of the testator's real estate, and for other purposes, and the receiver immediately went into receipt of the rents.

Part of the real estate being covered by a mortgage made by the executors to the London and Canadian Loan

and Agency Company, that company on May 13th, 1880, in ignorance of the appointment of the receiver filed their bill upon the mortgage, praying for immediate payment, possession and foreclosure.

On the 1st of November, 1880, the company filed a petition in both actions to be allowed to proceed with their action notwithstanding the receivership, notifying the receiver and the plaintiffs in *Wallace* v. *Wallace*, the executors having allowed the action to be taken *pro confesso*. An order was made on the 20th of December, 1880, giving the company leave to proceed with their action, but at the instance of the plaintiffs and the receiver opening up the matter and allowing a defence to be put into the company's action in the names of the executors. That action was subsequently tried, but was not determined till a judgment was obtained from the Divisional Court, dated December 18th, 1884, establishing the company's mortgage and adjudging possession and foreclosure in favour of the company. The receiver thereafter delivered possession to the company of those portions of the mortgaged property of which he had been in receipt of rents.

The company thereupon applied to the Master upon the reference in this case, and procured themselves to be added as parties, and subsequently the Master by his report, dated May 22nd, 1885, found the company entitled to the rents received by the receiver from May 13th, 1880, the date of filing of the company's bill. From this finding the parties having the conduct of the cause appealed on the following grounds, viz.:

1. That the said Master erroneously adjudged and determined that the London and Canadian Loan and Agency Company, Limited, was entitled to receive from the moneys in court in this cause the sum of $1362.17, paid into court by the receiver appointed in this cause.

2. Because, at all events, the said Master ought not to have determined that the said London and Canadian Loan and Agency Company, Limited, was entitled to the whole of said sum of $1362.17, but should in any case have

determined that the said company was only entitled to share in the said sum *pro ratâ* with the creditors of the estate of the testator, whose claims were before the said Master in this cause.

The appeal came up for argument on October 19th, 1885, before Boyd, C.

Moss, Q.C., for appellants. We say the Master is wrong in holding that the company is entitled to any of the rents; but at any rate they have only a right to participate in them on a footing with the other creditors. They have no priority, or preference: *Farhall* v. *Farhall*, L. R. 7 Ch. 123. The receiver was entitled to the rents for the benefit of the parties to *Wallace* v. *Wallace*, of which the company were not one. A mortgagee is not entitled to rents received by a receiver under such circumstances, even though he give notice to tenants. He should move to discharge the receiver. See *Thomas* v. *Brigstocke*, 4 Russ. 64; *Gresley* v. *Adderley*, 1 Swans. 573; *Coote* on Mortg. 5th ed. p. 761.

Arnoldi, for the company. *Thomas* v. *Brigstocke*, *supra*, has no application. This suit being a suit for the administration of the estate real and personal of Robert Wallace, the testator in the pleadings mentioned, the receiver was a trustee on that ground for all the parties interested in such estate, including the London and Canadian Loan and Agency Company, who, as mortgagees, were interested in that estate to the extent, at least, of their mortgage; and under the terms of the said mortgage and the default which had occurred, the London and Canadian Loan and Agency Company were the parties entitled to the possession when such default occurred, and therefore to the rents subsequently thereto; *Davis* v. *Duke of Marlborough*, 2 Swans. at p. 118. If payment to the receiver by the tenants was a good payment as against the London and Canadian Loan and Agency Company, although by the default which had occurred the company were at that time entitled to possession, it must be because the receiver represented the

company, under the general proposition that the possession of the receiver is for the benefit of the parties who are ultimately found entitled: *Kerr* on Receivers, pp. 118, 122; *Skip* v. *Harwood*, 2 Atk. 564; *Story's* Eq. Jur., 7th ed. vol. 2, p. 159. The order on petition of the 20th day of December, 1880, made the London and Canadian Loan and Agency Company parties to the suit of *Wallace* v. *Wallace*, to the extent of any interest or claim they might establish to the property over which the receiver had been appointed in that suit, and made the receiver a trustee for them to the full extent to which they are interested, as might be developed by the suit of *London and Canadian Loan and Agency Co.* v. *Wallace*, 8 O. R. 539; *Tatham* v. *Parker*, 1 Jur. N. S. 992; *Walker* v. *Bell*, 2 Madd. 21; *Sharp* v. *Carter*, 3 P. Wms. 375. The intervention in the defence in the suit of *London and Canadian Loan and Agency Co.* v. *Wallace*, *supra*, was at the express instance of the receiver, who delayed and prevented the company getting the rents and getting possession of the property to which they were ultimately found entitled, and the receiver should on that ground be held a trustee for the company The London and Canadian Loan and Agency Company having succeeded in the suit for possession and getting judgment therefor, they would in ordinary cases be entitled to an action against the defendants or the receiver, who was in possession by his tenants, for mesne profits, that is, for damages for keeping them out of possession, with something for their trouble, &c. The company are prevented from bringing this action and recovering these damages because the action of the tenants in paying the rents to the receiver was lawful and absolves them from liability for mesne profits, and, therefore, the receiver should be held a trustee for the said company to the extent to which he has received rents and profits from property to which the company have established their claim to possession: *Doe* v. *Wright*, 10 Ad. & E. at p. 80; *Doe* v. *Harvey*, 8 Bing. at p. 42; *Doe* v. *Whitcomb*, *ib.* 46.

Moss in reply. The order of December, 1880, did not

make any difference at all as to the rights of the mortgagees: it did not make the receiver collector of the rents for the mortgagees. An order might have been obtained to discharge the receiver as to these rents. The company, however, allowed the receiver to remain in possession, and did not assume the responsibility of going into possession: *Langton* v. *Langton*, 7 DeG. M. & G. 30. The doctrine of mesne profits never applied as to mortgagees, but the mortgagor has the right to possession until put out by process of law: *ex parte Wilson*, 2 Ves. & B. 252; *Flight* v. *Camac*, 25 L. J. Ch. 654.

March 10th, 1886. BOYD, C.—The receiver here was appointed April 20th, 1880, and the tenants under the executors attorned to him. After the attornment and in ignorance of it the mortgagees of the executors brought their action against the tenants and the mortgagors on May 13th, 1880, claiming payment, foreclosure and immediate possession of the lands. The bill was served on the tenants on May 19th, 1880. On September 7th the mortgagees, the company, first learned that a receiver had been appointed, and that the tenants had attorned to him. A petition was served (it is said) on December 9th for leave to go on with the action, notwithstanding the appointment of receiver, and an order was made to this effect on December 20th, 1880. The bill had been noted *pro confesso* against all the defendants, but this order opened the matter up as to the executors who filed an answer disputing the validity of the mortgage, and setting up the possession of the receiver in March, 1881. In the result the company's mortgage was established by judgment of December, 1884, 8 O. R. at p. 540, and an order was made February 9th, 1885, for the delivery up of possession by the receiver to the mortgagees. Meanwhile the rents were being collected by the receiver in all amounting to $1362.17, which the Master has awarded to the company as being the rents received since May 13th, 1880 (date of filing bill by mortgagees). The executor's defence was really that of the creditors of

the Wallace estate, who had procured the appointment of the receiver in this administration action. Prior to the order of December 20th, 1880, rent was paid to the receiver as follows: August 4th, $20; October 1st, $300; and November 1st, $31. The leases were all after the mortgage and executed only by the mortgagors.

Thomas v. *Brigstocke*, 4 Russ. 64, is relied on by the appellants. It is not very fully reported, but I judge the facts to be very different from those now before me. In that case the receiver was appointed in a suit to carry into execution the trusts of the mortgagor's will on May 22nd, 1818. In November, 1827, the mortgagee, who was not a plaintiff, applied to have the rents accrued since June, 1818, and paid into court by the receiver, paid out on his mortgage, his whole right apparently being based on the fact that he at that time, and while his mortgage title was disputed, had given notice to the tenants to pay rent to him. This notice had not been complied with in consequence of the intervention of the receiver, and the mortgagee appears to have remained inactive for nearly ten years. It was held that he could only be entitled to such rents as accrued due when he was in possession of the mortgaged premises, and that his mere notice could not divest the possession of the receiver, which was in truth the possession of those who claimed under the will of the mortgagor. It was said further that for the purpose of divesting such possession an application to the court was necessary, and it was said that he had made an application but a few months before the application to be paid the rents, whereby he obtained an order for the discharge of the receiver. Whereupon the M. R. held that the mortgagee might be considered in possession from the time that he first made his application for that discharge. I guess from the manner of expressions used by the judge that the mortgagee might have obtained an order for the discharge of the receiver at a much earlier period, but did not do so. The reasoning of this case will apply to defeat the right of the company up to the time when they applied for leave to

proceed as against the receiver. The bill did not claim rents but merely possession as against the tenants, and the company takes no steps to intercept the payment of rents prior to the application of December, 1880. At that date all the defendants were in default, and judgment could have been obtained for immediate possession but for the property then being *in custodia legis*. But as the creditors proposed to dispute the validity of the company's mortgage, and were allowed to set up a defence for that purpose it is evident that no order would have been then made for the discharge of the receiver till that contention was disposed of. The receipts of the rents thereafter by the receiver was not as in 4 Russ. on behalf of the mortgagors (for they had made originally no defence, and the bill had been noted in default against them), but in truth on behalf of the creditors of this insolvent estate. So that in several respects we have a difference between the cases. The mortgagees did all that could be done to assert their rights promptly, they were deprived of a judgment for immediate possession by the active intervention of the creditors, defending in the name of the executors, and the question of application of the rents during the period of litigation arises between the creditors of the estate on the one hand, and the mortgagees of this specific property on the other. Whereas in 4 Russ. only a notice was given some ten years before by the mortgagee to the tenants, and such a notice, in the language of Pollock, C. B., "amounts to nothing": *Hickman* v. *Machin*, 4 H. & N. 720.

The leases being made after the mortgage all the tenants were in possession merely on sufferance, so far as the mortgagees were concerned, and they had the right to eject. From the time when they were stopped in getting judgment for possession by the possession of the receiver it is but fair to allow the mortgagees the rents *qua* mesne profits. (See *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932.)

Though the order appointing the receiver was silent on the subject, yet I think it is a most reasonable practice to

hold that such appointments are always made, and to be treated as made without prejudice to prior incumbrances: *Berney* v. *Sewell*, 1 Ja. & W. 647; *Piddock* v. *Boultbee*, 16 L. T. N. S. 837.

Inasmuch as the mortgage was disputed an order could not have been obtained to discharge the receiver as to this property, and the only alternative was to get permission to prosecute the claim for possession effectively against the receiver: *Brooks* v. *Greather*, 1 Jac. & W. 178; *Bryan* v. *Cormick*, 1 Cox. 422. The moment judgment was obtained as against the creditors and the receiver that would relate back to the date of the order allowing the action to be prosecuted notwithstanding the receiver, and his perception of the intermediate rents would enure for the benefit of the mortgagee thus succeeding in his claim.

The result is in my opinion that the Master's ruling was well founded as to all except the rents received prior to the application of December, 1880, and with this deduction I affirm his report with costs to the mortgagees.

A. H. F. L.

[CHANCERY DIVISION.]

MURPHY v. THE KINGSTON AND PEMBROKE RAILWAY COMPANY.

Railway—Expropriation—Deviation—One mile limit—Railway Act of 1879—42 Vic. ch. 9—46 Vic. ch. 64, (D.)

A railway company after the completion of its line, sought to expropriate a piece of land not marked or referred to on any map or plan filed, or book of reference made by the company, but within one mile's distance of the terminus of the railway as delineated on the filed plan, for the purpose of better utilising a certain other property previously acquired by them as a passenger and freight station.

Held, that, under 42 Vic. ch. 9, sec. 8, sub-s. 11, (D.,) this was not permissible, there being no provisions affecting the matter in the special acts of the company.

Held, also, that 46 Vic. ch. 64, (D.,) which empowered the company to hold and own land in any municipality through or in which the main line or any branch was carried for the erection and maintenance thereon of stations, sidings, &c., as might be necessary for the purposes of the company, did not empower them to expropriate against the will of the owner.

THIS was an action brought by Catharine Baker Murphy, as owner in fee simple of certain lands in the city of Kingston, and by John Baker Murphy, her husband, against the Kingston and Pembroke Railway Company, claiming an injunction restraining the defendants from taking possession of the said lands or any part thereof, or from procuring the appointment of an arbitrator to value the said lands, and from taking any steps or doing anything for the purpose of expropriating the same; also a writ of prohibition prohibiting the application for or the appointment of a sole arbitrator, and prohibiting the granting of any warrant authorizing the taking possession of the said land, the defendants, as the plaintiffs alleged, being about to make application to the judge of the County Court of the county of Frontenac for these purposes.

The facts of the case are stated in the judgment.

The action was tried at Toronto before Boyd, C., on May 6th, 1886.

Cattanach and *Rogers*, for the defendants, were first called on. 46 Vic. ch. 64, (D.,) sec. 3, is to be read into the original Act.

The general Railway Act of 1879, 42 Vic. ch. 9, (D.,) applies to railways already constructed. We refer to *Grimshawe* v. *Grand Trunk R. W. Co.*, 19 U. C. R. 493; *In re Stratford, etc. R. W. Co.* v. *The Corporation of the County of Perth*, 38 U. C. R. 112; *Municipal Council of Peterborough and Victoria* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 220.

S. H. Blake, Q. C., *Britton*, Q. C., and *Black*, for the defendants. *Grimshawe* v. *Grand Trunk R. W. Co.*, *supra*, went upon consent and waiver of the plaintiff. We say the railway here is completed, and there is no power to expropriate: *Simpson* v. *South Staffordshire Waterworks Co.*, 34 L. J. N. S. Ch. 380. When once a terminus was adopted in Kingston, there was no power to alter afterwards. The right to deviation was only while the line was *in fieri*. See *Pierce* on Railroads, p. 254; *Wood* on Railroads, vol. 2, secs. 238, 268; *Brown and Theobald* on Railway Companies, p. 259; *Redfield* on Railways, 4th ed., pp. 384, 388; *Loosemore* v. *Tiverton &c., R. W. Co.*, 22 Ch. D. 25; *London, Brighton, &c., R. W. Co.*, v. *Truman*, L. R. 11 App. Cas. 45; *Blakemore* v. *Glamorganshire Canal Navigation Co.*, 1 My. & K. 154, 165, S. C. 1 Cl. & F. 278; *Brice* on Ultra Vires, 2nd ed., p. 515; *Hinckley* v. *Gildersleeve*, 19 Gr. 212; *Parker* v. *Great Western R. W. Co.*, 7 M. & Gr. 253; 42 Vic. ch. 9, sec. 9, sub-secs. 10, 11, sec. 10 (D.); 47 Vic. ch. 11, sec. 13, (D.); *Dodd* v. *Salisbury and Yeovil R. W. Co.*, 1 Giff. 158.

Cattanach, in reply, referred to 42 Vic. ch. 9, sec. 7, (D.,) sub-s. 19, sec. 8, sub-s. 12; sec. 9, sub-ss. 1, 12; 16 Vic. ch. 37; 18 Vic. ch. 33, sec. 4; *Canada Southern R. W. Co.* v. *Norvall*, 41 U. C. R. 195; 42 Vic. ch. 61 D.; *Shelford* on Railways, 4th ed., p. 542; *Re Yorkshire, &c., R. W. Co., In re Dylar's Estate*, 1 Jur N. S. 975; *Simpson* v. *Lancaster and Carlisle R. W. Co.*, 15 Sim. 580; *Wood* v. *Epsom, &c., R. W. Co.*, 8 C. B. N. S. 731.

May 13th, 1886. BOYD, C.—The Kingston and Pembroke Railway Company was incorporated in 1871 by 34 Vic., chap. 49 (D.), with power to lay out, construct and finish a

road from within the limits of the city of Kingston to and into the town of Pembroke. (Sec. 2.)

By 42 Vic., chap. 61 (D.), (1879), power was given to build branch lines at any point from the main line in Lennox and Addington to some place in Lanark to connect with the Canada Central Railway, with a proviso that the power thereby granted should not be exercised till the main line of the railway, to connect with the Canada Central Railway, was constructed. By sec. 5 the time for the completion of the railway was extended for ten years from the passing of the act. By 46 Vic., chap. 64 (D.), (25th May, 1883), sec. 3, the company was allowed to hold and own lands and water lot property in any municipality through or in which the main line or any branch was carried, for the erection and maintenance thereon of necessary stations, depots, curves, sidings and wharves as might be necessary for the purposes of the Company. This Act also empowered the Company to build branch lines, among others a branch to Eganville, but only on condition that the main or a branch line of the railway was built to the village of Renfrew, in the County of Renfrew (sec. 1.)

In 1873 the city of Kingston passed a by-law for a bonus of $300,000, one condition of which was that upon its payment the railway should obtain in fee for not less than 21 years the site for a passenger and freight station, to be located within the area bounded by North street on the North, Division street and Barrie street on the West, and Kingston Harbour on the South and East in Kingston. The Company by its President in January, 1873, made a declaration that the Company had, by purchase in fee, obtained a site for a passenger and freight station, being lots 24 and 25, Place d'Armes, within the area specified in the by-law, and had purchased, but not yet patented, lots 21, 22 and 23 adjoining thereto for additional station room and the general purposes of the railway, and had otherwise complied with the conditions, whereupon payment was made to the Company of the full amount of the city bonus.

By another city by-law of October 24th, 1881, provision was made for exempting the real and personal property of the railroad in Kingston from taxation for twenty years, one of the conditions being that the Kingston and Pembroke should be constructed and completed from its then actual northern terminus, or point to which it was then constructed, to a junction with the Canada Central Railway (*i. e.*, as then called the Canada Pacific Railway) in the city of Renfrew, with rails laid and trains running thereon before January 1st, 1885. This by-law was legalized by the Parliament of Ontario by 45 Vic. ch. 37 (1882).

The company, by its secretary Osborne, advised the city of Kingston, on January 17th, 1885, that the line of the Kingston and Pembroke Railway Company having been completed and opened for traffic to the town of Renfrew, and connection there made with the Canada Pacific Railway on December 26th, 1884, the company thereupon claimed the right of exemption under the said by-law. The letter further stated as follows: "I would also state that the junction made at Renfrew constitutes the completion of the company's line, and the municipalities appointing directors will now be relieved from that duty." The reference in the last clause is to section 15 of the original charter (34 Vic. chap. 49), which provides that any municipality which has given a bonus shall be entitled "during the *construction* of a railway, but not afterwards," to appoint annually a person to be a director of the company.

On May 28th, 1883, the railway procured from the Government of Canada a lease for 99 years of one and four tenths of an acre of the market battery, in the city of Kingston, and engaged themselves to construct thereon the necessary passenger and freight buildings required in connection with their traffic and for other purposes connected with the railway. This is within the area designated in the first by-law granting a bonus, and for the purpose of better utilizing this lately acquired property as a passenger and freight station, the company seek to expropriate the land of the plaintiffs. This land is not marked or referred

to in any map or plan filed or book of reference made by the company although it is within one mile's distance from the old terminus as delineated in the filed plan.

The evidence leads me to the conclusion that the company's line was constructed and completed before they sought to expropriate the land in question and although under the act of 1883 they might be able to hold some additional land I do not see that they can do so against the will of the owners in the present case. (*a*)

No hardship is involved in this conclusion because by the General Act ample provision is made for giving relief to the company by 42 Vic. ch. 9, sec. 7, sub-sec. 18 and secs. 10 and 14 (D). These provisions give emphasis to the general rule of the court not to extend the compulsory powers of a company beyond the express words or absolutely necessary implication of the act: *Lamb* v. *North London R. W. Co.*, L. R. 4 Ch. 522.

The decision which goes furthest in aid of the defendants is *Re Yorkshire, etc. R. W. Co., In re Dylar's Estate*, 1 Jur. N. S. 975, where the power to take lands for a siding was exercised, though the main line had been constructed but in that case the land taken was within the limits of deviation delineated on the maps and plans of the company's undertaking.

The language of Burns, J., in *Grimshawe* v. *Grand Trunk R. W. Co.*, 19 U. C. R. at p. 505, is against the exercise of the compulsory power of deviation after the road is completed and in full operation, and although Robinson, C. J., in that case expresses the view that deviation is permissible within

(*a*) The contention of the defendants as set out in their statement of defence was that, "they are entitled by law to make a deviation for any distance less than a mile from the line of railway or from the place assigned thereto on the said map or plan and book of reference" (*i. e.*, those filed by the defendants in compliance with the statute in that behalf with the clerk of the peace of the county) "on to, through, across, under or over any part of the lands not shown on such map or plan and book of reference, or within one mile of the said line and place;" and that the land sought to be expropriated being only "a third of a mile from their line or the place assigned thereto upon said map or plan and book of reference, they are by law entitled to expropriate the same in the manner provided by the Consolidated Railway Act, 1879, and the amendments thereto."—REP.

a mile though the alteration is not exhibited on the map or plan, I find myself unable to extract such a meaning from the statute now in force. The important clause is in 42 Vic. ch. 9, sec. 8, sub-sec. 11 (D.), which is as follows: "No deviation of more than one mile from the line of the railway, or from the places assigned thereto in the said map or plan and book of reference, or plans or sections, shall be made into, through, across, under, or over any part of the lands not shewn in such map or plan and Book of Reference, or plans or sections, or within one mile of the said line and place, save in such instances as are provided for in the special Act."

No provision being made for deviation in any of the special acts relating to this company their right to expropriate the land in question does not exist unless it be given by virtue of the provision which I have cited from the general act.

Now the intention of the legislature is to be ascertained by applying the usual rules of grammatical construction unless some such absurd or incongruous results ensue as necessitate a modification of these rules. The obvious meaning of the sub-section in hand appears to me to be this: The limits of deviation shall not exceed one mile from the line of railway in the case of lands not shewn in the plans and books of reference or the alterations thereof; but even within one mile from the said line no deviation shall be permitted, except in such instances as are provided for in the special act. This may be a cumbrous and possibly tautological way of expressing what is meant, but it yields a sensible meaning. I am not therefore to torture the words into other combinations which will give a more favourable result to the railway authorities.

I suspect there is an error somewhere in the composition of this sentence. I notice that in the original whence it passed into the Consolidated Statutes of Canada and the General Railway Act, 1872, it has a change of one word which may alter the meaning, if possible, more to the disadvantage of the company. In 14 & 15 Vic. ch. 51, sec.

10, it for the first time appears thus: "No deviation of more than one mile from the line of railway or from the places assigned thereto, &c., shall be made *nor* into, through, across, under, or over any part of the lands not shewn on such map or plan and book of reference, or within one mile of the said line and place, save in such instances as are provided for in the special act." It seems to be clear from this language that no deviation is to be made into any land not shewn on the plan and book of reference, which would be fatal to the company's contention.

The construction of this section was not brought to my notice when I gave an opinion upon a former application as to the meaning of the word "deviation."(*a*) I adhere to that meaning, but I do not see that it gets rid of the other difficulty in the way of the defendants, namely, that they have no power to take this land against the will of the plaintiffs. This suffices to dispose of the case, and I do not deem it needful to consider the other matter argued before me. The judgment will be in favour of the plaintiffs as prayed, with costs.

A. H. F. L.

(*a*) Reported 11 O. R. 302.

[COMMON PLEAS DIVISION.]

IN RE HODGSON AND THE CORPORATION OF THE TOWNSHIP OF BOSANQUET.

Municipal corporations—Arbitration and award—Compensation—Reference to a Judge.

A portion of a drain constructed by a township corporation having been dug on the plaintiff's land, an arbitration was had under the Municipal Act to ascertain the compensation plaintiff was entitled to by reason of the damage alleged to have been sustained by him: (1) for land taken for the drain; (2) for the throwing of earth on the land on the site of the drain; (3) the building of bridges by the plaintiff to cross the drain; and (4) the backing of water into the plaintiff's cellar. The arbitrators found that the plaintiff had not sustained any damage, and they made an award against him, imposing on him a large portion of the costs.

Held, by CAMERON, C. J., that the evidence sustained all the grounds of damage except the last, as to which the evidence was not very satisfactory. The learned Judge was therefore of opinion that he could not ascertain the compensation himself, but set aside the award, and intimated that unless the parties would agree on new arbitrators, he was disposed to direct a reference to the County Judge.

This was an appeal from an award made by arbitrators appointed under the provisions of the Municipal Act, to determine the compensation, if any, the plaintiff was entitled to, by reason of the construction of a drain on the plaintiff's premises.

The arbitrators by their award found that the plaintiff had sustained no damage which entitled him to compensation; and therefore did not award him anything; and they directed the plaintiff to pay all his own costs of the arbitration, and the arbitrators' fees, and the costs of the award, and all the counsel fees of the corporation; and that each party should pay his own witnesses; and that the costs were to be taxed on the scale of the High Court.

On January 29, 1886, *Aylesworth* supported the motion. *Lash*, Q.C., contra.

May 11, 1886. CAMERON, C. J.—The evidence in this case discloses that the defendants, under the authority of a by-law to construct a drain under the provisions of the

Municipal Corporations Act, 1883, caused a portion of such drain to be dug on the premises of the appellant Hodgson, who claims to be entitled to compensation for injury done to him thereby.

He claims in respect of the following heads: lands taken for the drain; injury to the soil by throwing the earth from the ditch upon the land at the side of the drain; the necessity of erecting bridges to cross the said drain in at least two places for the proper and beneficial use of the land and approach to the house; and for injury done to the house by water backing into the cellar.

The evidence sustains all the grounds except the last, as to which I cannot say that I am satisfied the cellar was flooded by reason of the existence of this drain more than it would have been if this drain had never been constructed.

But there was, I think, a clear invasion of the appellant's right to the use of his land free from this drain for which he was entitled to some compensation. The drain was not necessary to the full enjoyment of his land as the private drains he had constructed were sufficient for his purposes; and the existence of the drain renders it necessary for him to construct bridges that otherwise would not have been required. His land may derive some benefit from the work; but for the proportionate benefit it does receive he has been assessed with those for whose advantage the drain was brought on to the appellant's land. In this benefit the corporation itself participates in the greater security given to the lake shore road, and renders that road less liable to be washed out than it would have been if the water now borne by this drain had found its outlet by other drains or channels.

I am therefore clearly of opinion the appellant was entitled to some compensation, and the majority of the arbitrators in awarding him nothing and saddling him with a large portion of the costs did not do him justice.

I am, therefore, of opinion the award must be set aside, with costs.

Owing to the evidence as to the flooding of the cellar being caused by the drain in question not being satisfactory, I do not feel I could determine the proper amount of compensation to which the appellant is entitled; and, unless the parties can agree upon fresh arbitrators, I am disposed to direct a reference to the Judge of the County Court. It would be better that the reference should be to some one who can see the appellant's land and the drain upon it, as that will be a great help to the proper understanding of the evidence and the weight to be attached to it. I may say that it strikes me the depreciation in value of the land stated by the appellant and some of the witnesses caused by the drain is put very high, and probably places the appellant's damages as much in excess of what a just claim should be, as the finding of the arbitrators places it below what would be just.

I do not wish to prejudice the case of either party by anything I have said, but desire to leave the arbitrators or arbitrator, as the case may be, free to form their or his own opinion upon the merits of the drain and the extent of the injury suffered.

I do not know, if the arbitrators had only awarded a small sum as compensation, that I could properly have interfered with their finding as they from their observation would be in a better position to judge. Having seen the land, the drain, and the witnesses they would be in a better position to judge of the extent of the damage done; but they have, in the face of an interference with the dominion of the appellant over his property for the benefit of others, awarded him nothing by way of compensation, although the only benefit the drain is to him, according to the evidence, is to facilitate underdraining if he chooses to adopt that system of drainage, which he is certainly not bound to do unless he approves of it and thinks fit to adopt it. The evidence does not shew anything from which it could be inferred the land has acquired any increased marketable value, while there is evidence that it has been seriously diminished in such value.

I have not over-looked the fact that the appellant approved of the location of the drain, but that approval was only in the event of the drain being forced upon him. He objected to it altogether, but if it was to be constructed the situation in which it was placed was more acceptable to him than any other.

[COMMON PLEAS DIVISION.]

THE LONDON MUTUAL FIRE INSURANCE COMPANY OF CANADA v. THE CORPORATION OF THE CITY OF LONDON.

Assessment—Income—Mutual Ins. Co.—Appeal to County Judge—Finality.

The defendants assessed the plaintiffs for $590.52 on an alleged income of $26,000, being the balance of moneys received by the plaintiffs, a mutual insurance company, for premiums, &c., after payment of the current year's losses and expenses. The plaintiffs contended that there was no income for that the said balance, under the statute relating to the plaintiffs, was to be applied in reduction of the amounts on the premium notes for the ensuing year, and they appealed to the Court of Revision who confirmed the assessment. They then appealed to the County Judge who dismissed the appeal. The plaintiffs then paid the amount under protest, and brought this action to recover same back.

Held, that the decision of the County Judge was final; and this action was therefore not maintainable.

The statement of claim set up, in substance, as follows: The plaintiffs, in the year 1859, were incorporated under the Mutual Insurance Companies Act, C. S. U. C. ch. 52.

Under this Act the plaintiffs were compelled to make a new assessment upon the premium notes as often as a loss occurred, which being found cumbersome and difficult of application, by 27 Vic. ch. 52, additional powers were conferred upon the plaintiffs, under which they adopted the plan of making the annual assessment of all the premium notes received during the year next preceding

By 41 Vic. ch. 40 (D.) it was provided that the plaintiffs might effect insurance upon the cash premium principle, whereby the insured paid in cash the full amount of their

premiums and incurred no liability for further calls or assessments; and the plaintiffs' business had since that date been conducted under both the cash premium system and the premium note system.

By sec. 42 of the last mentioned Act it was provided that: "For the purpose of keeping down, if possible, the assessment which the company may now by law make, so as not to exceed the sum of one dollar on each hundred dollars insured, should a disastrous year or series of such years occur; and to provide for the speedy and certain payment of losses incurred, the company may raise from any savings they may be able to effect in favourable years out of the assessments collected on the premium notes of the company while such collection does not exceed one dollar on each hundred dollars on isolated farm property or detached buildings for three years, a guarantee or equalization fund not to exceed $50,000; and the said fund, and all the interest that may accrue thereon, shall belong to the said company, and shall be applied for the purpose mentioned in the commencement of this section, and when not required for such purposes shall be applicable to the payment of any losses, debts, and expenses of the company." In pursuance of the powers thereby granted and conferred the plaintiffs accumulated a guarantee fund of $33,520, invested in municipal debentures of the cities of Hamilton and St. Thomas, which were held by the Minister of Finance as security for the policy holders of the company, and which, it was alleged, were exempt from taxation.

The rate of assessment in each year on the premium notes, and the rate charged upon the cash system, were made such as, along with all other sources of income of the company, would, from the former experience of the company, serve to meet all the losses which the company would make during the year next ensuing, the cost of management, and no more.

The assessment upon premium notes was due on the 15th December in each year, and as a result a large deposit stood to the credit of the plaintiffs at their bank at the

close of each year; but this amount was paid out during the ensuing year to meet losses which accrued during that time.

The re-insurance fund of the plaintiffs in the year 1883 amounted to $242,998.31, and in 1884 was $269,659.84, an increase of $26,660; but this was an increase in the plaintiffs' liabilities, yet the defendants claimed that the said amount represented the plaintiffs' income for the year 1884, and wrongfully assessed them upon the same, and claimed $590.52 municipal taxes thereon.

The plaintiffs appealed to the Court of Revision against said assessment, but the same was sustained, and the plaintiffs thereupon appealed to the County Judge in conformity with the statute in that behalf, but their appeal was dismissed.

On 2nd January, 1886, the defendants' collector of taxes made a formal demand upon the plaintiffs for the amount of said taxes, and threatened to place a distress warrant for the same in the hands of his bailiff unless the same was forthwith paid, whereupon the plaintiffs paid to the defendants, under protest, the said sum of $590.52.

The plaintiffs alleged that being a mutual fire insurance company, the balance of moneys received in any year for premiums or otherwise, over and above the amount required to meet the losses for the then current year and the expenses of management, served simply to reduce the rate of assessment for the year next ensuing, and the plaintiffs, therefore, had no income taxable for municipal purposes.

The plaintiffs claimed that the increase in the plaintiffs' re-insurance fund in any year did not represent the plaintiffs' income for that year: that the plaintiffs had no income liable to taxation for municipal purposes: that the defendants might be ordered to pay to the plaintiffs the said sum of $590.52 wrongfully obtained from the plaintiffs by the defendants, together with interest thereon from 2nd January, 1886, and the costs of the action.

By the statement of defence the defendants set up in substance that the plaintiffs were in the year 1885, and for many years prior thereto, domiciled and carried on

business in the city of London; and were in and for the said year 1885, under "The Assessment Act" and amendments thereto, assessed in and upon the assessment roll of the said city for $26,000 for income.

The defendants submitted that the assessment having been confirmed as set forth in the statement of claim was final and conclusive, and that the plaintiffs could not go behind the said proceedings, but were bound by the assessment: that even if the plaintiffs were entitled to go behind the proceedings the said assessment was authorized by the said Acts: that the plaintiffs by their statement of claim disclosed no cause of action against the defendants, and they claimed the same benefit of this objection as if they had demurred to the said statement of claim according to the former practice of this honourable Court.

The cause was tried before Proudfoot, J., without a jury, at London, at the spring Chancery sittings for 1886. The facts so far as material are set out in the pleadings.

E. R. Cameron, for the plaintiffs.

W. R. Meredith, Q. C., and *T. G. Meredith*, for the defendants.

The learned Judge delivered the following judgment:

May 14, 1886. PROUDFOOT, J.—The defendants assessed the plaintiffs upon an alleged income of $26,600 for 1884 at the sum of $590.52. The plaintiffs appealed to the Court of Revision, who confirmed the assessment, and they then appealed to the County Judge, who dismissed the appeal. The plaintiffs paid the amount assessed under protest, and now bring this action to recover the amount so paid, upon the ground that the company had no income, and that the $26,600 was a sum raised for the purpose of meeting prospective and contingent losses.

It was contended for the plaintiffs that where there was no jurisdiction to assess, the decision of the Court of Revision and of the County Judge were not binding.

That in a mutual insurance company such as this there could be no profits, and therefore there was no income to assess.

Under the Assessment Act, R. S. O. ch. 180, sec. 2, sub-sec. 8, secs. 5 and 6, income is assessable as personal property, and over personal property within the limits of the Province, the municipal council had a general jurisdiction; and the alleged income in the present case does not come within any of the exemptions in the statute. Whether there was any income or not is a question of fact to be decided by the authorities specified in the Act; and if the assessor errs in this respect the matter may be set right by an application to the Court of Revision, or by an appeal to the County Judge: R. S. O. ch. 180, sec. 57; and the decision of the County Judge is final and conclusive.

The assessor, the Court of Revision, and the County Court Judge have in this case found that the personal property or income of the plaintiffs liable to assessment was $26,600; and I could not give effect to the plaintiffs' contention without trying over again the facts upon which they have come to that conclusion; and this I have no jurisdiction to do.

There are numerous cases cited in *Nickle* v. *Douglas*, 37 U. C. R. 51, 63, and to which it is needless for me to refer, that establish, where there is a general jurisdiction over the subject matter, the proper course is to appeal.

I cannot distinguish the present case in principle from *Canadian Land and Emigration Co.* v. *Dysart*, 9 O. R. 495, 12 A. R. 80, where it was held that an excessive assessment of lands, though alleged to be fraudulent, must be brought before the Court of Revision and on appeal to the County Judge; and that his decision was final.

I have referred to all the cases that were cited, but do not find they can lead me to any other conclusion. The action is dismissed with costs.

[COMMON PLEAS DIVISION.]

YOUNG V. PURVIS.

Will—Description of real and personal estate—Appointment of executors—Executor according to the tenor—Description of land—Maintenance—Charge on land—Infant executors—Devastavit.

A testator by his will directed his executors, "hereinafter named," to pay his debts and funeral expenses; and then devised the residue as follows: To his son David "lot 16, concession 7, N. H., real and personal property;" the said David to pay to each of his daughters $500, namely, Janet, Mary, and Agnes in two years after his death; Margaret and Ellen at 25, and Christina to remain on the farm, the said sum to be given her when she became of age. No executors were named. Parol evidence was admitted to shew that the land mentioned was in the township of Morris; that N. H. meant the northhalt, and that it was the only land owned by testator. Parol evidence was also admitted to shew that Christina, though spoken of as a minor, was 23 years' old when the will was made, and that she was of delicate constitution and of weak mind.

Held, that there was an effectual disposition of the real and personal estate: that to a disposition of personal estate executors need not be expressly named, but may appear by implication, and that David was executor according to the tenor: that as to the land the parol evidence, which was properly admissible, cleared up any ambiguity as to the description; and the parol evidence also shewed that as regards the provision in favour of Christina, she must be treated as an adult; and that the provision for her would include maintenance.

An infant, whether executor or executor *de son tort* is not liable for a *devastavit*. Legacies directed to be paid out of a mixed residue are a charge on land.

THIS action was brought for the construction of the will of James Purvis, by the plaintiff, who is a daughter of the testator and a legatee under the will.

The will was as follows:

"MORRIS, September 6th, 1883.

"This is the last will and testament of me, James Purvis, of the township of Morris, in the county of Huron and Province of Ontario, farmer. My will is: First, that my just debts and funeral expenses be paid by my executors, hereinafter named, and the residue and remainder of my property, which shall not be required for such purposes, I give, devise, and dispose thereof as follows, to wit: I give and devise to my son David Purvis lot 16, concession 7, N. H., real and personal property; the said David Purvis to pay to each of my daughters the sum of five hundred dollars, Janet Purvis, Mary Purvis, and Agnes Purvis, to receive the same in two years after my death, Margaret Purvis, Ellen Purvis to receive the said amount when they arrive at the age of twenty-five years, Christina Purvis to remain on the farm, the said sum to be given her when she becomes of age."

The testator died on the 10th September, 1883.

The only land owned by him was lot 16, in the 7th concession of the township of Morris, in the county of Huron, upon which he had resided for many years prior to his death, and which he had farmed.

The additional facts are set out in the judgment.

March 15, 1886, *Garrow*, Q.C., for the plaintiff.
M. G. Cameron, for the defendant Purvis.
Malone, for the Toronto General Trusts Company.

April 14, 1886. PROUDFOOT, J.—The plaintiff alleges that the testator owned a large amount of personal property used upon the farm, &c., worth about $1,500, which was taken possession of by David Purvis immediately after the testator's death; and that he has since sold and disposed of a large portion thereof, and converted the same to his own use, and claims to be the owner of the personal property under the will. That on the death of the testator David Purvis took possession of the farm and claims to be the owner thereof under the said will. That he has paid none of the legacies: that he is an infant of the age of seventeen years; and that Christina Purvis is of weak mind.

The will is stated to be ambiguous and of doubtful construction in that it does not appear clearly that the testator has effectually disposed of either his personal or real estate, nor what lien or charge, if any, the defendant Christina Purvis has upon the estate by means of the direction that she shall remain upon the farm.

Ellen Burgess or Purvis is also an infant. The plaintiff asks for a declaration of a lien in respect of the said legacy to her of $500, and payment of it with interest, and for the construction of the will, and other relief.

The defendant, David Purvis, puts in the usual infant's answer by his guardian *ad litem*; and so does the defendant Ellen Burgess.

The defendants, the Toronto General Trusts Company,

who have taken out administration to the testator answer, not admitting any of the allegations in the statement of claim except that the testator made the will (above set forth); and submit to the direction of the court; and ask to be paid their costs of the action, and other expenses, &c., &c.

I think the testator has effectually disposed of his real and personal estate. He has not appointed executors, but to a disposition of personal estate it is not necessary that executors should be expressly named. It is enough that it appear by implication who are to be executors. The debts here are all a charge on the real estate. The testator directs their payment, and then devises the residue of his property to David. See the cases cited in 2 *Jarman* on Wills, 4th ed., 585: and he directs David to pay the legacies. David would then be entitled to be executor according to the tenor: 1 *Williams* on Executors, 7th ed., 243. But David is still an infant, and could not exercise his office during infancy: *Simpson* on Infants, 102. Administration has been granted to the Trusts Company, it does not appear in what shape, but I presume during infancy.

I think the real estate is also effectually disposed of. The objection on this point is that the will gives an imperfect description of it, not naming the township in which it was situate. But by the will the testator purports to devise all his property, and then mentions the lot 16 in the 7th con., N. H., these initials meaning, as it was proved, "north-half."

I think that parol evidence was admissible to shew, and it did shew, that he only owned lot 16 in the 7th con., north-half of the township of Morris: *Doe d. Lowry* v. *Grant*, 7 U. C. R. 124, 128; *Summers* v. *Summers*, 5 O. R. 110; *Re Shaver*, 6 O. R. 312, and *Hickey* v. *Stover*, in this Division, in which judgment was given on the 23rd December, 1885, ante p. 106.

The legacies are charged on the land. The mixed residue of real and personal estate is given to David Purvis,

and he is directed to pay the legacies to the legatees, which is part of the disposal thereof in the first part of the will. It amounts to a direction to pay the legacies out of the mixed residue. And the rule, as laid down by *Jarman*, is, that "Where, however, the executor is devisee of real estate, a direction even to him to pay debts or legacies will cast them upon the realty so devised: 2 *Jarman* on Wills, 4th ed., 595; *Robson* v. *Jardine*, 22 Gr. 420.

Some evidence was given of a *devastavit* having been committed by David in disposing of some of the personal property by auction in March, 1885, and some $300 in notes for chattels then sold seem to have come into the hands of the administrators. For the *devastavit* David is not liable, being an infant, whether he were an executor: *Hindmarsh* v. *Southgate*, 3 Russ. 324, or an executor *de son tort*: *Stott* v. *Meanock*, 31 L. J. N. S. Ch. 746.

There was some evidence given of the amount of the personal estate which does not seem to have been of great value; but some of it is in the hands of the administrators. Part of it, that the administrators value at $144, consists of household furniture. Another part consists of farming implements, cattle, horses, &c. The testator intended the place to be occupied by the devisee, and by Christina; and as David is both devisee of the real estate and legatee of the personal estate there is no conflicting interest to say that the legacies should be paid out of one rather than the other. I do not think therefore that the household furniture, farming stock and implements should be made liable for the legacies. If there is any other personal estate it will be administered.

It was said the debts were paid, but evidence was not given to that effect. The legacies to the six daughters amount to $3,000, four of these are now payable, the other two not till the legatees attain twenty-five years of age. If the farm were to be sold to pay these legacies it would defeat the testator's apparent intention that a home should be kept there for Christina. The land is worth according to the evidence from $3,500 to $4,000.

Although the will mentions Christina as not being of age, it seems that she was twenty-five years old in October, 1885, and therefore was nearly twenty-three when the will was made. The legacy to her was therefore payable on the death of the testator. It was a mistake to treat her as under twenty-one; but there was no uncertainty as to the person intended, and evidence was no doubt admissible to show the true age. The evidence showed that she was of a rather delicate constitution and not of a strong mind. The plaintiff in her evidence says that there is something the matter with Christina's mind; she is not very strong; never grew right; at school she did not learn; her memory is defective. This furnishes a reason for the provision made in regard to her, that she was to remain on the farm. This direction also must be considered as made in favour of an adult, which she was, and therefore not to terminate with infancy, which could not be as she was no longer an infant.

The effect of this provision remains to be considered, as it was contended, that Christina was not entitled to *maintenance*, but only to reside on the farm. Maintenance may be given either expressly or impliedly. It is not given expressly in the will; but I think no one can doubt that the testator intended his infirm and rather weak-minded daughter to be maintained when he directed that she was to remain on the farm. She could not remain there without food, or clothing, and other necessaries. And he could not have contemplated that she was to employ the legacy he gave her in providing everything but house-room, the interest of it would not suffice to provide them, and the principal would, in a few years, be exhausted.

This question has received considerable attention from the civilians, and their opinions commend themselves to reason and justice. A legacy of a habitation, or the right to reside gratuitously in a house belonging to another, includes the use of furniture as stools, chairs, tables, and the like: *Menochius de Presumptionibus lib. IV. Pres.* 157, *n* 23.

The same writer says that when a testator by will desires his sons to be brought up with their mother, or that the mother should dwell with her sons, to educate them, maintenance is impliedly given to the mother: *Ib. n. 2.* It is the same when a testator bequeaths to his wife a dwelling with his sons: *Ib. n. 3.* So also where he leaves the management, or care and administration of his house to his wife: *Ib. n. 4.* So if he bequeaths to his daughter that in case of widowhood she may return to his house or the house of his sons his heirs: *Ib. n. 5*; and other cases of a like nature, in all which it is presumed that the testator intended the legatee to have aliment or maintenance.

Other questions may arise, if it shall be found that Christina cannot remain on the farm.

I declare that the personal and real estate of the testator has been effectually disposed of by his will; and that Christina is entitled to maintenance on the farm, without prejudice to any right she may have in case she shall find that she cannot remain on the farm; and I refer to the Master at Goderich to inquire as to the debts and personal estate of the testator; and whether it will be most for the advantage of the devisee, David Purvis, to mortgage the farm or to sell a portion of it to realise funds to pay the legacies; and I reserve further directions and costs.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

RE O'MEARA AND THE CORPORATION OF THE CITY OF OTTAWA.

Municipal Act, 1883, s. 503, s. 497, ss. 4-6—By-law—Sale of fresh meat less than by quarter carcass—Restrictions, &c.—Reasonable accommodation.

By section 503 of the Municipal Act, 1883, the council may, subject to the restrictions and exceptions contained in the six next preceding sections, pass by-laws as provided by the following sub-sections: "(1) For establishing markets; (2) for regulating markets, &c.;" "(3) for preventing or regulating the sale by retail on the public streets, or vacant lots," &c.; "of any meat," &c.; (4) for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed; "(5) for regulating the place and manner of selling and weighing grain, meat * * and all other articles exposed for sale, and the fees to be paid therefor," &c.; "(6) for granting annually or oftener licenses for the sale of fresh meat in quantities less than by the quarter carcass, and for regulating such sale, and fixing and regulating the places where such sale shall be allowed, and for imposing a license fee * * and for preventing the sale of fresh meat in quantities less than by the quarter carcass unless by a person holding a valid license, and in a place authorised by the council," &c. The restrictions and exceptions, so far as applicable, were those contained in sub-secs. 4 and 6 of sec. 497. Sec. 4 applied to articles for sale brought into the municipality after 10 A.M., upon which market fees are not to be imposed unless they are offered for sale on the market; and sec. 6 applied to those persons who go to the market place before 9 A.M., between 1st April and 1st November, and 10 A.M., between 1st November and 1st April, with any article they may sell on the market place; and with regard to such persons that after these respective hours they shall not be compelled to remain on the market place, but may proceed to sell elsewhere on paying the market fee.

Held, that a by-law passed under sub-sec. 6, need not be made subject to such restrictions, &c., the proper construction of the section being that sec. 503 is made subject to such restrictions so far as properly applicable, and that sub-sec. 6 is in the nature of an exception from these general restrictions, &c.

Semble, that the Court might quash a by-law of this description when plainly insufficient accommodation is furnished, unless in the alternative the municipality should provide reasonably fit and full accommodation; but as a rule the municipality is the judge of its own business and affairs, and it is probably an extreme case in which the Court would interfere.

An order *nisi* was obtained to set aside by-law No. 629 of the corporation of the city of Ottawa, on the following among other grounds:

1. The by-law was *ultra vires*, for that (*a*) it was not made subject to the restrictions and exceptions imposed by the Municipal Act, 1883, sec. 503. (*b*) It operated to restrain

the carrying on of the business of a retail butcher by all persons other than the licensees themselves. (*c*) It prohibited the carrying on the business of a retail butcher in all places other than the market stalls of the city. (*d*) It prohibited the carrying on of the said business at all times and in all places except in the said market stalls. (*e*) It prohibited the exposing for sale of fresh meat in quantities less than by the quarter carcass.

2. It operated as an undue restraint upon trade contrary to public policy in contravention of sec. 287 of the said Act.

3. It created, or tended to create, a monopoly contrary to the said section of the Act, because the corporation of the city were the owners of the stalls in the said market, and controlled the leasing of the stalls, and the renewing of such leases.

4. It was unreasonable, because sufficient accommodation was not thereby provided for the carrying on of the trade of a butcher in the city, and in the various districts thereof.

5. And on grounds disclosed in affidavits filed.

6. Or why paragraphs 3, 4, 5, 6 of the said by-law should not be quashed on the grounds aforesaid, and with costs.

The by-law was passed on the 10th of December, 1885. It was in substance as follows:

1. Upon the 1st of January in every ensuing year every butcher or other person selling or exposing for sale fresh meat, in quantities less than by the quarter carcass, within the city, shall procure a license, for which license $1.00 shall be paid.

2. No butcher or other person shall, after the passing of the by-law, sell or expose for sale fresh meat in quantities less than by the quarter carcass within the city without a license as aforesaid.

3. The following places shall be the only places within the city where fresh meat in less quantities than by the quarter carcass shall be sold:

The market stalls in By Ward market place No. 1.

The market stalls on the east side of By Ward market place No. 2.

The market stalls in Wellington Ward market place.
The market stalls in Victoria Ward market place.
The market stalls in Cathcart Ward market place.
The market stalls in Anglesia Ward market place.
4. Prohibited such sales elsewhere.
5. Prohibited such sales in any of the said market stalls without a license so to do.
6. Fine for infraction of by-law.

Many affidavits were filed on each side. Those for the defendants answered fully those filed by the applicant.

Clement supported the order. The by-law should have been made subject to secs. 497 to 502 inclusive; that is, that persons may without restraint after 9 A.M. between the 1st of April and the 1st of November, and after 10 A.M. between the 1st of November and the 1st of April, sell fresh meat in any part of the city without license, while the by-law is opposed to that. That general section 500 was first enacted by the 45 Vic. ch. 24, sec. 10 (O.) There is no power to restrict the sale of fresh meat to market stalls, nor to receive a license to sell the same. The by-law is in restraint of trade: sec. 287 of the Act of 1883. The accommodation for butchers should be extensive enough to permit all to follow his trade who wish to follow it: *Re Borthwick and Corporation of Ottawa*, 9 O. R. 114; *Dillon* on Municipal Corporations, 3rd ed., secs. 319, 327, 328, 362; *Kelly and Corporation of Toronto*, 23 U. C. R. 425; *Re Fennell and Corporation of Guelph*, 24 U. C. R. 238; *Snell and Corporation of Belleville*, 30 U. C. R. 81; *Re Nash and McCracken*, 33 U. C. R. 181; *Regina* v. *Johnston*, 38 U. C. R. 549.

Maclennan, Q.C., contra. The by-law is fully authorized by the sections of the Act referred to, for it authorizes the council to fix the place and manner of selling fresh meat, giving authority to require licenses to be taken out for this purpose. In *Regina* v. *Gravelle*, 10 O. R. 735, Mr. Justice O'Connor was of opinion the by-law was not made subject to the six sections immediately preceding section 503.

Section 500 refers to country people frequenting the market and city for sale. Section 503 is wholly different. The by-law is not in restraint of trade; nor does it create a monopoly; nor is it unreasonable. It is said there are only two stalls in Anglesia market. There is room for two more if necessary; but additional stalls have not been asked for, nor are they, as is stated by the affidavits filed by the defendants, required. There has been no complaint made to the council that the market is not conveniently situated, and that people have to go too far to make their purchases. The city is willing to give more accommodation if it is required. That a further accommodation by a more convenient market, or by more market stalls, is for the council to decide upon, and is not a matter for the consideration of the court.

Clement in reply.

May 12, 1886. WILSON, C.J.—It was argued, and the chief part of the argument was maintained, upon the respective heads set forth in the first objection in the order *nisi*.

It was contended the by-law was invalid because it was said to be opposed "to the restrictions and exceptions contained in the six next preceding sections" to section 503.

The by-law was passed under section 503, and, so far as this motion is concerned, the sub-sections affecting the by-law are:

"(1) For establishing markets.

"(2) For regulating all markets established, and to be established," &c.

"(3) For preventing or regulating the sale by retail in the public streets, or vacant lots adjacent thereto, of any meat," &c.

"(4) For preventing or regulating the buying and selling of articles or animals exposed for sale or marketed.

"(5) For regulating the place and manner of selling and weighing grain, meat * * and all other articles exposed for sale, and the fees to be paid therefor," &c.

"(6) For granting annually, or oftener, licenses for the sale of fresh meat in quantities less than by the quarter carcass, and for regulating such sale, and fixing and regulating the places where such sale shall be allowed, and for imposing a license fee * * and for preventing the sale of fresh meat in quantities less than by the quarter carcass, unless by a person holding a valid license and in a place authorized by the council," &c.

"(11) For regulating all vehicles, vessels, and all other things in which anything is exposed for sale or marketed, and for imposing a reasonable duty thereon,"

The by-law only relates to the selling or offering for sale "of fresh meat in quantities less than by the quarter carcass."

The six next preceding sections, to section 503, are, with their respective sub-sections, the following, which in any way relate to the questions raised upon the by-law. They are sec. 497, sub-secs. 4 and 6.

Sub-sec. 4 applies to articles which may be sold by the persons having them for sale when brought into the municipality after 10 A.M., in which case they are not to pay a market fee unless they offer the same for sale upon the market place; and sub-sec. 6 applies to those persons who go to the market place before 9 A.M. between the 1st of April and the 1st of November, and before 10 A.M. between the 1st of November and the 1st of April with any article which they may sell in the market place; and with regard to such persons it is provided that after these respective hours they shall not be compelled to remain on the market place, but they may proceed to sell such articles elsewhere than in or on the market place on paying the market fee. So section 498 applies to articles which any one may sell, subject to that section.

But section 503, sub-section 6, under which this by-law was passed, applies to an article, "fresh meat in quantities less than by the quarter carcass," which persons generally are not to be at liberty to sell, if the municipality so determine; but such article, and the persons who deal in it, are

to be regulated and governed by the special provision of this particular section.

And with respect to such article and to the persons, the council may require: (1) That such persons shall obtain a license from the corporation to sell such article; (2) that the council shall have the power specially to regulate the sale of it; (3) that the council shall fix and regulate the places where the sale of such article shall be allowed; (4) that the council may prevent the sale of such fresh meat in quantities less than by the quarter carcass by any person, unless the person has been specially licensed as aforesaid; and (5) that all such sales may be prohibited unless made in a place specially authorized by the council.

The enactment of section 503 that the council may "subject to the restrictions and exceptions contained in the six next preceding sections," pass by-laws, &c., cannot possibly prevent the municipal council from exercising the very special powers with respect to the sale of fresh meat in quantities less than the quarter carcass, as it is an article which has in effect been expressly taken away from the general provisions of these six next preceding sections; and the proper reading of the whole of these sections is, to read them with the qualification that section 503 is made subject to the restrictions and exceptions in the preceding sections so far as they can or may properly be applied to it. But they cannot be applied to sub-section 6 properly or consistently, because that sub-section deals with fresh meat when sold in quantities less than by the quarter in an exceptional manner, and excludes all but licensees from dealing in it. The other sub-sections of section 503, and there are thirteen of them altogether, may be controlled by the restrictions and exceptions referred to, but sub-section 6 is in the nature of an exception from these general restrictions and exceptions.

The section might have been more precisely worded; but it is impossible to give sub-section 6 its literal interpretation, and yet enable persons under section 497, subsecs. 4 and 6, the right to sell fresh meat in quantities less

than by the quarter, after the morning hours named, without license and wherever they please throughout the city. I refer to *Caledonian R. W. Co.* v. *North British R. W. Co.*, 6 App. Cas. 114, 122; *Richards* v. *McBride*, 8 Q. B. D. 119; *Countess of Rothes* v. *Kircaldy Waterworks Commissioners*, 7 App. Cas. 694, 702; *Ex p. Walton*, 17 Ch. D. 746, 756; *North* v. *Lamplin*, 8 Q. B. D. 253; *Lion Insurance Association* v. *Tucker*, 12 Q. B. D. 176, 186; *Plumstead Board of Works* v. *Spackman*, 13 Q. B. D. 878, 10 App. Cas. 229.

These cases shew in what manner the language of the statute may be construed when there is a difficulty of interpretation. I think section 503, sub-section 6, may be given full effect to without violating the canons of interpretation which have been adopted in the construction of statutes; and that the main objection to the by-law must be overruled.

As to the objection that the by-law is unreasonable because sufficient accommodation for the sale of fresh meat in less quantities than by the quarter has not been provided by the council.

First of all the fact of insufficient accommodation is denied. Secondly, further accommodation has never been asked for; and thirdly, the council is willing to grant it, if required.

But why should a by-law be quashed because the accommodation may not be as ample as may be desired? If the accommodation is so plainly insufficient that the by-law must be held to be utterly unreasonable, I should say the court might quash it, unless in the alternative, the municipality would provide reasonably fit and full accommodation. But as a rule the municipality is the judge of its own business and affairs, and it is probably an extreme case in which the court would interfere.

The question in its plain form is, will the court in any such case grant a mandamus? If not, will it quash an existing by-law unless reasonably full and fit accommodation be given? I am not called upon to decide either

question. But I do decide expressly against the motion made in the present case for the reasons specially before given.

On the general question relating to markets I may refer to *Pierce* v. *Bartrum*, Cowp. 269; *Mosley* v. *Walker*, 7 B. & C. 40; *Macclesfield* v. *Pedley*, 4 B. & Ad. 397; *Ellis* v. *Mayor, &c., of Bridgnorth*, 15 C. B. N. S. 52; *Mayor, &c., of Manchester* v. *Lyons*, 22 Ch. D. 287.

There is not one of the grounds of exception taken which can, in my opinion, be supported; and I discharge the order, with costs.

Order discharged.

[CHANCERY DIVISION.]

GORDON ET AL. V. GORDON ET AL.

Will—Power to sell—Power to mortgage—Estate getting benefit of unauthorized loan—Position of mortgagees in such cases—General charge of debts on residue—Priority of mortgage of specific devisee.

A testatrix by her will devised and bequeathed all the rest and residue of her real and personal estate unto R. G. "upon trust to sell my real estate and to call in and convert into money the remainder of my personal estate, with power to demise or lease * * any portion thereof, for any term or terms of years. * * And I declare that the said trustee shall, out of the moneys arising from such sale, calling in, and conversion * * pay off the incumbrance, if any, existing on the F. property, and shall divide the balance of the said moneys among my four children."

The remaining property, not included in the residuary estate, was specifically devised by the will among the children of the testator in certain shares.

R. G. mortgaged a certain portion of the residuary real estate to one T. and applied the proceeds of the loan in part in liquidation of the outstanding mortgage on the F. property, and in part otherwise for the benefit of the estate. The property comprised in this mortgage was sold by the court on proceedings by T., but did not bring enough to pay off the whole mortgage debt.

Held, on administration of the estate by the Court, that the trust of the residue was a mere trust for conversion out and out, and R. G. had no power to make the mortgage in question, nevertheless to the extent to which the estate got the benefit of the loan, the executors of T. were entitled to rank against the estate for the balance of their mortgage debt, but only subsequent to certain mortgages placed by specific devisees since the death of the testatrix on portions of the estate devised to them, including the F. property, without knowledge, so far as appeared, of the source from which the money discharging the F. mortgage came.

Held, also, that the mortgage to T. being invalid, it could only carry interest at 6 per cent., although it provided for interest at 12 per cent.

London and Canadian Loan Co. v. *Wallace*, 8 O. R. 539, distinguished,

In this action a judgment by consent was pronounced on March 27th, 1884, whereby it was referred to the Master of this Court at Belleville to make all necessary enquiries, and take all necessary accounts and proceedings for the administration and final winding up of the real and personal estate of one Harriet Louisa Gordon, deceased, and the adjustment of the rights of all parties interested therein.

It appeared the deceased died on June 3rd, 1876, and by her will, dated May 29th, 1876, in the 4th paragraph, she devised and bequeathed to her four children certain lands

and premises known as the Foundry property, "to have and to hold the same to them, their heirs and assigns forever," and in the 9th paragraph she willed as follows:

"I give, devise and bequeath all the rest and residue of my real and personal estate and effects whatsoever and wheresoever situate unto Robert Gordon, of the town of Belleville, my husband, and to Roger Conger Clute, of the same place, barrister, and their heirs, executors, administrators and assigns, upon trust to sell my real estate either together or in parcels * * and to call in and convert into money the remainder of my personal estate, with power to demise or lease the same or any part or portion thereof for any term or terms of years at such rent or rents and generally upon such conditions and in such manner as they or he may think fit. And I declare that the said trustees or trustee shall out of the moneys to arise from such sale, calling in and conversion, and out of the money of which I shall be possessed at my death pay off the incumbrance (if any) then existing upon the said Foundry property * * and shall divide the balance of the said moneys among my said four children, having regard to the bequests hereinbefore made to them."

By the said will, also, the remaining property of the deceased other than that forming the residuary estate was specifically devised in parcels to her said four children. R. G. Clute renounced probate, which was taken out by Robert Gordon, who, purporting to act under the above residuary clause, on February 8th, 1878, mortgaged the real estate not specifically devised to one Patrick Turley, for $800, and applied some $577 of the proceeds upon the mortgage then outstanding against the Foundry property, and the rest as mentioned in the judgment of Proudfoot, J. This mortgage to Patrick Turley contained a covenant to pay by the executor, and the mortgage being in default Turley sued him and obtained judgment against him on the covenant, but when the property was sold it did not realize enough to pay off the mortgage.

The specific devisees, including those of the Foundry property, had placed mortgages on their shares since the death of the testator, and the question arose whether the executors of Patrick Turley had priority in respect to the balance of their mortgage debt over the incumbrances thus created by the specific devisees.

By his report dated March 1st, 1886, the Master in paragraph 20 reported as follows: "I find that the executor, Robert Gordon, had power and authority to make the mortgage under which the said defendant, William James Turley (one of the executors of Patrick Turley) has proved his claim in this action," being the mortgage above referred to, and he found the executors of Patrick Turley entitled to rank in respect to the balance of the mortgage debt on the shares of the specific devisees after the said incumbrances created by such devisees thereon.

Certain of the real estate, including the Foundry property, was sold by the Master in these proceedings.

The executors of Patrick Turley now appealed from the report on grounds stated in the judgment, where the other material facts sufficiently appear.

The appeal came on for argument on Monday, April 19th, 1886, before Proudfoot, J.

Clute, for the executors of Patrick Turley. We claim to be entitled to rank upon the proceeds of the property sold herein for the balance of our claim under the mortgage to Patrick Turley after deducting the amount realised from the sale of the property included in our mortgage, on the ground that the proceeds of the loan were applied in the payment of the mortgage on the Foundry property, and otherwise for the benefit of the estate: this, therefore, is a debt due by the estate to us, and as such should be paid before the incumbrances upon the shares of the parties to whom the property was specifically devised.

E. D. Armour, for a mortgagee of W. H. Gordon, one of the specific devisees. My client's mortgage should rank on the full share of W. H. Gordon. The will here did not

authorize a mortgage; and Robert Gordon was guilty of a breach of trust in mortgaging as he did. I refer to *The Edinburgh Life Assurance Co.* v. *Allen*, 18 Gr. 425; *Haldenby* v. *Spofforth*, 1 Beav. 390; *Stroughhill* v. *Anstey*, 1 DeG. M. & G. 635.

J. Hoskin, Q.C., for an infant devisee. The will did not authorize a mortgage, and if Turley is entitled to rank on the estate interest can only be allowed at six per cent., not at twelve per cent.

Kappele, for Georgina Gordon, one of the devisees. It is to be noticed that the notice of appeal only seeks to rank upon the Foundry property. Turley's mortgage, however, cannot affect a mortgagee of a specific share.

Neville, for R. Gordon, the executor. The mortgage to Turley was made to prevent the mortgagee of the Foundry property from pressing his claim, and to relieve the estate from costs. The will did authorize this mortgage; *R. S. O.* c. 107, sec. 17, 18; *Sproatt* v. *Robertson*, 26 Gr. 333; *Ewart* v. *Gordon*, 13 Gr. 40; *London and Canadian Loan and Agency Co.* v. *Wallace*, 8 O. R. 539. The decree, however, concluded the Master from going into the question of the validity of the mortgage. I refer, also, to *Sievewright* v. *Leys*, 18 C. L. J. 262; *Barber* v. *Mackrell*, 12 Ch. D. 534.

April 28th, 1886. PROUDFOOT, J.—Appeal from the report of the Master at Belleville by the executors of Patrick Turley, deceased, (1) because the Master should have found that the balance due on the mortgage held by the said executors, after deducting the proceeds of the sale of land covered by the mortgage, should rank upon the proceeds of the Foundry property mentioned in the proceedings; (2) and because the proceeds of the said mortgage were applied in payment of the mortgage due on the said Foundry property to a large extent, and it was in fact a debt due by the estate of the testatrix, and should be paid before the incumbrances upon the shares of the parties to whom the property was specifically devised.

The testatrix, after specific devises to her children,

devised all the rest and residue of her real and personal estate to her trustees upon trust "to sell my real and personal estate * * and to call in and convert into money the remainder of my personal estate * * and out of the money to arise from such sale, calling in, and conversion, &c., pay off the incumbrance, if any then existing, upon the said Foundry property, &c.

Purporting to act under this trust, the executor and trustee, on February 8th, 1878, mortgaged part of the real estate not specifically bequeathed to Patrick Turley for $800, bearing 12 per cent. interest. The Master finds that this money was applied as follows:

Paid on mortgage on Foundry.....	$557 13
" in taxes against the estate	108 70
" for valuation	4 00
" for expenses of loan	41 20
" personal debt of executor	139 07
	$850 10

but he does not shew how $850 could be applied out of $800.

The property mortgaged to Turley was sold under the decree of the court and the executors being allowed to bid, was purchased by them for $400, from which were to be deducted taxes to the amount of $125.62 and some other charges, leaving only $252.80 applicable to the reduction of the mortgage debt.

The Master has ascertained the amount due on the Turley mortgage by calculating the interest at 12 per cent. for eight years and a little over, at $787.60 + principal $800 = $1587.60, and deducting proceeds of sale $252.80, leaving due on the mortgage $1334.80.

The Master has reported (par. 20) that the executor had power to make the mortgage under which the executors of Turley claim; a finding, I may remark, at variance with a previous part of the report, in which he says: "The evident intention of the testatrix was, that the rest and residue of her real estate was to be sold for whatever it would realize *when the trustee thought fit to sell*, and that

the proceeds might be applied in payment of the mortgage debt on the foundry. She evidently did not contemplate mortgaging the property or creating any liability in that way, and I am not aware, without specific authority to mortgage, that the executor could bind the estate by his covenant." (a).

The will has not been left with me and I must assume that the only charge of debts is that contained in the direction to sell the residue for the purpose of discharging them, as reported by the Master.

In that respect the case differs from *The London and Canadian Loan Co.* v. *Wallace*, 8 O. R. 539, where there was a general charge of debts upon the real estate, as well as a special power of sale; and it was upon the general charge that the judgment rested.

The present case must depend upon the express power of sale. Upon this subject I agree with the first thoughts of the Master, and, therefore, that he erred in the 20th paragraph of his report. The R. S. O. ch. 107, sec. 17, only applies in the absence of an express power. The trust was a mere trust for conversion out and out. And certainly a mortgage at 12 per cent. interest could not be considered a proper carrying out of the trust. I agree with the rule laid down in *Stroughill* v. *Anstey*, 1 DeG. M. & G. 635, and in *The Edinburgh Life Assurance Co.* v. *Allen*, 18 Gr. 425.

The Master has allowed the whole sum he finds due on the mortgage as a charge against the estate. Had the mortgage been authorized by the trust that might have been correct, as the mortgagee would not have been bound to see to the application of the money; but when not so authorized, all that could in any way be a charge would be that of which the estate got the benefit, and certainly would not include the $139 applied in discharging a personal debt of the executor.

I think, however, that to the extent the estate benefited

(a) This is a citation not from the report itself, but from the judgment or reasons of the Master.—REP.

by the advance the estate of Turley must be paid. As the mortgage was invalid the interest will not be computed at 12 per cent., but 6 per cent.

The Master was right, however, in not giving this claim any priority over the incumbrances created by the specific devisees. It does not appear that these incumbrancers had any notice of the source from whence the money that discharged the Foundry mortgage came. There was nothing in the registry to shew that Turley could have any claim upon other property than that mortgaged to him. And, indeed, it seems that when the mortgage was made the property mortgaged was valued at double the amount of the mortgage, the depreciation of property in the neighbourhood having also affected this. A general charge of debts cannot be enforced against an incumbrance created by the heir-at-law or devisee in the absence of notice of unpaid debts: *Kinderley* v. *Jervis*, 22 Bea. 1. This Foundry mortgage was made a general charge on the residue. The money advanced by Turley would be a general charge upon the estate, and could not entitle him to a specific charge upon a specific devise to the prejudice of the incumbrance of that specific devise. And in fact it could not be known till the sale under the decree and long after the execution of the mortgages on the shares, that there would be any deficiency in the lands mortgaged to Turley to satisfy his mortgage.

Robert Gordon, the executor, is entitled to an annuity of $137.50 out of the Foundry property, and out of the proceeds of the sale of that property the Master has set apart $2291.93 to realize the annuity at 6 per cent. interest. But the money in court only realizes 4 per cent; more money, therefore, should be set apart for that purpose ($3437.50).

The will of the testatrix has not been left with me, and I have found great difficulty in dealing with the facts scattered over a very long report.

The amount due to Turley's executors will have to be arranged something after this fashion:

Principal		$800 00
Interest at 6 per cent		393 80
		$1193 80
Deduct proceeds of sale	$252 80	
Interest will have to be added.		
Also $139.07 applied on personal debt of executor	139 07	
Interest on this last sum at 6 per cent	68 11	
		$459 98
		$733 82

The exact figures can be ascertained by the Master, and the amount will be a charge on the estate.

Upon the appeal of Frost from the allotment of costs it was admitted that the report was wrong, and it will be corrected as asked.

It will be referred back to the Master to review his report in these particulars.

The appeal of Turley is dismissed, with costs. That of Frost is allowed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

CAREY V. GOSS.

Trade mark—Newspaper—Infringement—Assignment of trade mark—Registration—42 Vic. ch. 22 (D.)

The I. F. P. P. Co. published a newspaper called *The Commercial Traveller and Mercantile Journal*, which was known as *The Commercial Traveller*, and registered it under the Trade Mark and Design Act of 1879 as *The Commercial Traveller's Journal*. The company sold the paper and good-will to the plaintiff, and on the negotiations for the sale the plaintiff saw the defendant, who was then employed by the company as manager and editor, and who showed him the assets of the paper, the printing contracts, &c., and recommended the purchase as a good investment.

After the sale the defendant, who had retained the mail list of the subscribers to the paper, published a new paper called *The Traveller*, and used the list to send copies of his paper to some of the names contained therein. It was shewn in evidence that while the defendant was in the employ of the company he often used the word *Traveller* as designating the paper then known as *The Commercial Traveller*. In an action to restrain the defendant from infringing the plaintiff's trade mark, it was

Held, that the title of the paper published by the defendant was an infringement of the trade mark of the plaintiff, and that the subsequent publication by the defendant of a newspaper under the name of *The Traveller* was calculated to mislead persons, and induce them to believe the plaintiff's paper was the paper referred to.

Held, also, that although the 4th section of the Trade Mark and Design Act of 1879, 42 Vic. ch. 22 (D.), requires registration of the trade mark before the proprietor can bring an action; and the 14th section provides for registration of an assignment, the latter section does not enact that registration shall be necessary to give effect to such assignment. An injunction was therefore granted.

THIS was an action brought by Thomas H. Carey against John Goss to restrain the defendant from infringing a trade mark and claiming an injunction and damages.

The action was entered for trial at the Spring Assizes held in Toronto before Galt, J.

The jury for which notice had been given was dispensed with by the learned Judge, and the evidence for the plaintiff was taken on April 2, 1886, and a motion for nonsuit being made, the case was adjourned for argument on a future day.

Foy, Q.C., appeared for the plaintiff.
Bigelow, for the defendant.

The case subsequently came up for argument at Osgoode Hall, on May 12, 1886.

The facts sufficiently appear in the judgment.

Foy, Q.C., for the plaintiff. The evidence shews that the defendant himself was in the habit of calling the plaintiff's paper "The Traveller"; that it was popularly known by that title, and defendant's paper was calculated to mislead people. I refer to the following cases: *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *The Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376—As to sufficiency of assignment. *Shipwright* v. *Clements*, 19 W. R. 599—As to registration of assignment not being necessary: *Ihlee* v. *Henshaw*, 31 Ch. D. 322, and to *Walker* v. *Alley*, 13 Gr. 366; *Crawford* v. *Shuttock*, 13 Gr. 149; *Davis* v. *Kennedy*, 13 Gr. 523; *Davis* v. *Reid*, 17 Gr. 69; *The Accident Insurance Co.* v. *The Accident, Disease, and General Insurance Co.*, 54 L. J. Ch. 104; *Metzler* v. *Wood*, 8 Ch. D. 606; *Re Barker's* Trade Mark, 53 L. T. 23; *Gage* v. *The Canada Publishing Co.*, 6 O. R. 68; 11 A. R. 402; *Anglo Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Slater* on Copywright and Trade Marks, 57, 235, 315, 317, and our own Statute, 42 Vic. ch. 22, sec. 17 (D.)

Morson, for the defendant. The plaintiff has no registered title to the trade mark he claims: 42 Vic. ch. 22, secs. 4, 14, 47 (D.); *Sebastian's* Law of Trade Marks, 2nd ed., 127. There is no infringement of the trade mark as registered: *Sebastian* 115. There was prior user here so there could be no trade mark: *Maxwell* v. *Hogg*, L. R. 2 Ch. 318; *McCall* v. *Theal*, 28 Gr. 56; *Sebastian* 265; *Slater*, 51, 280. There can be no trade mark in the name of a newspaper: *Bell* v. *Locke*, 8 Paige N. Y. 75; *Sebastian* 15; *Slater*, 51. There has been no damage: *The Collins Co.* v. *Reeves*, 28 L. J. Ch. 56. There can be no trade mark in words indicating a class of customers, or consumers, or words of mere description or in common use: *Slater* 264, 280; *Joyce* on Injunctions, 173.

May 16, 1886. GALT, J.—This action was entered for trial at the last Toronto Assizes, notice having been given

by the defendant for a jury. At the trial I dispensed with a jury. The action is brought praying for an injunction to prevent the defendant, his servants and agents, from infringing plaintiff's trade mark. At the close of the case of the plaintiff, Bigelow moved for a non suit; the case was adjourned for argument.

An interim injunction had been granted by Ferguson, J

It appeared from the evidence that since the year 1880, the London Free Press Printing Company of London, Ontario, Canada, had published a newspaper called "The Commercial Traveller and Mercantile Journal." This is the full title of the paper, but from the copy produced it is evident that the name by which the paper would be known was that of "The Commercial Traveller," as those words are printed in very much larger letters than the words "and Mercantile Journal."

On the 9th April, 1880, an application was made to the Minister of Agriculture, under the Trade Mark and Design Act of 1879, for a specific trade mark; this was granted on 14th April, 1880. In the application the following appears: "The said specific trade mark consists in the words 'The Commercial Travelers' Journal;' the essential features of the said trade mark being the words 'Commercial Traveler' as the title of a newspaper or periodical published by us." The certificate is: "This is to certify that this trade mark (specific) which consists in the words 'The Commercial Travelers' Journal,' as the title of a newspaper or periodical as per the annexed application, has been registered in the Trade Mark register in accordance with the Trade Mark and Design Act, 1879, by the London Free Press Printing Company."

On the 3rd November, 1885, the London Free Press Printing Company sold to the plaintiff "the business and good-will of the paper called the *Commercial Traveller* published by the company in the City of Toronto," &c.

The defendant had been employed by the company as their agent and manager to conduct the publishing of their paper from its inception to the time when it was sold to the plaintiff. At the trial the plaintiff stated as follows:

Q. Did you see the defendant at all in connection with your purchase of the paper or before you purchased it? A. Yes, I saw Mr. Goss before I concluded the arrangement with the London Free Press.

Q. He was the man in charge here, I suppose, of this paper? A. Yes.

Q. Well what passed between you, did he shew you round the premises or show you what it consisted of? A. Well he gave me a statement of the assets of the paper; he spoke in very favourable terms of the journal and said it was a good investment.

Q. Well he represented the vendors in the transaction did he? A. Well he showed me a set of contracts for advertising, etc.

Q. Did he recommend you to purchase? A. Yes, he did.

After some further questions he is asked:

Q. Now was the mail list transferred to you when you received the paper?

Q. Did you know he had kept back a copy of the mail list? A. Yes.

Q. Did you know it at the time you took over the paper? A. I did not.

Q. Would you have permitted him to do so? A. Certainly not.

The defendant as to this question of the mail list in his examination before the trial is asked as follows:

Q. When you ceased the management of "The Commercial Traveller" had you their mail list in your possession. A. Yes.

Q. Have you it still? A. Yes; I have not produced it. (It was agreed by counsel to produce it.) After the production the examination proceeded.

Q. This is the mail list you carried with you from the London Free Press office? A. Yes. It was in my possession when I left and has been ever since.

There is no doubt from the evidence that the defendant made use of this list for the purpose of sending copies of his paper to some of the persons whose names appear on

the list. After the sale to the plaintiff of the "Commercial Traveller and Mercantile Journal," the defendant, in the month of December, published a paper called "The Traveler." Before the first number was issued, the plaintiff notified the defendant that if he issued such a paper he would consider it a breach of the trade mark to which he was entitled under his purchase from the London Company. The defendant not paying attention to this notice, this action was commenced on 18th December, 1885. The first number of the defendant's paper was published about the 22nd December; a second number in the month of January. I am not sure whether there was any in the month of February, and on the 3rd March the present injunction was issued, "ordering that the said defendant, his servants, workmen and agents, are hereby restrained from publishing or issuing the newspaper as or under the name or title of "The Traveller" or "The Traveler," until the trial or final disposition of this action. In considering this case it must not be forgotten that the defendant had been the manager and editor of the "Commercial Traveller" while it was the property of the Free Press Company, and was the person to whom the plaintiff was referred when it was proposed to sell the paper to the plaintiff.

From the evidence it appears clear to me that the title of the paper published by the defendant was an infringment of the trade mark of the plaintiff. From the evidence of the defendant himself it is plain that, while in the employ of the company and acting as their servant, he used the word "Traveller" as designating the paper then known as "The Commercial Traveller." There were three extracts, or rather notices, cut from that paper shewn to the defendant on his examination, and he is asked:

Do you know this notice referring to Ex. A.? Yes.

They were inserted in the paper during your management? Yes.

How long were they inserted in the paper? I think probably a year, I think in every issue.

Each of the notices speaks of the "Commercial Traveller" as the "Traveller?" Yes.

The notices are as follows :

TRAVELLERS' BUREAU.

Commercial travellers in need of engagements should leave their wants with qualifications at this office (meaning the office of the paper), where a register will in future be kept for the convenience of merchants requiring travellers in the respective branches of the wholesale trade. No charge will be made, and names will be registered in the strictest confidence, and with every regard to the particular wishes or desires of the traveller registering.

We have adopted this new feature in connection with "The Traveller" at the suggestion of many merchants and commercial men, and hope our endeavours to meet their wishes, will be appreciated by those wanting situations handing in their names at once.

EVERY ADDRESS LABEL

on "Traveller" sent to our subscribers gives the date to which subscriptions are paid. From that date subscriptions are in arrears.

Merchants wishing to engage competent travellers should advertise in the columns of the "Traveller."

I think it impossible to doubt, after reading the above extracts which were printed and published by the defendant himself in the "Commercial Traveller," that a subsequent publication by him of a paper under the name of "The Traveler" was calculated to mislead persons and induce them to believe that "The Traveler" was the paper referred to. In addition to the cases referred to, reference may be had to *Clement* v. *Maddick*, 1 Giff. 98 ; *Prowett* v. *Mortimer*, 4 W. R. 519. The present case is much stronger in the plaintiff's favour than either of them.

An objection was taken at the trial by Mr. Bigelow and subsequently urged before me on the argument, that the plaintiff had no title because the assignment of the paper or rather of the so called trade mark had not been registered, at the time when this action was commenced. I do not consider that the defendant is in a position to avail himself of this objection even if it were a valid one ; he was the agent of the London Free Press Printing Company, and he was well aware of the sale of the paper to the plaintiff. The

4th section of the Trade Mark and Design Act enacts that no person shall be entitled to institute any proceeding to prevent the infringement of any trade mark until and unless such trade mark be registered in pursuance of the Act." The trade mark (if such an expression applies to a newspaper) has been duly registered, and consequently the proprietor has a right to bring such action. By the 14th section an assignment of a trade mark may be made, and such assignment may be registered, but it does not enact that registration shall be necessary to give effect to such assignment.

I give judgment in favour of the plaintiff with costs there will be no damages. The judgment is that the injunction be continued restraining the defendant, his servants, workmen and agents, from editing, printing, publishing or issuing the newspaper referred to in the statement of claim as "The Traveler" or "The Traveller."

G. A. B.

[CHANCERY DIVISION.]

IN RE MELVILLE.

Conveyance subject to a condition—Breach of condition—Will—Devise—Possibility—R. S. O. ch. 106, sec. 2—Right of entry for condition broken—Valid condition of re-entry—Heirs-at-law—Devisees.

On September 26th, 1844, J. Le B. by deed bargained and sold, &c., to the municipal council of D. district, in consideration of five shillings, a certain lot for the purpose of erecting thereon a school-house for the use of the D. district. *Habendum*, for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso that the said council should within one year from its date erect a school-house for the use of the said district, or if the said council should at any time erect any other building save said school-house and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. Le B. and his heirs to re-enter and avoid the estate of the said municipal council.

J. Le B. by his will, dated July 23rd, 1847, devised all his real estate to certain neices, and died in the year 1848, without having revoked or altered said will

The municipal council complied with the condition by building a school-house, and at the time of the making of the will, the condition had not been broken, but the successors of D. district dealt with the land otherwise than was authorized by the deed, and broke the condition. The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. Le B. or his heirs-at-law were entitled to the proceeds thereof.

Held, that the word "possibility" in R. S. O. ch. 106, sec. 2, includes a "right of entry for condition broken," mentioned in sec. 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition no new estate was acquired, so as to require words applicable to after acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made, and the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession.

Held, also, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room; and that the condition in this case was therefore perfectly valid.

The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it.

THIS was a petition presented in this matter by Elizabeth Ross and others on behalf of herself and other devisees under the will of John Le Breton to have it declared that the said devisees and those claiming under them, were entitled to lot No. 5, in block C, in lot No. 40, in the 1st

Con. of the Township of Nepean in the County of Carleton, or to the money, the proceeds of the sale of the said lot.

The facts are sufficiently set out in the judgment.

The petition was argued on February 24th, 1886, before Proudfoot, J.

W. N. Miller, Q. C., for the petitioners. The only question to be decided here is: What is the effect of the will of John Le Breton? Did it pass the possibility of the land reverting on the breach of the condition on which it was granted? It seems plain that it did, and I need only refer to R. S. O., c. 106, secs. 2, 3, 4, and 5, to establish my contention. Sec. 2 defines the word "land," and sec. 3 the effect of the will.

Maclennan, Q. C., for the infants, who were some of the heirs at law of John Le Breton. The infants are entitled to the land or the proceeds of it. It was decided in *Whateley* v. *Whateley*, 14 Gr. 430, that a general devise did not pass a future estate unless the future estate was named, but the law is different now. The deed was a common law conveyance not by way of uses, and the condition was void: even if it was valid, it was not broken at the time of John LeBreton's death, and there was no right of entry then. R. S. O. ch. 106, sec. 2, contains no words sufficient to cover this case: 1 *Jarman* on Wills, 4th ed. 147 to 151; *Leith's* Real Property Statutes 74; *Attorney-General* v. *Vigor*, 8 Ves. 256, 282. The only way in which a vested estate can be divested, is under the Statute of Uses, or by will. There is no shifting use here. It cannot be divested by a condition subsequent in a deed: *Smith's* Real and Personal Property, 3rd ed., 65.

Rae, for adult respondents, the other heirs at law. Our Wills Act of 1834 (4 Will. IV. cap. 1) is not so extensive as the English Wills Act of 1st Vic., cap. 26. The latter Act permitted a devise of rights of entry on a condition broken. Section 3 of the Imperial Act is the same as sec. 10 of our Wills Act R. S.

O., cap. 106, and covers a condition broken, but that was not enacted here until 1873, therefore this will did not pass the possibility of reverter. The exclusion of this section from the Act of 1834 indicated the intention of the Legislature to be, not to render such estates devisable. A possibility of reverter is not devisable : 1 *Sheppard's* Touchstone, 1820, ed., pp. 117-120 : *Powell* on Devises, 46.

Miller, Q. C., in reply. The devolution of this interest is governed by the Act of 1834. Upon a grant to a corporation and the corporation not applying it for the purpose, &c., the estate reverts to the heir. John LeBreton had an interest or a possibility, in the language of the Act: *Leith's* Blackstone, 2nd ed. 288.

March 6th, 1886. PROUDFOOT, J.—On the 26th September, 1844, John LeBreton, by deed bargained and sold, &c., to the Municipal Council of the Dalhousie District, in consideration of five shillings, a parcel of land, now within the City of Ottawa, for the purpose of erecting thereon a school-house for the use of the District of Dalhousie, to have and to hold the same for the purpose aforesaid unto the Municipal Council for ever. The deed was subject to a proviso that unless the said Municipal Council should within the space of one year from the date of the deed, build or erect on the said land a school-house, to belong exclusively to the said Municipal Council for the use of the said district; or if the said Municipal Council should at any time thereafter erect or build upon the said land any other house or building save the said school-house and the necessary outhouses and offices appurtenant thereto, or if the Muncipal Council should at any time thereafter sell, lease, alien, transfer or convey the said land, or any part thereof, then the indenture was to be null and void, and it should be lawful for the said John Le Breton and his heirs to re-enter the said land and premises and avoid the estate of the said Municipal Council.

On the 23rd July, 1847, John Le Breton made his will. He devised to certain nieces, naming them, all his real

estate, to have and to hold the same to them and their heirs for ever share and share alike.

The Municipal Council of Dalhousie District complied with the condition by building a school house on the land and at the time of the making of the will the condition had not been violated.

The successors of the District of Dalhousie have dealt with the land otherwise than was authorized by the deed, and have broken the condition.

The land has been sold and the purchase money is in Court, and the question is whether the devisees of John LeBreton or his heirs-at-law are entitled to the money.

It was contended for the heirs-at-law, that under the law existing when the will was made, that future estates would not pass,—that when the will was made John LeBreton had no estate, legal or equitable, in the land—and that a mere possibility of reverter was not devisable,—and that the condition was itself void—that the only way the object of the parties could have been effected, was by a conditional limitation.

It was decided in *Whateley* v. *Whateley*, 13 Gr. 436, 14 Gr. 430, that a general devise, not containing any words referring to such estate as the testator should die seized of, did not pass after acquired estates.

The question then is: Whether a possibility of reverter was devisable?

The R. S. O. ch. 106, sec. 2, repeating C. S. U. C. ch. 82, sec. 14, defines the meaning to be given to the word *land* in wills before the 1st January, 1874, and says it shall extend among other things, not applicable to the present case, "to any possibility, right or title of entry or action and any other interest capable of being inherited," whether the same "are in reversion, remainder or contingency."

In the same Revised Act, ch. 106, sec. 10, in declaring what property may be devised by wills after the 1st January, 1874, copies the clause on that subject in the Imperial Act, which mentions among other things, "all rights of entry for condition broken," which are not included in sec. 2, and omits "possibilities," which are included in sec. 2.

If sec. 10 had mentioned "possibilities" there would have been some reason for arguing that they differed from rights of entry for condition broken. But not having done so, it is thus left open to infer that "possibilities" may include rights of entry for condition broken.

Some help towards ascertaining the meaning of "possibility" may perhaps be found in R. S. O., ch. 98, sec. 5, which specifies interests in land that may be conveyed by deed, and among others "a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land."

That section seems to be copied from the Imperial Statute, 8 & 9 Vic., ch. 106, sec. 6, and under that statute it has been held that this section 6, does not relate to a right of entry for condition broken: *Smith's* Real and Personal Property, 6th ed., sec. 2424; *Shelford* Real Property Stat., 8th ed., 639; *Hunt* v. *Remnant*, 9 Exch. 640, per Maule, J.; *Hunt* v. *Bishop*, 8 Exch. 680. It would seem to follow that such a right of entry does not come under the words "possibility coupled with an interest," or these cases would have been argued on that ground, and decided the other way.

That does not determine, however, the meaning of possibility, when not limited by being coupled with an interest.

In *Smith's* Real and Personal Property, 6th ed., sec. 890, it is said that "the word possibility has a general sense, in which it includes even executory interests which are the objects of a limitation. But in its more specific sense it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded in any lost but recoverable seisin. Of this nature is a possibility of reverter on the grant of a qualified or determinable fee. * * * And of the same nature is a contingent right of entry in case there should be a breach of a condition subsequent."

Hence it would seem that "possibility" in R. S. O. ch. 106, sec. 2, includes a right of entry for condition broken, men-

tioned in the 10th section, and is more extensive than that phrase, and might therefore be the subject of a devise, and is covered by the general name of "land."

Upon the happening of the breach of condition in this case, which took place after the death of the testator, and it would have been the same if it had happened after the making of the will, and before the death of the testator, no new estate was acquired so as to require words applicable to after acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made. The subsequent breach of the condition gave a right of entry, by which the contingent interest might be converted into an estate in possession.

It remains therefore to consider whether the condition in this deed was void. The subject is discussed in *Leake's* Digest of the Law of Property in Land, p. 214, *et seq.*, and in *Smith's* Real and Personal Property, 6th ed., p. 76, *et seq.* Conditions subsequent appear in the two forms of *conditional limitations*, and *conditions of re-entry*, or *conditions* strictly so called at common law. A conditional limitation operates to determine the estate by the intrinsic force of the limitation; in the event prescribed by the terms of the condition the estate ceases. A condition operates by reserving a right of re-entry to the grantor and his heirs; in the event prescribed the estate becomes defeasible by entry, but until entry the estate continues. Apt words of limitation are *durante viduitate*, or *durante vita*, &c., words of conditions are *sub conditione proviso*, &c. In the present case the condition is under the shape of a proviso, and is a condition subsequent, giving a right of entry upon breach. A condition can be reserved in a conveyance at common law only to the grantor or lessor of the estate, and to his heirs, and to no other person. A condition may be reserved upon a conveyance in fee simple, leaving no reversion, or upon an assignment of a term of years leaving no reversion. The sentence in *Smith's* Real and Personal Property, 6th ed.,

appears in sec. 170 of the 8th ed., and is to the effect that "these limitations can only be by way of use or devise. They would be void if inserted in a deed at common law, being foreign to the simplicity of the conveyances before uses and devises were introduced." But the learned author is there speaking of conditional limitations, not of conditions. But when speaking of conditions, in sec. 154, he refers to subsequent conditions as a means by which an estate or interest is to be prematurely defeated or determined, and no other estate is to be created in its room.

I think, therefore, that the condition was perfectly valid.

My conclusion is that the devisees, and not the heirs of John Le Breton are entitled to the land or to the money representing it. The costs will come out of the fund.

G. A. B.

[CHANCERY DIVISION.]

REGINA EX REL. FELITZ v. HOWLAND.

RE O'BRIEN.

Contempt of Court—Publication of letter by solicitor pending appeal—Right of a relator to make the motion—Apology—Costs.

A judgment was delivered by the Master-in-Chambers on a *quo warranto* proceeding on March 23rd, 1886, and an article referring to it was published in "The Mail" newspaper on the next day. On March 26th O'B. who was the solicitor for the defendant, gave notice of appeal against the judgment, and on the same day wrote a letter in answer to the article, commenting on the conduct of the Master in reference to the case, which letter was published in the "The Mail" on the following day.

On a motion made by F. the relator to commit O'B. for contempt, notice of which was given on the same day as the notice of the abandonment of the appeal. It was

Held, that the nature of the charge against O'B. must be determined at the time of the publication of the letter, and could not be affected by the fact of the abandonment of the appeal on the same day that the notice for the motion to commit was given; that O'B. could not take advantage of his double character of citizen and solicitor; that it is not allowable for a solicitor engaged in a cause to comment thereon in the press during the pendency of the case; that the relator in the *quo warranto* proceeding had a right to make the application; and that the letter was not only an injudicious but an improper one, and was a contempt of Court.

An affidavit was put in and read on the argument containing an explanation by O'B., which was coupled with statements by his counsel as to the character, ability, and conscientiousness of the Master-in-Chambers, and a denial of any intention to impugn any of these.

Held, that as the appeal had been abandoned and no prejudice could now arise to the applicant a proper disposition of the case would be to refuse the motion which was done, but upon payment of the costs by O'B. the solicitor.

THIS was a motion to commit one Henry O'Brien, a solicitor, on the ground that the said Henry O'Brien while such solicitor, and while the proceedings in this cause were still pending, had been guilty of contempt of this Court, and for his said contempt of court in writing and publishing and procuring to be published in the issue of "*The Toronto Daily Mail*" of Saturday the 27th March, 1886, a letter addressed to the editor of the *Mail* with the heading "The Mayor's position explained," and signed Henry O'Brien. (*a*)

(*a*) The letter is set out in full in the judgment, at page 638.—REP.

The action was a *quo warranto* proceeding to unseat one William H. Howland, who had been elected Mayor of the city of Toronto, and the judgment of the Master in Chambers had been delivered on March 23rd, 1886, unseating him.

On the following day an article was published in *The Mail* referring to Mr Howland and the judgment.

On March 26th, notice of appeal against the decision of the Master was given by Mr O'Brien, who was the solicitor for Howland in the action, and he, on the same day, wrote the letter in question, which was published in *The Mail* on the next day.

Notice of abandonment of the appeal was served on March 29th, and on that day notice of this motion was served.

The motion came up for argument on April 13th, 1886, and was heard before Proudfoot, J.

Affidavits proving the writing and publication were filed by the relator in the *quo warranto* proceedings, who made this motion, and an affidavit containing an explanation was filed on Mr. O'Brien's behalf, setting out, among other things, that on the 25th of March it was finally decided not to appeal, and instructions were given to him to that effect (par. 9). (*a*)

Bain, Q. C., for the motion. Notice of appeal was given and the appeal was pending when the letter was written and published, and there is no doubt the publication constituted a contempt of Court by Mr. O'Brien. It is for the Court to consider whether the apology contained in the affidavit is sufficient. It does not appear so to the plaintiff. The publication is what was complained of, and no solicitor has a right to publish such a letter commenting on the judgment of an officer of the Court pending an appeal from such judgment. The solicitor may state in his affidavit that he had no intention of offending. His intention must be gathered from the letter, and it

(*a*) This affidavit is set out in full in the judgment at p. 639.—REP.

is what he then said that has now to be dealt with. He says the law was not properly expounded. [PROUDFOOT, J.— Doesn't every litigant say that when he appeals?]. Perhaps he does in a measure, but he does not rush into print in the public press and give his reasons there. The letter says the arguments were not considered. [PROUDFOOT, J.—Would that be more than a fair criticism if the appeal was not pending?] We are now considering this letter, written by the defendant's solicitor and published while the appeal was pending. In such case it would be a contempt. "The principle is quite established * * that no person must do anything with a view to pervert the sources of justice; * * in fact they ought not to make any publications, or to write anything," &c., &c.: *Daw* v. *Ely* L. R. 7 Eq. at p. 59. "Gentlemen who are concerned for contending clients in this Court, whether solicitor or counsel, should abstain entirely from discussing the merits of these questions in public print." *Ib.* 61.

"The tendency of such publications is to interfere with a fair trial and equal justice to both parties. * * * We must determine the object of Mr ——— was to obstruct, as far as he could, the due administration of justice." * * *Re Bothwell Election Case*, 4 O. R 224, per Wilson, C. J., at page 228; *Tichborne* v. *Mostyn*, L. R. 7 Eq. 55 in footnote; *Skipworth's Case*, L. R. 9 Q B. 230; *Ex. p. Turner* referred to in *Odgers* at p. 430, 3 Mont. D. and De G. 523. The apology in the affidavit is not sufficient. The deponent only says in effect: "If I have gone too far I am sorry;" but he will not say he has done wrong, and does not admit that he had no right to publish such a letter and should not have done so.

S. H. Blake, Q.C., contra. There is no aspersion on the Court or its officer or it would have been withdrawn, and none was ever intended. If no utterance as to litigation of this kind is to be allowed it must be so decided. Such applications as this used to be made in olden times, but they are never made now unless justice is impeded. This case is beneath the dignity of the Court. The relator here

has no right to make this motion, and he does not represent the Court. Such a motion can only come up in two ways: (1) when a suitor says, I cannot get a fair trial if such course of conduct is allowed; and (2) when the Court is offended and takes upon itself the onus of instituting the proceedings. In any event the notice of the abandonment of the appeal in this matter had been given, and the Master's judgment stood when this motion was initiated. These motions are a contempt of Court themselves: *Plating Co.* v. *Farquharson*, 44 L. T. N. S. 389, L. J. James. There is no more ground for moving against a solicitor than against an editor: Article "The History of Constructive Contempt of Court," 33 Albany L. J. 145. A citizen does not sink his identity as a citizen when he becomes a solicitor, and this letter was written by Mr. O'Brien as a citizen in answer to an article in "*The Mail*" newspaper. The letter is a simple statement of facts. As to the position of a solicitor I refer to *Lechmere Charlton's Case*, 2 Myl. & C. 316. There the Court itself initiated the proceedings, and even then it was not sufficient that the letter was written by a barrister, but the course of justice was being impeded, and the object was to divert the course of justice. The case here had passed away from the officer commented on, so he could not be affected. I also refer to *Re Lincoln Election*, 2 A. R. 353; *Regina* v. *Wilkinson—Re Brown*, 41 U. C. R. 1; 5 Crim. Law Magazine, 178, 157, and 173; 20 Am. Law Reg. 83; *Story* v. *The People of the State of Illinois*, 79 Ill. 45; *Re Dill*, 32 Kan. 668; *State* v. *Frew*, 49 Am. Rep. 259.

Bain, Q.C., in reply. It makes no difference whether the notice of abandonment of this appeal was served before or at the time this motion was made; the relator's position is to be considered as at the time the letter was published, and what his rights were then, he is entitled to insist upon. [PROUDFOOT, J.—Should it be considered only as reflecting on the Master's position, or as influencing the decision of the appeal?] I contend it influenced public opinion. [PROUDFOOT, J.—But the article previously published might

do the same thing.] The letter went too far in answering the article. My client has nothing to do with the previous article, and he is not responsible for it. I do not deny the right of the press to criticise in a fair spirit a suit after it is decided; but I contend no solicitor has a right to discuss matters arising in an action or comment upon a judgment in the public press while an appeal is pending. The rule is laid down in *Odgers* on Libel and Slander, 428. The Court must judge whether the apology contained in the affidavit is sufficient; but even the apology, such as it is, was not forthcoming until these proceedings were commenced, and it was the fear of the result that forced the apology.

April 28, 1886. PROUDFOOT, J.—Motion to commit Henry O'Brien, Esq., solicitor for W. H. Howland in this cause, because while such solicitor, and while the proceedings in this cause were still pending, he had been guilty of a contempt of court in writing and publishing and procuring to be published in the issue of the *Toronto Mail* of Saturday the 27th March, 1887, a letter addressed to the editor of the *Mail*, with the heading "The Mayor's Position explained."

It appeared that Mr. Dalton, the Master in Chambers, on the 23rd March had delivered judgment on *quo warranto* proceedings declaring that Mr. Howland had not the necessary qualification for Mayor. On the next day, 24th March, an article appeared in the *The Mail*, in which it was said, "It is eminently proper that the occupant of the Mayor's chair should be duly qualified according to the requirements of the Act; and without doubt Mr. Howland made a bad blunder in running for the position last January without having the necessary qualification," and then recommended that he should be returned by acclamation.

On the 26th March notice of appeal from the judgment of the Master was given, and on the same day Mr. O'Brien wrote the letter in question which appeared in the *Mail* of the 27th March. Notice of the abandonment of the appeal was served on the 29th of March, and on the same day notice of the present motion was given.

The following is the letter of Mr. O'Brien :—

THE MAYOR'S POSITION EXPLAINED.

To the Editor of "The Mail."

SIR,—The many friends of Mr. W. H. Howland must have been gratified (as doubtless he was himself) as well by your timely and heartily expressed suggestion that he should now be returned by acclamation, as by your appropriate remarks on the conduct of those who have been stirring up this litigation. There is one remark, however, which I must ask your indulgence to refer to and explain.

You say Mr. Howland made a bad blunder in running without a proper qualification. It was perhaps natural to assume this, on the supposition that the law was correctly expounded last Tuesday. We contend it was not so, but will speak of that hereafter. Mr. Howland's advisers, however, had to take the law as they found it. How then did it stand before the election ?

1. Ever since we have had municipal institutions it has been assumed that a husband properly rated, and whose wife has the necessary property, had the right to vote and qualify in respect of that property. The generally received and acted upon opinion was, that the property had, under such circumstances, the right to representation, and that this right was in the husband. The whole country has acted on this view, and the right has never been questioned until now. It might have been brought up at any time since the Married Woman's Act of 1859, but was not.

2. Chief Justice Richards, probably the best authority on such matters in Canada, had held in 1871, that under such circumstances the husband had the right we contend for in the Howland case. This decision has never been overruled, is consistent with common sense, and with the universally accepted opinion on the subject.

Under these circumstances the counsel who advised Mr. Howland that his qualification was sufficient were amply justified in so doing. They did so advise Mr. Howland plainly and distinctly when asked by him. If they were wrong surely the blame should rest on them, and not on the person who had been unhesitatingly advised that he had the qualification required by law.

You may naturally ask, why then was the decision the other way ? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the Court overruling the judgment of a Chief Justice, who, above all others in our land, was skilled in matters of municipal law. But the Legislature, on both sides of the House, on the matter being presented, at once admitted that the interpretation of Chief Justice Richards was correct and according to the original intention of the Legislature ; and thereupon declared that to be the case, and removed

the apparent difficulty. This being the case, Mr. Howland has decided not to keep matters in abeyance by asking for a stay of proceedings pending appeal; and instead of relying upon a reversal of the late judgment by a higher authority, has determined to go at once to the people, encouraged thereto partly by your own manly utterance on the subject, and by the universal expressions of sympathy and support which he has received.

It may be necessary as a question of costs to appeal from the recent judgment, but that does not now affect the question before the electors.

Yours, etc.,

Toronto, March 26. (Sgd.) HENRY O'BRIEN.

In answer to the motion Mr. O'Brien has made an affidavit of the following purport:

I, Henry O'Brien of the city of Toronto, Barrister, make oath and say:

1. That I am the person referred to in the affidavit of the relator filed on this application.

2. I was (merely as a citizen of the city of Toronto) a prominent supporter of the respondent when he was asked to become a candidate for the mayoralty of this city, and was chairman of his executive committee.

3. The said defendant was elected by a majority of 1718 votes, but on the last day possible for that purpose, *quo warranto* proceedings were taken, under which he was unseated for lack of qualification, the judgment of the learned Master in Chambers being delivered on the 23rd day of March instant, a copy of which judgment obtained from the proper officer is now shewn me, marked exhibit A.

4. On the same day Mr. Christopher Robinson, who acted as senior counsel in such proceedings, and with whom Mr. Howland had been in consultation, left for Ottawa and only returned to-day.

5. On the 24th day of the same month an article appeared in the Mail newspaper which is now shewn me, marked exhibit B.

6. By reason of the statement in said article that Mr. Howland had made a bad blunder in running for Mayor without a qualification, serious injury, I was informed, was done to his reputation as a public man, and I held it to be my duty, being familiar with the matter, to explain his position.

7. My sole object in writing said letter, and the only thought in my mind at the time, or ever since, was a desire to correct a misapprehension which had been raised in the public mind by the said article and by certain other statements of a like nature, which letter was apparently intended to try and prevent Mr. Howland from again becoming a candidate as mayor of this city.

8. On the 25th day of the same month, an Act was passed by the Legislature of Ontario to amend the Municipal Institutions Act in various ways, and amongst others as to the qualification of candidates, and under which Mr. Howland has since been advised that he is qualified to sit as Mayor of the city if again elected.

9. There was considerable discussion at this time amongst Mr. Howland's supporters as to whether the said judgment should be appealed, but it was finally decided on said 25th day of March not to appeal and instructions were given to me to that effect, and an announcement thereof was sent to the newspapers and published that evening and next morning.

10. Much of our difficulty in arriving at a conclusion was caused by Mr. Robinson's absence. I had written to him for his advice in the matter, but owing to the shortness of the time he could only telegraph me on receipt of my letter on the 26th day of same month, that he thought we should not abandon the appeal until satisfied that Mr. Howland would be qualified under the recent Statute, but that he had written me.

11. Such telegram was received on the last day for giving notice of appeal from said judgment, and I felt uncertain what to do in view of the telegram and the instructions I had received to abandon the thought of appealing, and so I decided to give the notice of appeal and set the case down, knowing that it could be abandoned before argument, and after I had an opportunity of hearing further from Mr. Robinson and seeing Mr. Howland and his supporters, and I accordingly served notice of appeal at the last possible moment on the afternoon of the 26th instant for the reasons aforesaid.

12. I received the letter referred to in the tenth clause of this my affidavit on Saturday the 27th instant, but Mr. Robinson said that he could not, without time and consultation, give any opinion on which Mr. Howland should act. I therefore felt that there was no course open but to carry out the instructions not to appeal, and especially as Mr. Howland remained firm in the determination to offer himself for re-election without any appeal, and so on Monday the 29th instant I caused a formal notice of abandonment of the appeal to be served on the relator's solicitors, a copy of which is shewn to me and marked exhibit C. I also wrote them a letter, a copy of which is shewn me and marked exhibit D.

On receipt of Mr. Robinson's letter I telegraphed him of Mr. Howland's determination, and referred to the apparent inconsistency of running and appealing at the same time, and said I thought it better to abandon the appeal. Mr. Robinson's letter in answer to this agreed with this view.

13. I wrote the letter complained of on the morning of the 26th instant, before the notice of appeal was served, but as it was only written for the purpose and under the circumstances aforesaid, it did not occur to me that there was any necessity to withdraw it in view of any possible contention that the *quo warranto* proceedings could be said to be still technically pending.

14. When I wrote said letter, I believed that my professional connection with these proceedings was in fact at an end, and I wrote it simply as a citizen in the interest of the candidate I had supported at the last election and intended to support again, and as a matter of fact at such time no proceedings were pending in the said *quo warranto* matter.

15. That the notice of motion to commit me in this matter was not served until after I had written the letter now shewn to me marked with the letter "D," and the notice of abandonment now shewn to me and

marked with the letter "C," and after such notice had been actually delivered to the solicitors for the applicant in this matter.

16. I desired most sincerely in the said letter not to offend in any way, and in order to assure myself in this position I explained the matter fully to a learned Queen's Counsel in the city, who altered the letter in some respects, thereby making it as we both intended, and as he and I supposed, absolutely free from objection.

17. While I am unable to conclude that in writing the said letter I offended against any rule of this Honorable Court, or any rule of professional etiquette, or was guilty of disrespect to the learned Master, if it shewed he thought I in any way offended in these respects, or if there are (unintended by me) any expressions which could in any way indicate that I thought the learned Master had not acted with impartiality, I most unfeignedly say that I deeply regret them and desire to withdraw the said letter so far as the same are concerned.

Sworn March 31st, 1886.

The nature of the charge against Mr. O'Brien must be determined at the time of the publication of the letter, and cannot be affected by the fact of the abandonment of the appeal on the same day that the notice for this motion was given.

Nor do I think that Mr. O'Brien can take advantage of his double character of citizen of Toronto, and of solicitor for Mr. Howland. There are many things a citizen might do that would not be open to the solicitor; though I do not mean to say that even a citizen could have written such a letter, if it be an improper one, when an appeal was actually pending from the decision impugned.

There is no question here as to the liberty, or the license of the press. The press is not attacked. There are differences of opinion as to when the shadowy line between liberty and license has been crossed, but these I need not discuss.

Nor do I think there is any one absurd enough to contend that judges deem themselves infallible, and that when they open their mouths no dog must bark. The decisions of judges are amenable to criticism, as the opinions of other men are; and if the criticism be fair, open and candid, and made at a proper time, they welcome it as much as any one affected by the decision.

But judges are in a different position from ordinary disputants. If attacked, they cannot enter the arena of personal discussion, they have to leave their case to time, to calmer judgment, and to their rectitude of character, to the faithful discharge of their duties, and to the confidence and reputation these will ultimately produce. They are appointed to dispense justice with an even hand, and whatever tends to diminish confidence in their integrity, their impartiality, or their ability to dispose justly of the cases that come before them, is an injury not only to themselves but to the general public. Destroy confidence in them and one of the surest bonds of social order, social liberty, and personal security is sundered.

One of the most dangerous modes of affecting the pure administration of the law, is that of dragging pending cases into the public prints,—and that more especially when a solicitor for one of the parties does so. Only one side of the case is presented, and why? There must have been some purpose. In a case that might have to come before a jury, and now a days all jurymen may be considered as readers of the newspapers, the effect might be to prepossess the judgment upon a partial statement. The case may in reality be decided before it comes to trial. However determined to be just, the juryman may find it impossible to avoid an unconscious bias. The newspapers are not the Court to try the case. They have not the responsibility of the Court. But it is said the same malign influence would not result when the case is before a bench of Judges, or before the Court of Appeal. It is strange how much credit is in that case ascribed to the Judges. They are not as other men are, they will not be swayed by passion, nor biassed by what is said in the newspapers. I hope not. But how inconsistent at another stage in the cause to place them on the level of the suitors.

The paragraph in Mr. O'Brien's letter that was most commented on was that commencing, "You may naturally ask, etc." Can charges of that nature be made, can such criticism be allowed while the case is still undecided? It

is charged that Mr. Dalton simply ignored the arguments addressed to him, and did not even refer to the authority relied on by Mr. Howland's counsel, and that Mr. Dalton was overruling a judgment of Chief Justice Richards who, above all others in our land, was skilled in matters of municipal law. This is simply to charge that Mr. Dalton was not a proper person to discharge the duties of his office. It not only affects this particular case, but who can tell how much it would diminish confidence among the hundreds of suitors whose interests come before him weekly for consideration? It is not only the interest of the parties to the *quo warranto* proceedings, but of the public generally to know how this matter really stands.

In disposing of cases argued before him, it is not required that a Judge should consider and seriously refute, or assent to, every argument used before him. From his own knowledge of the case he can easily decide whether an argument is worth considering or not. If it has really no bearing on the case he lays it aside. Nor is it necessary that he should refer to every case that is cited to him. If he did, the disposition of cases would be a very slow operation. In many instances scores of cases are cited, which not infrequently, the counsel have not themselves consulted, but taken from a digest or a text book, and when asked the effect of them, have been unable to give it. Again, if an argument be supported by a really relevant case, it is enough if the judgment show that the case had been considered, and the argument weighed, without specifically naming it. The authority Mr. Dalton is said simply to have ignored I understand to be *The Prescott case, Hodgins'* Election Cases 1. That case was decided in 1871, and before the Statute of 1872 (35 Vic., c. 16, O.) and more recent acts, had much enlarged the nature of a married woman's right over her real estate, and very much diminished that of her husband in it. And Chief Justice Richards held, "that the Election Act of 1868, by the term 'owner,' gives to a husband whose wife has an estate for life or a greater estate, the right to vote in respect of his wife's property."

Mr. Dalton, in his judgment, shows that he had considered the subject, and that the definition of owner in the Election Act of 1868, was applicable to a different state of the law. He says, "The officer must have to his own use and benefit, in his own right, or in right of his wife, as proprietor or tenant, an estate, legal or equitable, freehold or leasehold, to a certain specified amount. This enactment as to property held in right of the wife has come down from a state of the law which was radically different from the present law as to the property of married women. Cases, however, may yet arise where that provision will be important. But as respects this case and the alleged qualification of the respondent, it is plain that he has no estate or interest whatever in the leasehold property specified. It is the property of Mrs. Howland in which the respondent has no estate or interest whatever, and over which he has no control."

It is no part of my duty upon this motion to say whether I think that a right or a wrong decision. It is enough to say that Mr. Dalton must have considered carefully, instead of ignoring, the authority relied upon, and instead of over-ruling Chief Justice Richard's judgment, if that had been possible for him to do, he distinguished it as applicable to a different state of the law, and therefore of no authority in the case before him.

Whether the letter would be considered as a fair criticism after the case had been finally disposed of, is not the question before me at present, but whether, being written by a solicitor in the cause and while an appeal is pending, the criticism is such as brings it within the definition of a contempt of Court. I have not to consider how far it might be deemed proper for an outside party to comment on a pending case, but I have no hesitation whatever in saying that it is not allowable for a solicitor engaged in the cause to do so. Whatever may have been the intention of the writer, and I am willing to accept Mr. O'Brien's statement that his design was to correct the statement in the *Mail* as to the *bad blunder*, the letter is to be judged of by the

language employed, and the inferences that would naturally flow from it. Any one reading it would at once conclude that Mr. Dalton had recklessly disregarded the argument in favour of the respondent.

It was then argued that the relator had no right to make this application, that he does not represent the Court, and the opinion of Mr Justice Morrison in *Regina* v. *Wilkinson*, —*re Brown*, 41 U. C. R. 123, was referred to. Till that time Mr. Justice Morrison says he had been unable to find any authority, or even suggestion, that "an applicant, failing to sustain his rule for a constructive contempt affecting himself, is now entitled to ask the Court, upon his own suggestion and at his instance, to punish his adversary for a direct contempt of the Court itself by the publication of the article in question—a contempt committed five months before this application—a publication which the Court did not think worthy of notice, did not think it necessary to call on the publisher to answer for;" although this arbitrary power of the Court had existed during many centuries, coeval with the Courts themselves.

But these conditions of Mr. Justice Morrison's judgment plainly distinguish it from the present. Here the applicant has not yet failed to get a rule, or to establish a constructive contempt against himself, he has never applied for one on that ground; there has been no lapse of five months here from the time of the publication complained of, and it is to be remembered also that Chief Justice Harrison thought that even these circumstances did not disentitle the applicant to the relief he desired. If I may venture to say so, I think Chief Justice Harrison's opinion the correct one, and I adopt it.

The Lincoln Election Case, 2 A. R. 353, was also referred to. The application there was against the publisher of a newspaper for commenting upon the proceedings on the pending trial and scrutiny, and for publishing a letter signed by the respondent. Moss, C. J., says (p. 362): "It is universally admitted that it is essential to the usefulness of a Court that all attempts which may be made during a

trial to impair public confidence in its integrity, to slander its proceedings, or to impugn the honour or motives of its Judges, should be checked and repressed." The Court held that the letter of the respondent was a contempt of Court. Different considerations applied to the publisher, and the application to commit him was refused, in the peculiar circumstances of that case. The Chief Justice refers to many authorities upon the subject. He (at p. 366) quotes from *Folkard* on Slander, 4th ed., 639: "The Court will discountenance any attempt to prejudice mankind against the merits of a case before it has been heard, and will protect every suitor against that which can affect the minds of persons who might be willing to give evidence, which might prevent persons from so doing;" and from Mr. Bishop: "That any publication, whether by parties or strangers, relating to a cause in Court, tending to prejudice the public as to its merits, and to corrupt and embarrass the administration of justice, or reflecting on the witnesses, may be visited as a contempt."

I have referred to most of the cases cited, but do not think it necessary to remark on any except those mentioned above; in them nearly every case cited to me is to be found, down to the dates of their decision.

The conclusion I have come to is, that the letter of Mr. O'Brien was not only an injudicious, but an improper one, and was a contempt of Court.

Mr. O'Brien's affidavit remains to be considered. It is evident from the 16th paragraph that he knew he was treading on delicate ground, and I regret that the learned Queen's Counsel whom he consulted had not altered more of the letter than he did. The 17th paragraph contains all that he says by way of apology, and I have also to express my regret that it is accompanied by such qualifications as considerably to diminish its value. He is unable to conclude that in writing the letter he offended against any rule of the Court, or any rule of professional etiquette, or was guilty of disrespect to the learned Master; if it shewed he thought he in any way offended in these respects (this

is not very intelligible, Mr. O'Brien's letter could not shew that the Master thought he so offended), or if there are (unintended by him) any expressions which could in any way indicate that he thought the learned Master had not acted with impartiality, he most unfeignedly, deeply regretted them, and desired to withdraw the said letter so far as the same are concerned.

The charge was not that he had accused the Master of partiality, but of disregard of his duty in his official position; and that the letter was calculated to diminish public confidence in the Court.

I am willing, however, to accept the apology, when coupled with the statements of his most able counsel, on his behalf, as to the character, the ability, and the conscientiousness Mr. Dalton has displayed in the discharge of his duties, for a long series of years, and the denial of the intention to impugn any of these; and it gives me pleasure to add my own testimony to the ability, and care, and assiduity with which Mr. Dalton has for many years filled his honourable position.

As the appeal has been abandoned, and no prejudice can now arise to the applicant, it will be a proper disposition of the case to refuse the motion, but it must be on payment of the costs.

G. A. B.

[CHANCERY DIVISION.]

WALLACE ET AL. v. THE BOARD OF PUBLIC SCHOOL TRUSTEES FOR UNION SCHOOL SECTION NUMBER NINE OF THE TOWNSHIP OF LOBO, IN THE COUNTY OF MIDDLESEX, ET AL.

New school section—Selection of school site—Change of same—Necessary requisites under 48 Vict. ch. 49, sec. 64—Costs.

A new rural school section being formed, it became necessary for the then trustees to provide a school site, &c. A public meeting of the ratepayers was called pursuant to 48 Vict. c. 49, s. 64 (O), which nearly all the ratepayers attended when the T. site was chosen by a majority vote of both the ratepayers and trustees as against the J. C. site.

A complaint against this result was lodged with the School Inspector under s. 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site, at which meeting a unanimous vote was had in favour of a third site called the C. site.

In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal, and to restrain building on the C. site in which it appeared that fifty out of the sixty-seven ratepayers approved of the latter site. It was

Held, that the necessary pre-requisite under sec. 64 of the statute, of taking the opinion of the ratepayers, had been complied with, and the selection made was the T. site: that no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose, and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change the site with the consent of the necessary majority.

The whole tendency of recent amendments of the education acts has been to give the rural school sections greater powers of self-regulation and self-government, and the Courts should not be astute to interfere unless there has been a plain violation of the statute, or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights.

The action was therefore dismissed, but without costs, as it was a new point, and the statute was not plainly expressed.

THIS was an action brought by John Wallace, a ratepayer, Neil Mitchell, a trustee, and several other ratepayers, against the above defendants, and Reuben Hambly and Edwin J. Ting, the other two trustees, for an injunction restraining the defendants from building on a certain school site called "The Compromise Site."

A motion for an interim injunction, which, by consent of counsel during the argument was turned into a motion for judgment, was made on May 11th, 1886, and was argued before Boyd, C.

The affidavit of the plaintiff Neil Mitchell set out the facts, which were not in the main disputed, as follows:

1. I am one of the trustees of the Board of Public School Trustees for Union School Section Number Nine of the Township of Lobo, in the County of Middlesex.

2. At the first meeting of the ratepayers of the said school section, held on or about the 30th December, 1885, Reuben Hambly, Edwin T. Ting and myself were elected as the three trustees.

3. On the said 30th December, 1885, subsequent to our said election as trustees, as aforesaid, notice of a special meeting of the ratepayers of said school section was given as follows:

SPECIAL SCHOOL NOTICE.

"The undersigned Trustees of School Section No. 9 of Lobo, and 13 of London, as authorized by the Public School Act of 1885, hereby give notice that a Special School Meeting of the supporters of the Public School in said school section, will be held at the School House No. 8, of Lobo, on Saturday, the 9th January, 1886, at the hour of Ten O'clock in the forenoon, for the selection of a site for building a School House, and what kind of material it shall be built of.

"Dated this 30th day of December, 1885.

(Signed) "EDWIN T. TING.
Trustees. "NEIL MITCHELL.
"REUBEN HAMBLY."

4. The said notice was duly posted on said 30th December, 1885.

5. Prior to the said notice, and between it and the meeting, there was a good deal of discussion and canvassing as to the site, and opinion being divided between the only two sites mentioned, called respectively "Jury's Corners," and the "Town-line Site."

6. During the canvass and before the meeting, the leading ratepayers in Lobo who were in favour of "Town-line Site," succeeded in inducing the ratepayers of the township of London to support the "Town-line Site."

7. That at the meeting where over sixty ratepayers attended, a majority of the ratepayers and a majority of the trustees selected the "Town-line Site."

8. The only two sites voted on were "Jury's Corners" and the "Town-line Site," and the majority in favour of the "Town-line Site," was only two, and the "Town-line Site" could not have been carried over "Jury's Corners" but for the votes of the London Township ratepayers.

9. The owner of the "Town-line Site" refused to sell the same, and arbitrators were appointed, and T. S. Carson, the School Inspector, was notified to proceed with the arbitrators, and appraise the damages, but he did not do so.

10. After the meeting an informal complaint (*a*) was, as I believe, made to said Carson, and on March 13th, 1886, the said Inspector attended at the house of one Donald Ferguson for the purpose, as I understood, of investigating the

(*a*) KOMOKA P. O., Jan. 26th, 1886.

MR. CARSON.

SIR.—We the undersigned ratepayers of Union S. S. No. 9, Lobo & London, petition you to inform you that a party has used undue influence towards putting the School House on the town line and not in the centre of the section which will place us out of reach of the school, some being over three miles from school, and the site they have selected is a very unhealthy one, being situated between two ponds of stagnant water, one of them being only about thirty paces from school site, there being at present about seven or eight feet of water in depth, being dangerous for children getting on the ice and getting drowned, and various other reasons. By putting the School House on the corner of side road and the second concession, it will be as near the centre of the section as it is possible to get it, it is also a good healthy place for a school. Mr. Jury says he will guarantee good water. and the school will be within reach of any in the section.

We ask nothing but our rights, and if they place the school on the town line it will only cause trouble in future. There is no doubt it will be moved to the centre in the course of two or three years, and if the other party would do what is right and not use influence in getting votes, it would have been placed on the corner side road and concession.

We now ask you to look into the matter and give us justice. We will remain yours truly.

(Signed) DANIEL FERGUSON.

P.S.—There was two of a majority for the school on the town line, but there was two illegal votes polled.

(Signed) JAMES BURNS.
WM. CAMPBELL.
MARK BARNEY. ✕
OSCAR COMFORT.

said complaint, there being present some twenty-five or thirty ratepayers, myself among the number.

11. Instead of proceeding with the investigation, he urged on those present the desirability of a compromise, and a majority of those present agreed to abandon the "Town-line Site" and vote for a site known as "Compromise Site."

12. Some of the ratepayers present, myself among the number, objected to the "Compromise Site," or in fact any site but that already selected, and publicly stated our objections.

13. Subsequently my co-trustees, Hambly and Ting, gave notice of a meeting for March 20th, to alter the site selected on said January 9th, but I, as trustee, declined to join in said notice.

14. A meeting was held on said March 20th, at which I attended and protested against anything being done to alter the site selected on January 9th, and then withdrew.

15. I believe a vote was taken at said meeting, and the "Compromise Site" was declared selected, but the total number of ratepayers present did not exceed 25 or 30.

16. The "Compromise Site" is most inconvenient to the ratepayers of the Township of London, and necessitates their travelling from their homes nearly or more than the "Town-line site" would, and I firmly believe that had the London ratepayers known at the January meeting that in voting for the "Town-line Site" they had rendered it possible for the "Compromise Site" to be selected, they would then have voted for "Jury's Corners," as that site would be much more accessible and convenient for them than the "Compromise Site."

17. I am advised, and believe that the meeting held on March 20, 1886, and all the proceedings thereat are illegal.

18. The defendants Hambly and Ting, as a majority of the trustees, notwithstanding my protests, are proceeding to erect a school-house upon the "Compromise Site."

The depositions of the defendant trustees and Inspector, and an affidavit of the defendant Ting, were also put in

which went to show that the "Compromise Site" was the most convenient, and that the defendant trustees had advised with the Minister of Education as to what they should do, and that the contracts were let and building operations commenced on the "Compromise Site."

Hellmuth, for the plaintiffs. The "Town-line Site" had been chosen in the proper manner under the statute 48 Vic. ch. 49, sec. 64 (O.), and there was no power to reconsider it, or to call a second meeting for that purpose. I admit that, if a proper complaint had been made to the School Inspector under the statute within the proper time, there could have been a reconsideration of the site. The evidence shows that the School Inspector did not consider the letter by which the complaint was made as sufficiently definite, and he did not act on it. Subsequently two other protests or complaints were put in, but neither of them was received within the twenty days limited by the statute, and one of these the Inspector did not consider definite enough to act on. In fact the Inspector did not investigate any complaint, but suggested a compromise, which resulted in the selection of the "Compromise Site." If the complaint had been sufficient, the Inspector was bound to investigate it, the words of the statute being "the Inspector *shall* investigate." He has no discretion in the matter. He, however, assumed that he had a discretion and urged the compromise. The petition for a new meeting was the result of his conduct and his conduct was altogether *ultra vires*. The document put in showing that the majority of the ratepayers are now satisfied with the "Compromise Site," does not affect the matter. A change of site can only be made after the election of fresh trustees, that is, not during this school year. I refer to *Williams* v. *The School Trustees of Sec. 8, Plympton*, 7 C. P. 559; *Ryland* v. *King*, 12 C. P. 198; *Vance* v. *King*, 21 U. C. R. 187; *Malcolm* v. *Malcolm*, 15 Gr. 13; *Coupland* v. *The School Trustees of Nottawasaga*, 15 Gr. 339; 13 & 14 Vic. ch. 48, sec. 11 and sec. 12, sub-s. 12; 16 Vic. ch. 185, sec. 6;

Con. Stat. U. C. ch. 64, sec. 30; 37 Vic. ch. 28, secs. 33, 34 (O); 40 Vic. ch. 16, sec. 5 (O).

T. G. Meredith, for the defendants. This is a new school section with no school-house, and the trustees should provide school accommodation this year. The Inspector has power even now to proceed with the investigation of the complaint if the selection of the "Compromise Site" by the ratepayers is declared invalid. Out of about sixty-five ratepayers only eight or ten belong to London Township, and they are the one's complaining. The evidence shows that the "Compromise Site" is the most convenient for the general body of the ratepayers of the section, and a document showing the approval by fifty ratepayers of that site, has been put in. The evidence also shows that the two defendant trustees have been acting under the advice of the Minister of Education and without any feeling or fraud in the matter, and have no personal interest in the "Compromise Site." Nothing has been done as far as "Townline Site" is concerned, by building on it or letting contracts or otherwise, to pledge the credit of the school section or make it liable in any way. The evidence shows it is not as convenient as the "Compromise Site" except for the few ratepayers from London Township. The first complaint was quite sufficient and the Inspector's conduct was reasonable. The change was adopted at the second meeting on March 20th, by a unanimous vote. The cases as to change of site referred to by my learned friend do not apply here, and the case of *Malcolm* v. *Malcolm* referred to by him is, if it has any bearing on this case in favour of our contention. They are only applicable to cases where there has been a disagreement between the majority of the trustees and a majority of the ratepayers, and in this case the majority of the trustees and a unanimous meeting of the ratepayers have selected the "Compromise Site." The Public School Act says a change may be made at a special meeting of the ratepayers called for the purpose, and the change was so made here. The change has been made as is admitted after due notice given and a meeting properly con-

vened, which is all the Public School Act requires and has so been made *bonâ fide* and under the advice of the Education Department.

Hellmuth in reply. The Inspector's powers are limited and circumscribed by the Statute, and the plaintiffs do not object to the investigation being proceeded with, even now, if the complaint is sufficient. There is nothing to show that the "Compromise Site" is the most convenient. A site once properly selected thereby becomes an established site, and there is no contention that the "Town-line Site" was not properly selected.

May 13, 1886. BOYD, C.—A new rural school section being formed out of parts of two townships, and called "Union Section No. 9 of Lobo," it became necessary for the trustees (three in number) to provide school accommodation, and for that purpose, to obtain a school site and build thereon. A public meeting of the ratepayers (who number some sixty-two or sixty-seven) was duly called for the selection of a new school site pursuant to the Public School Act 1885, sec. 40, sub-sec. 1, (2) and sec. 64. The meeting was attended by nearly all the ratepayers, and the result was that the site known as "The Town-line Site" was chosen by a majority vote, as against another proposed site known as "Jury's Corners." The vote was 30 to 28; with the majority voted two of the trustees, so that this matter was settled by a majority vote of both trustees and ratepayers in favour of "The Town-line Site."

A complaint against this result was lodged with the Inspector, pursuant to sec. 32, which led to his making attempts to have an amicable adjustment of the difficulties, the outcome of which was that two of the trustees gave notice of another special meeting being held "for the purpose of changing and selecting a school site." This was held on the 20th March, when a unanimous vote was had in favour of another site known as "The Compromise Site." A paper is in evidence, from which it appears that 50 ratepayers approve of this last named site.

This action is now begun to have it declared that the last meeting is illegal, and to restrain all action in the way of occupying the "Compromise Site." The position (shortly stated) of the plaintiff is that the school site was selected at the first meeting, and that there is no power to call another. The case chiefly relied on is *Williams* v. *Plympton*, 7 C. P. 559, which, however, proceeded on statutory provisions not identical with those which now govern. *Malcolm* v. *Malcolm*, 15 Gr. 13, was also cited, which, so far as it goes, aids the defendant, though it was also under differently expressed enactments.

Section 64 of the Public School Act, 1885, is that upon which the decision must rest, and I confess it is not so clearly worded as might be, yet I think its fair meaning justifies the action of the defendants. It is thus expressed:

"Before any steps are taken by the trustees for securing a new school site on which to erect a new school-house, they shall call a special meeting of the ratepayers of the section, to consider the site proposed; and no change of school site shall be made, except in the manner hereinafter provided, without the consent of the majority of such special meeting."

The first part of the section is strictly applicable to the case of a new school section such as this, without any school accommodation whatever, and it is then made a pre-requisite that before the trustees can act effectively in securing any site for the new school-house, they must take the opinion of the ratepayers. That was done in this case, and the selection made, was that of "The Town-line Site." That is not, however, to be for all time the school site without any possibility of change. It is argued for the plaintiffs that the first choice is final as to these trustees, and that no change can be made till another set of trustees is elected, or till the next municipal year. But the Act does not impose this limitation. The pre-requisite as to any change is found in the latter part of this section 64, and that is, no change of school site shall be made unless with the consent of the majority of ratepayers

present at a special meeting called for that purpose. This part of the section does not relate to the change of "the site of an *established* school-house," but of "school site." The Act itself gives us the signification of these words, (sec. 2, sub-sec. 4) as meaning "such area of land as may be necessary for the school-building, teacher's residence, offices, and play-grounds connected therewith." As applied to the circumstances of this case, the school site for this new section had been ascertained and fixed by the first meeting, but it was competent, in my view, for the second meeting to change this school site with the consent of the necessary majority. Good reasons appear to exist for the change. I mean it cannot be said to be capricious, and the sober second or third thoughts of the great majority of those interested were in favour of what was last done.

This is the affair of the trustees and ratepayers, and the whole tendency of recent amendments of the Education Acts has been to give to the rural school sections greater powers of self-regulation and self-government. It is a matter of great local concern to have the school placed most advantageously for those to be served thereby, and the Courts should not be astute to interfere in such cases unless there has been a plain violation of the statute or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights.

The parties agreed to let the merits of the case be decided upon the present motion by way of final judgment. I therefore dismiss the action, but it is not a case for costs, both because it is a new point, and because the statute is not plainly expressed.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA v. McCARTHY.

Conviction—Certiorari—Amendment—Defective information—Plea of guilty—32-33 Vic. ch. 31, sec. 5, (D).

A magistrate may amend his conviction at any time before the return of the *certiorari*, and the court refused to quash because of the previous return of a bad conviction, especially where this had not been filed. The objection that the defendant has pleaded guilty to a defective information is, under 32-33 Vic. ch. 31, sec. 5, (D.), not admissible.

THIS was a motion to quash a conviction.

H. J. Scott, Q. C., for the motion.
Aylesworth, contra.

The grounds of the motion and arguments of counsel are stated in the judgment.

June 22, 1886. GALT, J.—This is an application made by Scott, Q.C., to quash a conviction on the ground, 1st, that there had been a conviction previously returned to the Court which was bad, and there could be no amendment. The only conviction before me was correct, and even if there had been a previous erroneous one, it had not been filed, owing, as I understood the learned counsel, to some defect in the recognizance.

As said by Osler, J., in *Regina* v. *Smith*, 46 U. C. R. 442, "I can only take notice of the conviction which has been returned with the *certiorari*, which appears to be in all respects regular and sufficient in form." It is expressly stated in *Paley*, p. 289, that the formal conviction may be drawn up at any time before it is acted upon, or before the return of the *certiorari*. The *certiorari* is returned by the convicting magistrate on the 19th May, and the conviction is valid.

It appeared from the evidence the defendant pleaded "guilty," and Mr. Scott contended, as that plea was to a

defective information, the defendant should now be discharged and the conviction quashed. It was, however, answered by Mr. Aylesworth, who appeared in support of the conviction, that by sec. 5 of ch. 31, 32-33 Vic., (D.), such an objection was not admissible, and this seems clearly to be the law. The marginal note is, "No objection allowed on account of defect or variance in the information;" and it would certainly be absurd to hold that a conviction on a defective information was valid if the defendant was convicted after a trial, and was invalid if the defendant admitted his guilt. This motion will be discharged, with costs.

Discharged, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. MCNICOL.

Hawkers and petty chapmen—Consolidated Municipal Act, 1883—48 Vic. ch. 40, sec 1, (O.)—*By-law—Agent of non-resident—Compelling accused to testify.*

The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of section 1 of 48 Vic. ch. 40 (O).

The defendant, against the protest of his counsel, was called as a witness and swore that he bought the tea in question from one W. of the city of London and that he did not sell as the latter's agent, but on his own account: that he had formerly sold tea on commission for W., but purchased that in question for the purpose of evading the by-law.

The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:

Held, 1. That defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, sec. 495, sub-sec. 3, nor within 48 Vic. ch 40, (O). 2. That the conviction was defective in not stating that P. W., was non-resident within the county, and that the expression "of the city of London" was not sufficient. 3. That defendant had been improperly compelled to give evidence against himself. 4. That the having a license is a matter of defence, and not of proof by the prosecution. 5. That the intention to evade the by-law was immaterial so long as the agency did not in fact exist.

April 27th, 1886. *W. H. P. Clement* moved to quash the conviction in this case on the following, amongst other, grounds:

1. The information disclosed no offence against by-law No. 214 of the county of Bruce, and no amendment was asked for or obtained on the trial thereof.

2. The conviction did not allege with sufficient certainty the time when the alleged offence was committed.

3. The conviction did not set out with sufficient certainty the alleged offence, it not shewing to whom or in what quantity the tea therein mentioned was sold.

4. The conviction disclosed no offence against the by-law.

5. There was no evidence to support the allegation in the conviction that the defendant was, at the time of the

commission of the alleged offence, the agent of a person residing out of the county of Bruce.

6. Upon the trial the defendant was unlawfully compelled to give evidence by, and on behalf of, the prosecution.

7. It nowhere appeared by the conviction the defendant had not the necessary license to entitle him to do the act complained of.

8. It nowhere appeared in the conviction that the sale therein complained of was not a sale to a wholesale or retail dealer in teas.

9. It nowhere appeared by the conviction that the tea was not the growth or the produce of this Province.

10. The evidence taken at the trial disclosed no offence against the by-law.

The information stated that the defendant did on, &c., at, &c., sell tea and deliver the same contrary to by-law No. 214 of the county of Bruce; and the conviction was that on, &c., at, &c., before, &c., the defendant "is convicted for that he did at, &c., on, &c., sell tea and deliver the same as the agent of Peter Weston, of the City of London, contrary to a certain by-law, &c."

The facts and evidence are set out in the judgment.

H. J. Scott, Q.C., shewed cause.

May 11, 1886. WILSON, C.J.—The Municipal Act, 1883, section 495, empowers the council of any county, city, and town separated from the county to pass by-laws (sub-sec. 3) "for licensing, &c., hawkers or petty chapmen, &c. provided that no such license shall be required for hawking, peddling, or selling from any vehicle or conveyance any goods, wares, or merchandize to any retail dealer, or for hawking or peddling any goods, wares, or merchandize, the growth, produce, or manufacture of the Province [not being liquors within the meaning of the law relating to taverns or to tavern licenses] if the same are being hawked or peddled by the manufacturer or producer of

such goods, wares, or merchandize, or by his *bonâ fide* servants or employees having written authority in that behalf."

The 48 Vic. ch. 40, sec. 1, (O.) enacts that *hawkers*, in the Act of 1883, "shall include all persons who, being agents for persons not residents within the county, sell or offer for sale tea, dry-goods, or jewellery, or carry and expose samples or patterns of any of such goods to be afterwards delivered within the county to any person not being a wholesale or retail dealer in such goods, wares or merchandize."

The evidence of the defendant who was called for the prosecution [his professional adviser objecting to his being made a witness, but the objection being overruled] shews he agreed to sell the tea in question in Walkerton to Mrs. Rose, of that place, he, the defendant, living in Brant, in the county of Bruce, and that he bought the tea in question from Mr. Weston of the City of London. He bargained with Mrs. Rose about the 1st of February last to sell her the tea. He himself had not the tea then; he bought it from Mr. Weston in London about the 9th of that month, and delivered it to Mrs. Rose on the 16th of the same month. He said: "I sent down her order and the other orders about the 9th of February. I wrote the firm to send the goods to me. I did not send the funds with the orders. I do not send the funds till after the delivery is made. I have my own profit on the goods, no particular profit. Mrs. Rose pays me for the tea I sell her. I don't pay the same amount to Mr. Weston. The arrangement is I buy the tea from him; I buy the tea out and out; there is no bargain about commission; there is no plan between Mr. Weston and me to get over the by-law. I was paid by a commission before. I have not got the commission now. I can sell the tea for what I like; the goods are my own: the tea belongs to me when it gets to my possession. It was arranged between Mr. Weston when the new law came into force I was to buy the tea out and out and it was to become my property. I signed a letter of credit to that

effect. I am responsible for the tea I buy, whether I sell it or not. I don't carry samples but offer goods for sale. I delivered this card with Mr. Weston's name on it, but I cancelled the face of it with a lead pencil [containing Mr. Weston's name] when I gave it to Mrs. Rose. We just use the back of it. Weston is not liable for any losses I make."

Wm. W. Weston, a son of Mr. Peter Weston, of London, gave evidence to the like effect as the defendant. He said he allowed the defendant a discount for the invoice paid. "He (Mr. Weston) has no right to the tea the defendant has on hand. The defendant is answerable for the amount of the bill. The discount is allowed when the goods are sent. The defendant is not under my control. He does not require to report to me. I have a bond of security to secure me till I get the cash. Defendant has no authority to use our cards: he was told so."

Upon that evidence the defendant was convicted.

The evidence shews the defendant, upon his own account and for his own benefit, trafficked at the time when &c., and trafficked in tea, by making bargains to sell it in certain small quantities to families in the smaller towns and villages, and in the rural parts, and having made his bargains he then buys the necessary quantity of tea he has agreed to sell, and delivers it to his customers who have agreed to take it from him.

He is then paid by them, and he in his turn pays the person from whom he has bought the tea. He has at the present time a standing arrangement with Mr. Weston, of the City of London, in whose employment he at one time was, by which Mr. Weston agrees to supply him with tea as he requires it. Upon the defendant sending to Mr. Weston the different orders he has got from his customers, Mr. Weston makes up the different sales in parcels for the customers, then charges the whole amount of them to the defendant, and gives him credit by way of discount upon that amount, and sends the parcels to the defendant, who delivers them to his customers.

The defendant becomes personally liable for all the

goods charged to him, and can do with the goods as he pleases, and bears the loss, whatever it may be, himself either for sales not fulfilled by his customers or for failure upon their part to pay; and all that is done, by the admission of the defendant and of Mr. Weston's son, who manages his father's business, as "a plan between Peter Weston and myself to get over this by-law."

If the statement I have made from the evidence is the actual truth, and there is not, in my opinion, the least reason to doubt it, it is an arrangement which may be lawfully made, for the parties may take their arrangements out of the terms and scope of the law if they please. They must do so, however, actually and completely and not colourably.

The only question is, is the arrangement the parties have made within the provisions of the by-law or not? If it be not, the defendant has not been lawfully convicted. If it be within the operation of the by-law, the motion must be dismissed.

The conviction, if sustainable, is so under the third section of the by-law, which is a copy of section 1 of the 48 Vic. ch. 40, (O).

According to the evidence the defendant was *not* an *agent* of any person not residing within the county of Bruce, in which county he sold the goods in question; nor was he an agent at all, but an independent dealer and trader, and he did not, therefore, require to have a license. He was not within the Municipal Act of 1883, sec. 495, sub-sec. 3, for he was not carrying goods for sale. Nor was he acting in violation of the Act of 1885, ch. 40, because he was an independent trader.

The information is very insufficient. The conviction, I think, might be found to be open to objection, for alleging only that the defendant "did sell tea and deliver the same," without mentioning any quantity by weight or other descriptive statement. The precise quantity need not be stated, but it might properly, as in an indictment, be given under a *videlicet*, and the name of the purchaser of the tea

should also be given, if known, and if not known the fact might be so stated.

The 5th objection in the order *nisi*, as to the alleged agency, is not, as I have said, established. The conviction, too, alleges the defendant was the "agent of Peter Weston, of the city of London." The Act requires the defendant should be the agent of a person "not resident within the county" in which the goods are sold or offered for sale; and a person may not inaptly be described as *of* the City of London for some purposes, although he is at the time a resident within another county.

The defendant should not have been obliged to give evidence against himself.

The possession of a license is, I think, a matter of defence and not of proof by the prosecutor: *Thibault qui tam* v. *Gibson*, 12 M. & W. 88, and other cases.

The other objections require no answer. I say nothing as to costs.

I make the order absolute to quash the conviction.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

NEWCOMBE V. ANDERSON ET AL.

Replevin—Boarding-housekeeper—Lien—R. S. O. ch. 147.

J. and his wife took rooms in premises kept by defendant, R. A., called the "Shandon House," partly furnishing them and agreeing to pay $50 per month for rooms and board. Subsequently they rented from plaintiff a piano. They left the "Shandon House" in debt for board and lodging to R. A., who thereupon detained the piano, which was claimed by the plaintiff. *Held*, that the relation between defendant, R. A. and J. was not that of inn-keeper and guest, but of boarding-house keeper and boarder. *Held*, also, that as the piano was not the property of J. and his wife, that defendant had no lien on it for board and lodging under R. S. O. ch. 147.

Quære, whether the house kept by defendant R. A. was an "inn" within the meaning of R. S. O. ch. 147, sec. 1.

REPLEVIN for a piano.

Defence:

1st. Denial of the taking of the piano.

2nd. Denial that the piano was the defendants' property, and claiming a return of the piano, and damages for its detention.

Issue.

The cause was tried at the last Fall Sittings of this Court at Toronto, by Galt, J., without a jury.

The following pleas were added by leave of the Judge at the trial: 1. That the defendant Rosina Anderson, who was the wife of the defendant Robert W. Anderson, kept a common inn or house of public entertainment for the reception of travellers and others, and before and at the time of the alleged detention of said piano, she had a lien on the same for money payable by one Jessett and wife to the said Rosina Anderson, for the lodging and entertainment of said Jessett and wife, as guests, at said inn, found and provided by said defendant, as inn-keeper as aforesaid, within said inn, at the request of said Jessett and wife, said piano having been brought to said inn by said Jessett and wife, who were lawfully possessed thereof, and whom said defendant believed to be owners thereof, of all which plaintiff had notice, and alleging that the said money was still wholly due and unpaid, and the said lien in

full force and effect. 2. That said defendant Rosina Anderson was the keeper of a boarding-house in the city of Toronto, known as the "Shandon House:" that said piano was brought to said house by one Jessett and his wife, who were boarders at said house, and who were lawfully possessed of said piano, and whom said defendant believed to be the owners thereof: that at the time of the alleged detention, a large sum of money, to wit, the sum of $299 was due and owing by said Jessett and wife to said defendant for food and accommodation furnished to said Jessett and wife by said defendant in said house, and said sum was still wholly due and unpaid; and said defendant detained said piano, claiming to be entitled to a lien thereon under the provisions of R. S. O. ch. 147.

The plaintiff put in and proved the following instrument: "Received from Messrs. Octavius Newcombe & Co., a 7 octave 3 string upright 304, on hire for three months, at five dollars per month, payable monthly in advance, the said piano being valued at three hundred and fifty dollars, for which sum I will be responsible in case of fire or any other accident that may damage or destroy the said instrument; and I further bind myself to return the same free of expense in like good order as when received, reasonable wear excepted; and should the above period be extended, this agreement shall continue to be binding; and I also agree that said instrument shall not be removed from the premises now occupied by me at 22 Ann street, without notice to and consent of Messrs. Octavius Newcombe & Co.

(Signed) "MARY JESSETT."

"Toronto, December 1st, 1884."

This was taken from Mrs. Jessett at the time the piano was delivered to her on hire, on or about the date of it.

The plaintiff also proved a demand upon the defendants for the piano, which they refused to give up, claiming a lien upon it for the board of Mr. and Mrs. Jessett. The defence set up appears in the evidence of the female defendant, the only witness called for the defence, which was as follows:

Rosina Anderson, sworn—By Mr. *Ritchie.*

Q. You are the proprietor of the Shandon House? A. Yes.

Q. That house is where? A. 22 Anne street.

Q. You bought it some time ago, I believe? A. Yes, from Judge Boyd.

Q. For what purpose? A. For a temperance hotel, just the same as the Robinson House.

Q. Has your husband anything to do with it? A. Nothing at all.

Q. How long have you been keeping this kind of hotel? A. Well, I have only been one year in Judge Boyd's house.

Q. How long have you been engaged in that line of business? A. About eighteen years.

Q. Is that your regular line of business? A. Yes.

Q. Who do you accommodate there? A. Anyone that comes along for board if they are respectable and proper looking persons.

Q. Are you confined to week boarders or day boarders? A. Week boarders, or month boarders, or just give them a meal: I have a boarder who comes just for lunch.

Q. You take everybody who comes along who pays your price? A. Yes, if they are respectable

Q. If they are drunk you do not take them? A. No.

Q. What are your regular terms by the day? A. $1 a day.

Q. Do you advertise keeping this house, the Shandon House? A. Yes, regularly advertised in the *Mail* and *Telegram.*

Q. For the accommodation of the public generally? A. Yes.

Q. And you do accommodate the public generally? A. Yes: any one that comes along, if I have room for them, I take them.

Q. Mr. and Mrs. Jessett came to board with you, I believe? A. Yes.

Q. They had boarded with you before you took this Anne street house? A. Yes: they boarded with me in Richard's House on Yonge street.

Q. Have you got stable accommodation at your house? A. Yes, stable and coach-house.

Q. Do you accommodate horses there? A. Yes, if any gentleman brings one.

Q. Is there any difference between your hotel and an ordinary hotel such as the Rossin House? A. Well, we have no bar; that is the only difference.

Q. Are you advertised to keep open to the public in the same way? A. Yes.

Q. Except that you have got no bar, and no license? A. No.

Q. You took Mr. and Mrs. Jessett in Judge Richard's house first? A. Yes.

Q. And they went to board with you in the Shandon House? A. Yes, from the other house to the Shandon House.

Q. And took two rooms there? A. No.

Q. And took it at $50 a month? A. Yes.

Mr. McLaren—Under the issue this is not relevant.

GALT, J.—The whole question is whether they have a lien.

Q. How much did they owe you when they left? A. $299.

Q. You charge the sundries in the same way as the regular hotels? A. Yes.

Q. And that they still owe you? A. Yes.

Q. You recollect the piano coming in there? A. Yes.

Q. Whose did you understand it was? A. I understood Mrs. Jessett had bought the piano and brought it.

Q. Did she speak to you about it? A. No, but I heard her telling the other guests at the table that she had been out and bought a piano.

Q. You supposed it was her's? A. Yes.

Q. How did you come to let her board run along so long? A. Well, I thought I had the piano there and some furniture in there, and I thought I was perfectly safe.

Q. They partly furnished their rooms? A. Yes.

Q. You relied on the piano? A. Yes: I felt secure in having it there: I would not have trusted them so long without that.

Q. Did you ever hear about Mr. Newcombe having any claim on that piano until after Mrs. Jessett left? A. Never.

Q. Who made the agreement for board with you at the Shandon House? A. Mr. and Mrs. Jessett: they both went together.

Q. When did you first hear Mr. Newcombe claim this piano? A. When Mr. Curran came.

Q. He spoke to you? A. Yes: told me it was Mr. Newcombe's piano: I was very much surprised.

Q. Did you claim a lien on it? A. Yes.

Q. You refused to give it up? A. Yes.

Q. Your husband had nothing to do with it? A. No; he might have spoken about it, but I did the business.

Q. Mr. Newcombe says he never saw the sign, "Shandon House?" A. He can come and see it there now. It is there conspicuous over both gates, put there when we commenced.

Q. Over or on the gate? A. On the top of the gate.

Q. It is a public gate? A. Yes.

Q. And you have advertised the Shandon House in the newspapers? A. Yes.

The learned Judge gave the following judgment:

GALT, J.—This was an action of replevin, brought in respect of a piano which was claimed by the plaintiff as his property, and which was detained by Mrs. Anderson, one of the defendants, under a claim of lien for a debt due by certain parties who had been boarders in her house, and who had brought the piano to her house. The case of *Threfall* v. *Borwick*, L. R. 10 Q. B. 210, is similar to the present as respects the description of the article detained, the head note being as follows: "A. went to the defendant's inn and stayed there with his family for some time. He took with him a piano as his own, which he had hired of the plaintiff. A. having left the inn in debt to the defendant, the defendant claimed as against the plaintiff to detain the piano by virtue of his lien as inn-keeper. Held, affirming the decision of the Court of Queen's Bench, that whether the defendant, as inn-keeper, was bound to take in the piano or not, having done so, he had a lien upon it." This case was decided in 1875, but Coleridge, C. J., in giv-

ing judgment, says: "It is admitted that in general an inn-keeper has a lien on all goods which the guest brings as his own, whether they are his own or another's, and the only question raised is whether the lien extends to goods which the inn-keeper would not be bound to receive. I may say that I should be inclined to agree, if a guest brought a piano with him for his own amusement, that, according to the advanced usages of society, the inn-keeper might be well held to be bound to receive it if he has room for it. But it is quite unnecessary to decide that question, because we are all clearly of opinion that the defendant having taken in the piano and safely kept it, it is too clear to be doubted that he has a lien upon it."

This case is exactly the same as that before us, so far as the article detained and the ownership are concerned; but Mr. McLaren contended it did not decide that now before me, because, he contended, Mrs. Anderson was not an inn-keeper. Before the passing of the Act 37 Vic. ch. 11, (O.), although inn-keepers had a lien on the property of guests or persons using the inn, they had no right to sell it; but that statute enacted that every inn-keeper, boarding-house-keeper, and lodging house-keeper, shall have a lien on the baggage and property of his guest, boarder, or lodger, for the value or price of any food or accommodation furnished to such guest, boarder, or lodger; and in addition to all other remedies provided by law, shall (under certain conditions) have a right to sell such property, "and after any such sale such inn-keeper, boarding-housekeeper, or lodging-housekeeper, may apply the proceeds of such sale in payment of the amount due to him, and shall pay over the surplus, if any, to the person entitled thereto, on application being made to him therefor."

The statute appears to me to have been passed for the purpose of extending, not for the purpose of limiting, the power and rights of inn-keepers. The law was settled as to their right of lien on all property brought under their charge, whether as in the case of *Threfall* v. *Borwick*, it belonged to the guest or not, and to give effect to Mr. Maclaren's argument would be to limit the lien to such property only as belonged to the guest; for he contended, inasmuch as Mrs. Anderson was a boarding or lodging-house-keeper and not an inn-keeper, she could have a lien only on such articles as were the actual property of the guest; whereas it is plain from the first section that "inn-keeper, boarding-housekeeper, and lodging-housekeeper"

are all placed on the same footing as respects the baggage and property of guests, boarders, or lodgers; and consequently, if a boarding-housekeeper and lodging-housekeeper have no lien on any property unless it is the property of the guest, the same rule must apply to an inn-keeper. There is no doubt that the privilege accorded to inn-keepers by the common law arose from their being obliged to receive all guests, and that boarding-house-keepers being under no such obligation were not entitled to the same security; but the legislature has, it appears to me, placed them all on the same footing. There are several other sections of the Act which apply only to what are properly known as inn-keepers, but the first section is expressly made applicable to persons in the position of the defendants.

I give judgment in favour of the defendants.

On the 2nd of December, 1885, *McLaren* moved to set aside the judgment for the defendants, and to enter judgment for the plaintiff, with costs, upon the ground that the learned Judge erroneously held that the defendants, as boarding-house keepers, had a lien on the goods of the plaintiff for the board of one Jessett, at the defendants' boarding-house.

Ritchie, Q.C., shewed cause. Everything a guest brings into a house intending to take away, is baggage. See *Macrow* v. *Great Western R. W. Co.*, L. R. 6 Q. B. 612; *Thomson* v. *Lacy*, 3 B. & Ald. 283. See also *Latham's* English Dictionary as to the word "baggage." The defendants say, first, we are inn-keepers; secondly, the piano is baggage.

McLaren, contra. Is there a lien by a boarding-house-keeper on a piano? Where there is an arrangement to board by the month, say, the relationship of the inn-keeper does not exist. The test of the liability is whether the former would be liable for the loss of the property. See *Threfall* v. *Borwick*, L. R. 10 Q. B. 210, 211, per Bramwell, B. On the liability of inn-keepers in case of a special contract, see Bac. Ab. "Inns and Inn-keepers," 5; *Whiting* v. *Mills*, 7 U. C. R. 450; *Regina* v. *Askin*, 20 U. C. R. 626; *Parkhurst* v. *Foster*, 1 Salk. 387; *Dansey* v. *Richardson*, 3 E. & B. 144.

June 29, 1886. ARMOUR, J.—Various definitions have at different times been given to the word "Inn," many of which may be found in *Abbott's* Law Dictionary, title "Inn." "And I take the true definition of an inn to be a house where the traveller is furnished with everything which he has occasion for whilst upon his way:" per Bayley, J., in *Thompson* v. *Lacy*, 3 B. & Ald. 283.

An "inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received:" per Best, J. S. C. See also *Wintermute* v. *Clark*, 5 Sandford 242.

"Inns are instituted for passengers and wayfaring men, for the Latin word for an inn is *diversorium*, because he who lodges there is *quasi divertens se a via*, and so *diversoriolum;* and therefore if a neighbour, who is no traveller, as a friend, at the request of the innholder, lodges there and his goods be stolen, &c., he shall not have an action, for the writ is *ad hospitandos homines*, &c., *transeuntes*," &c.: *Calye's Case*, 8 Co. 32.

The inn-keeper is liable to indictment and to an action on the case for damages for refusing to receive a traveller: *Hawkins*, P. C. 714. But the person refused must be a traveller, else he is not liable: *Regina* v. *Luellin*, 12 Mod. 445; *Regina* v. *Ivens*, 7 C. & P. 213; *Regina* v. *Rymer*, 2 Q. B. D. 136. But if he receive a person as a traveller who is not really a traveller, he has the same rights against him and the same liabilities to him as if he were a traveller: *Walling* v. *Potter*, 35 Conn. 183. He is also bound to receive such goods as the traveller may reasonably bring with him, but he is not bound to receive, all such goods as the traveller may bring with him. But if he receives goods that he is not bound to receive, he is entitled to the same rights, and subject to the same liabilities with respect to such goods as if he had received them, being bound to do so: *Threfall* v. *Borwick*, L. R. 7 Q. B. 711, L. R. 10 Q. B. 210.

As soon as the inn-keeper receives the traveller into his inn, the traveller becomes his guest, and the inn-keeper is liable for the safe-keeping of the goods brought by the guest to the inn, and is entitled to a lien upon them whether they are his guest's goods or not, unless he was aware when they were brought there that they were not the guest's goods: *Broadwood* v. *Granard*, 10 Ex. 417.

If the relation of guest is changed to that of a boarder, or if a person comes to the inn, not as a traveller, but as a boarder, in such cases the inn-keeper has no other rights or liabilities with respect to the goods of such a person than a boarding-housekeeper would have, and would have no lien upon the boarder's goods, and would not be liable for their safe-keeping. See *Dansey* v. *Richardson*, 3 E. & B. 144; *Holder* v. *Soulby*, 8 C. B. N. S. 254.

If A. comes with goods to an inn in London, and stays there for a week or a month, or longer, and is then robbed of them, he shall have an action against his host, though perhaps, being at the end of his journey, he cannot then be said *transeuns* according to the writ in the register.

"But if an attorney hires a chamber in an inn for the whole term, he is *quasi* a lessee, and if robbed the host is not answerable. So if a man upon a special agreement boards or sojourns in an inn, the host shall not answer for it": *Bacon's* Abridgment, vol. iv. 448.

In *Grimiston* v. *Innkeeper*, Hetley 49, in an action upon the case it was said at the bar and not gainsayed, that they ought to say in the declaration *transeuns hospitavit*, for if he board or sojourn for a certain space in an inn, and his goods are stolen, the action upon that is not maintainable and for omission, although the verdict was given for the plaintiff, judgment was given *quod nihil capiat per billam*.

In *Ewart* v. *Stark*, 8 Rich. (S. Carolina) it was held that an inn-keeper could not detain the goods of a boarder for the price of his board, and it was said by the Court, "With respect, therefore, to a boarder or sojourner, the law imposes no obligation on the inn-keeper to receive him, and the

parties are left to make what contract they please, and consequently he cannot detain for the price of board unless it is stipulated for."

In *Hursh* v. *Byers*, 29 Mo. 469, Mrs. A. had been a regular boarder at an hotel in Iowa City for two years, paying a stipulated sum per week for her board; when she was on the point of leaving the hotel-keeper presented his bill, and told her she could not remove her trunk from the room she occupied until the bill was paid. It was held that the hotel-keeper had no lien.

In *Pollock* v. *Landis*, 36 Iowa 651, it is said: "There are two classes of persons who are entertained by inn-keepers for reward, guests and boarders. Upon the goods of the former the inn-keeper has a lien, but upon those of the latter he has not." See also *Regina* v. *Askin*, 20 U. C. R. 626.

In *Thompson* v. *Lacy*, 3 B. & Ald. 283, Best, J., said: "In this case the defendant does not charge as a mere lodging-housekeeper by the week or month, but for the night. A lodging-housekeeper, on the other hand, makes a contract with every man that comes, whereas an inn-keeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price."

In *Willard* v. *Reinhardt*, 2 E. D. Smith 148, it is said: "The distinction between a boarding-house and an inn is this, in a boarding-house the guest is under an express contract at a certain rate for a certain period of time; but in an inn there is no express engagement; the guest being on his way is entertained from day to day according to his business upon an implied contract."

See also *Stewart* v. *McCready*, 24 Howard. Pr. Reps. 62; *Cromwell* v. *Stephens*, 2 Daly 15.

"An establishment may be both a boarding-house and an inn. In respect to those who occupy rooms and are entertained under precise contracts, it is a boarding-house; while, with respect to transient persons, who, without any stipulated contract remain from day to day, it is an inn:" *Seward* v. *Seymour*, *Anthon's* Law Student, 51.

As the keeper of a common inn may have inmates of his house for a reward to whom he may not be under the strict liability of an inn-keeper, so may the keeper of a boarding-house occasionally entertain transient persons, without acquiring the character or being under the responsibilities of an inn-keeper: *Kisten* v. *Hildebrand*, 9 B. Munro, 72.

And it is a difficult question to determine sometimes whether a person staying at an inn is to be regarded as a guest or a boarder. If he was originally a guest the presumption would be that the relation of guest would continue until a new contract was shewn to have been entered into: *Allen* v. *Smith*, 12 C. B. N. S. 638. In the *Berkshire Woollen Company* v. *Moody*, 7 Cush. 417, one Russell, as agent of the plaintiffs, went to Boston to attend to a lawsuit for the plaintiffs, and put up at the defendants' hotel. He agreed with the defendants for the price of his board by the week, and if he did not stay a week the price was to be greater than at the rate by the week. It was contended that he was not a guest but a boarder. The Court said: "It is further maintained for the defendants that Russell was not a guest in the sense of the law, but a boarder. But Russell surely came to the defendants' inn as a wayfaring man and a traveller, and the defendants received him as such wayfaring man and traveller, as a guest at their inn. Russell being thus received by the defendants as their guest at their inn, the relation of inn-keeper and guest was instantly established between them. The length of time that a man is at an inn makes no difference, whether he stays a week or a month, or longer, so that always he retains his character as a traveller. The simple fact that Russell made an agreement as to the price to be paid by him by the week could not upon any principle of law or reason take away his character as a traveller and a guest. A guest for a single night might make a special contract as to the price to be paid for his lodging; and whether it were more or less than the usual price it would not affect his character as a

guest. The character of guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an inn-keeper there for board at his inn, he is a boarder and not a traveller or guest in the sense of the law. But Russell was a traveller and put up at the defendants' inn as a guest, was received by the defendants as a guest, and was in the sense of the law and in every sense a guest." See also *Norcross* v. *Norcross*, 53 Maine, 163.

In *Pinkerton* v. *Woodward*, 33 Cal. 557, it appeared that the plaintiffs and his three companions were residents of Canada, and had been mining at the Cariboo Mines in British Columbia. They left the mines with their gold dust and money, the result of their labours, and started on their journey home in Canada West. They came to San Francisco by steamer, and arrived on the 1st of November, 1865. Having no business there at all they immediately went to the hotel, called the "What Cheer House," of which the defendant was proprietor, and very shortly after engaged passage by the Nicaragua route to New York in the Steamship America, which sailed on the 13th November, 1865, and expected and intended to embark on her. The rule and custom generally observed at the "What Cheer House" was, that persons stopping there were required to pay for their rooms and lodging in advance, and persons eating at the restaurant, whether lodging at the "What Cheer House" or not, were required to pay for each meal as it was eaten. This rule at the restaurant was not inflexible, however, and was not enforced as to the plaintiff, who settled for a portion of the meals eaten by him with the clerk of the "What Cheer House" by general bill. The Court said: "A traveller, who enters an inn as a guest, does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of his entertainment, or paying for what he has occasion for as his wants are supplied. We see no reason why the inn-keeper may not require payment

in advance, or why the guest may not pay in advance for lodgings for a part or all the time he intends to remain as a guest at the inn."

In *Hall* v. *Pike*, 100 Mass. 495, in an action against an inn-keeper in Cambridge, for loss of the plaintiff's goods, there was evidence that the defendent both entertained transient guests and kept weekly boarders: that the usual amount paid by the former was $2 a day, by the latter $5 a week; and that they sat at separate tables. There was no evidence that the plaintiff knew of the different rates, and he testified that he had no knowledge of the custom as to separate tables. There was also evidence that the plaintiff, a journeyman carpenter, boarded in Boston when not employed elsewhere; but that being employed on a building in Cambridge, he went early in November to the defendant's inn and agreed to pay $5 a week for board: that nothing was said as to the time he would remain: that he remained a week or two, and then left: returned again in four or five days, and remained until December 6th, taking his meals at the table with those who boarded by the week, and usually spending Sunday in Boston at his old boarding house. The Court held that it was a question of fact, to be decided upon all the evidence, whether the plaintiff sustained the relation of guest or boarder in the defendant's inn at the time of the loss of the articles sued for. If the defendant was only an inn-keeper, the presumption would be that a temporary sojourner, in the absence of other proof, must be a guest. When in the same house he carries on the business of inn-keeper and keeper of boarders, it is more difficult. The more prominent occupation would perhaps control where there was no other evidence. The duration of the plaintiff's stay, the price paid, the amount of accommodation afforded, the transient or permanent character of the plaintiff's residence and occupation, his knowledge or want of knowledge of any difference of accommodation afforded to or price paid by boarders and guests, are all to be regarded in settling the question. Upon the evidence reported in this case it

would have been clearly erroneous for the Judge to have ruled, as a matter of law, that the plaintiff was a boarder and not a guest. See also *Jalic* v. *Cardinal*, 35 Wis. 118.

In *Lusk* v. *Belate*, 22 Minn. 468, in August, September and October, 1872, the defendant was keeping the Park Palace Hotel, a public inn and boarding-house in the city of St. Paul. On September 20, 1872, the plaintiff, his wife and four children, being inmates of the hotel, a gold watch belonging to the plaintiff, and certain articles of jewellery belonging to two of the children mentioned, was stolen from the rooms occupied by the plaintiff and his family. The jewellery consisted of ordinary articles of wearing apparel and ornaments of the plaintiff's two children, to whom the same belonged, and was brought to the hotel when they came there. The plaintiff's wife and six children became inmates of the hotel on August 7, 1872, and, with the exception of two children, who left a few days before the theft, remained there until some time in October following. The plaintiff was not a resident of this State, but at the time when they came to the hotel his wife and children were living, and for three or four years previous had been living, in St. Paul, sometimes keeping house and sometimes staying at a hotel or boarding-house, the plaintiff being in the habit of making them an occasional visit as often as two or three times a year. The plaintiff arrived at St. Paul, and became an inmate of the hotel about September 10, 1872, and remained about four weeks. The court held that "as the articles of jewellery stolen belonged to the plaintiff's children, being their ordinary articles of wearing apparel and ornaments, and were brought to the defendant's inn when such children came there and became inmates thereof, the liability of defendants as respects their loss must depend upon the status of the persons to whom the same belonged. Considering the length of time during which, and the manner in which they had been living in St. Paul before they became inmates of the defendants' inn, they must be regarded as in fact dwellers in and inhabitants of St. Paul.

There is no reason why they may not properly be so regarded, although their domicile was in law in another State. They were certainly not travellers in any just sense of the word; for persons who have dwelt in a city no larger than St. Paul, do not become travellers by changing their dwelling place from one part of it to another. It is manifest, therefore, that as regards the jewellery stolen, the verdict cannot be sustained, for upon the evidence it is obviously based upon the defendants' supposed liability for the loss of the same under the rule above mentioned, a rule as we have seen applicable only as between an inn-keeper and a traveller.

In reference to the plaintiff, it appears that he was not a resident of this State, and that he came to the defendants' inn from some place without this State upon a visit to his family. There is no room upon the evidence to doubt that he came to defendant's inn and was received there as a traveller and in no other character. His purpose was evidently to make a flying visit to his family, and merely a temporary stay in St. Paul, where he remained about a month only. Under such circumstances, unless something appears affirmatively to the contrary, his status as a traveller, like any other status once shewn to exist, is to be presumed to have continued. Neither the agreement, by which he was to pay special rates for himself and family lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, nor, so far as we discover, any other fact which appeared in the case, furnishes any evidence that his character was changed from that of a traveller to that of boarder. As respects, then, the plaintiff's watch, we see no reason why the evidence was not sufficient to charge the defendant for its loss."

In *Hancock* v. *Rand*, 94 New York 1, the findings of the referee showed that the plaintiff was an inmate of the defendant's hotel from November, 1873, to June, 1874, and that the articles lost were taken from the rooms occupied by plaintiff in the month of March, 1874: that the husband of the plaintiff, General Hancock, was an officer in the

United States army, and that in November, 1873, he applied for rooms and board at the defendant's hotel for himself and family; that after some conversation between the defendants and said Hancock, in regard to himself and family remaining at defendant's hotel, in which certain rooms in a private house adjoining said hotel, which the defendants were then using in connection with the same, were mentioned, it was said by General Hancock that he expected to remain until the following summer, provided everything was satisfactory, and provided, also, he was not sooner ordered elsewhere on military duty: that the defendants offered the terms which they would take for said rooms, which terms General Hancock accepted, on the understanding that he should continue to occupy them until the next spring or summer, provided everything was satisfactory, and provided, also, he was not sooner ordered away on military duty. The referee also found that General Hancock and family, immediately prior to their going to the hotel of the defendants, had been boarding at another hotel in New York, and had no permanent home anywhere: that prior to the year 1873, and ever since that time the home of General Hancock had been wherever his military headquarters were, and that such headquarters during that time had been at different places. The referee refused to find, as requested by the defendants that any substantial agreement had been made by General Hancock as to the length of time he and his family should occupy said rooms. The Court held that, according to the agreement made by General Hancock with the defendants, there was no time fixed for his stay at the defendant's hotel: that really and actually he was but a transient guest who had the right to come and go whenever he pleased: that officers of the army and navy, and soldiers and sailors, who have no permanent residence which they can call home, may well be regarded as travellers or wayfarers when stopping at public inns or hotels, and to make them chargeable as mere boarders, it should be shown satisfactorily that an explicit contract had been made which deprived them of the privi-

leges and rights which their vocation conferred upon them as passengers or travellers.

This decision has been much criticized. See The Albany Law Journal, vol. 20, p. 64, vol. 28, p. 461. I refer also to *Vann* v. *Throchmorton*, 5 Bush 41; *Manning* v. *Wells*, 9 Humphreys 746, and *McDaniels* v. *Robinson*, 26 Vermont 317.

I do not think it necessary to determine whether the "Shandon House" was properly speaking an inn or a boarding-house. According to what was said by the female defendant it may have been both. She said she accommodated any one that came along for board if they were respectable and proper looking persons, week boarders, or month boarders, or just gave them a meal, any one that came along if she had room for them she took them if they were respectable. For I am of opinion that, assuming it to have been an inn, the Jessetts were not guests there, but boarders, and that consequently the female defendant had no lien upon their goods at common law, and so no lien upon the piano in question.

The Jessetts had been boarding with her in the "Richards House" on Yonge street before she took the "Shandon House" on Anne street, and when she took the "Shandon House" they came with her from the "Richards House" to the "Shandon House": they took rooms at $50 a month and partly furnished them.

The Jessetts do not appear to me to have come to the female defendant's house as travellers, or to have been travellers, but to have come there as boarders, paying a fixed price for a fixed time for certain rooms which they themselves partly furnished, and they do not appear to have had any other home.

Under these circumstances I think it clear that they were not guests, but boarders. I think, therefore, the plea by the female defendant setting up a lien upon the piano in question at common law, by virtue of her being an innkeeper, must be decided against her.

It remains to consider her plea of a lien under R. S. O. ch. 147.

Inasmuch as at the common law neither a boarding-housekeeper nor a lodging-housekeeper had any lien upon the goods of his boarder or lodger for the board or lodging of such boarder or lodger, nor had an inn-keeper any lien upon the goods of a person received by him into his inn as a boarder, nor upon the goods of a person who having been at first received by him into his inn as a traveller, and having thereby become his guest, afterwards had changed his relation to the inn-keeper from that of a guest to that of a boarder, the object of the Act R. S. O. ch. 147, was to afford a remedy for this by giving to the boarding-house keeper and lodging-house keeper a lien on the baggage and property of his guest, boarder or lodger, for the value or price of any food or accommodation furnished to such guest, boarder or lodger, and by giving to the inn-keeper a like lien; so that by virtue of this statute the inn-keeper has now what he had not at common law—a lien upon the goods of a person received by him into his house as a boarder, and upon the goods of a person who, being in his house as a guest, has changed his relation to that of a boarder.

This statute, however, only gives a lien upon the baggage and property of the guest, boarder or lodger, and does not by its words, or by necessary inference, give any lien upon the baggage and property of third persons brought to the inn, boarding-house or lodging-house by the guest, boarder or lodger.

At the common law the inn-keeper was bound to receive a traveller into his inn as a guest, and such goods as he reasonably brought with him, and it was but reasonable that he should have a lien on such goods so brought, whether they belonged to the traveller or not; but he was not bound, nor was a boarding-housekeeper or lodging-house keeper bound to receive a boarder or lodger; nor does this statute impose any obligation upon them to do so; nor does

it impose any responsibility upon them for the safe-keeping of the baggage and property of the guest, boarder or lodger. I think, therefore, there is no reason for construing this statute, and that it would be highly unreasonable to construe it, so as to give a lien to the inn-keeper, boarding-housekeeper, and lodging-housekeeper, upon the baggage and property of third persons brought by a boarder or lodger to the inn, boarding-house or lodging-house. In my opinion, therefore, the female defendant has failed to establish a lien upon the piano in question under this statute, and her defence fails.

The motion will therefore be absolute, with costs, and the judgment will be entered for the plaintiff, and $5 damages, with full costs of suit.

WILSON, C. J.—Mrs. Anderson kept the Shandon House. She bought it for a temperance hotel. Mr. and Mrs. Jessett boarded with her for a considerable time at $50 a month. They owed Mrs. Anderson $299. Mrs. Jessett had a piano there and some furniture with which she partly furnished the rooms she and her husband occupied.

The piano had been obtained by Mrs. Jessett from the plaintiff upon what is commonly called a hire receipt. Mrs. Anderson detained the piano for her claim for the board and lodging of Mrs. Jessett and her husband. The plaintiff demanded it, Mrs. Anderson refused to give it up, claiming to have a lien upon it in respect of the account for board and lodging due to her by Mrs. Jessett and her husband. The defendant, Mrs. Anderson, claimed she had the right to do so, as she kept a common inn or house of public entertainment for the reception of travellers and others, and also because she kept a boarding-house. One question was whether Mrs. Anderson kept a public inn or hotel? If she did, her right was not denied to detain the piano.

The other question was if she did not keep a public inn or hotel, whether she had the right of detainer of and lien upon the piano for her debt as a boarding-housekeeper under the statute.

It was not denied that she did keep a boarding house.

The R. S. O. ch. 147 defines an inn "in the construction of the act" to be a hotel, inn, tavern, public-house or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests.

An inn-keeper is defined to be "the keeper of any such place."

By section 2, every inn-keeper, boarding-house keeper, and lodging-housekeeper, shall have a lien on the baggage and property of his guest, boarder or lodger, for the value or price of any food or accommodation furnished, etc.

Mrs. Anderson kept what she called a temperance hotel, a kind of hotel now very common, but which was utterly unknown in the days when *Calye's Case* was determined.

There may now be such a place as a hotel or inn, popularly so-called, which might not have been in former times, and which may not now be an inn, as understood at the common law.

The temperance hotel kept by Mrs. Anderson was not open to every one. She said, "We accommodate any one that comes along for board, if they are respectable and proper looking persons." There are two conditions mentioned here; first, "We take any one who comes along for board;" and "if they are respectable and proper looking persons."

As to *board*, the defendant did not, I daresay, mean to confine her statement to *board* merely; for she had a person who took only his lunch there, that is, part of his board, for board is confined to the taking of meals and does not apply to any other kind of accommodation.

She had persons who not only had their board, but their lodging as well, and it was her business to supply both board and lodging; and therefore I will not construe her evidence as applying only to board in the strict meaning of the term. "Board and lodging" include residence in the house as well as meals; so, perhaps, also, do "bed and board," in the common use of the term.

But the other condition on which she took boarders, "if they were respectable and proper-looking persons," by which I understand, if they were what is commonly called

genteel and of proper social standing, is a limitation, I think, not understood at the common law, which had for its special case all wayfarers and travellers who were able and ready to pay for their accommodation. I do not think Mrs. Anderson considered herself bound to receive all who presented themselves at her house, but such only as she approved of as desirable inmates.

The first section of our Act does not include boarding-housekeepers or lodging-housekeepers by name, nor by intendment; for such a house as Mrs. Anderson keeps is not only not an inn, as the term inn is commonly understood, but it is not a tavern, nor a public house, nor other place of refreshment, which latter term applies to such houses which are of the like kind with those before named. The word "hotel" applies to the kind of house which Mrs. Anderson keeps, and which she calls a hotel. A hotel is said to be a "superior lodging house with the accommodation of an inn, a genteel inn, a public house, an inn."—*Worcester's* Dic.; and a hotel so defined is not in my opinion a public and common inn at the common law. The special enactment relating to inn-keepers (including within that term hotel-keepers), and to boarding-house and lodging-housekeepers, is that they shall have a lien on the baggage and property of their guests, boarders, and lodgers for the value or price of any food or accommodation furnished.

I do not go over the cases relating to these different kinds of houses.

It is now clearly settled the common law imposed no duty upon and gave no lien to a lodging-housekeeper to take care of the goods of his lodger; and a boarding-housekeeper comes under the same rule: *Holder* v. *Soulby*, 8 C. B. N. S. 254, referring back to *Parker* v. *Flint*, 12 Mod. 255, and to *Calye's Case*, 8 Co. 32.

The inn-keeper had such lien not only upon the goods of the guest, but upon any property which the guest took to the inn, even if the goods had been stolen, so long as the inn-keeper did not know they had been wrongfully come by, because it was said the inn-keeper could not tell whose goods the guest brought to his inn, and he was bound to re-

ceive the guest, and was therefore bound to receive his goods too: *Robinson* v. *Walker*, 3 Bulstr. 269; *Johnson* v. *Hill*, 3 Starkie 172; *York* v. *Greenaugh*, Ld. Ray. 866; *Turrill* v. *Crawley*, 13 Q. B. 198; *Broadwood* v. *Granara*, 10 Ex. 423.

The lien is inseparably connected with the duty cast upon the inn-keeper to receive the guest and his goods; for if the person be not a guest, the inn-keeper is under no duty to receive his goods, and he has therefore no lien for its keep: *Binns* v. *Pigot*, 9 C. & P. 208.

As the boarding-housekeeper has now a lien upon the goods of the boarder or lodger, he will be bound to take such care of them as a prudent person will take care of his own goods. And if the lien do not extend to the goods of a third person, although the boarder takes them with him as his own to the house, such goods remain as they were before the passing of the Act, not subject to the lien; nor is the boarding-housekeeper responsible for their safe keeping. That condition of things [some of the goods being subject to the lien, and some not subject to it] may create a difficulty; for the boarding-housekeeper will not know upon what goods his lien attaches, nor will he be able to distinguish those goods, for which he is to some extent answerable for their safe keeping, from those for which he is not so answerable. It is a risk in some respects like that which every buyer runs in the purchase he makes; for he gets the title only which the vendor has to the goods, and not a title to those of which he has just the possession. So the pledgee gets the title only of his pledgor.

The legislature has given Mrs. Anderson a lien over the goods only of the boarder—a right which she did not possess before that Act. We cannot say she has any greater right than that which has been specially given to her. The result is that Mrs. Anderson had not the right of detainer of the piano, the property of the plaintiff, as against her, for her claim against her boarder; and the motion must therefore be absolute with costs.

O'CONNOR, J., concurred.

Judgment accordingly.

[CHANCERY DIVISION.]

RE TRENT VALLEY CANAL.

"RE WATER STREET" AND "THE ROAD TO THE WHARF."

Public works — Expropriation — Compensation — Ownership of roads—Soil vested in Crown—22 Vic. ch. 99, sec. 301—Parties.

Certain lands on which were two roads called "Water street" and "The Road to the Wharf," being required for public works, were expropriated by the Dominion Government, and the compensation therefor was claimed by the corporation of the village in which the roads were, and by one R. C. S. through or over whose lands the roads ran.

It appeared that the roads were established as public highways by the municipal authorities by by-laws in the years 1842 and 1845, respectively, under 4 & 5 Vic. ch. 10, secs. 39 and 51, although no compensation was paid to the owners therefor.

Held, that although originally the soil and freehold of the roads or streets may have remained in the private owner, subject to the public easement (the right of user); since the year 1858, at all events they became vested in the Crown as representing the Province of Ontario, by virtue of 22 Vic. ch. 99, sec. 301, and that the compensation therefor was payable to the Attorney-General of Ontario, who was ordered to be made a party in order to give protection to the Dominion Government in expropriating the land.

THIS was an appeal and cross-appeal from a report of the Master at Lindsay.

Certain lands were required and had been expropriated by the Dominion Government for the purposes of construction of the Trent Valley Canal, and as the title to some of them was not clear the compensation money was paid into Court, and on an application being made to the Court it was ordered that it be referred to the Registrar to settle an advertisement and notice to the parties appearing to be interested in the compensation money.

Pursuant to that order an advertisement and notice were settled and published and claims were sent in, and the matter again coming before the Court, upon hearing counsel for nearly all the parties interested, and having read the certificate of the Registrar as to the claims sent in it was referred to the Master at Lindsay to enquire who were the parties entitled to the said compensation

money or any part thereof, and in what proportions in respect to the lands and premises (setting them out.)

On this reference the corporation of the village of Fenelon Falls and one Robert Charles Smith, both claimed to be owners of two parcels of the lands called "Water street" and "The Road to the wharf" respectively under the circumstances set out in the judgment of the learned Chancellor.

The Master found as follows:

As to Water street—I find the facts upon evidence and a view of the *locus in quo* to be as follows:

The land was a flat rock covered by a thin growth of trees through which a track could easily be made. From a very early date in the settlement of the place a track was used over it by waggons, &c., as a portage from the landing place below the Falls to the lake above. At one point the track varied according to the height of the water in the river, but with this exception it generally followed the same route, excepting that R. C. Smith, at one point, many years ago, removed it further out from the river and planked it for a short distance.

In the year 1842 the County Council passed a by-law laying out a road along the margin of Cameron's Lake and extending down along the land in question forty feet wide. This road was two or three miles in length, it was never opened, and neither it or any road in lieu of it has been travelled at any point except where the portage road had already existed.

No road was laid out upon the ground pursuant to that by-law, nor was the road already travelled made to conform with it. No change in the existing state of things was made pursuant to the by-law. Mr. Jarden, a witness called on behalf of the village, says: "It was always used as a portage I think. I remember it before 1842. I don't know any difference in the user before and after 1842."

The witnesses all concur in saying that no statute labour nor public money was ever expended on it. The route of the road travelled does not correspond with the line fixed by the by-law. * * *

There is nothing to indicate any formal taking possession of the road by the public at any time. Originally it was a bit of country through which a heavy waggon could be easily driven. The next comer followed the first track, and so a road was gradually made. Since this time other roads have been opened which serve all purposes for which this was used.

I think these facts bring this road within the principle of *Regina* v. *Plunkett*, 21 U. C. R. 536.

It must be borne in mind, also, that no such width as 40 feet has been in use as a road. As nearly as I can make out the track is about 16 feet wide.

Then a large part of the forty feet next the river has been in the actual occupation of R. C. Smith or those through whom he claims since about 1864 as a piling ground for lumber.

The village also claims because a plan laid out by Stayner* shews Water street. If they rely upon this as a dedication, I think the soil reverts to the owner of the fee whenever the road ceases to be used as a highway; that it is dedicated to the public for a highway, and when the object for which it is so dedicated ceases, it reverts. This, I think, is the result of the authorities, and it is certainly in accordance with the principle which is recognized by our Legislature in making provision for the altering of plans and the revesting of streets in the owner of the land comprised in the plan.

The "Road to the Wharf"—is a different case from Water street. Here we have a well defined road cut indeed for the most part through solid rock, travelled always upon the same track for a great many years, and we find a by-law passed more than forty years, laying out a street upon the route which this street occupies. It seems to me that upon these facts we must assume that everything was regularly done; the owner was entitled to be paid for the land taken for the street, and in the absence of direct proof to the contrary we must assume that he was paid, or at all

* A former owner.

events we cannot assume that he was not paid. Whether he was or not, if the street was laid out under the by-law, the fee would now be in the municipality after the long adverse possession finding the public in possession for so many years of a street which was established under a by-law. I do not find any such evidence of dedication by the owner as would entitle him to claim the soil after it ceased to be used as a street.

From the first of these findings the corporation of the village of Fenelon Falls appealed, on the ground that the Master should have found the corporation entitled to the fee simple of "Water street," and entitled to be compensated therefor.

And the said Robert Charles Smith brought a cross-appeal against the second finding on the ground that the Master should have found him entitled to the fee simple of the "Road to the Wharf" and entitled to be compensated therefor. Both appeals came on together and were argued on December 23rd, 1885, before Boyd, C.

G. T. Blackstock and *Moore*, for the village of Fenelon Falls. The evidence shews that Water street is a highway, and therefore R. C. Smith is not entitled to compensation for it. It was opened by a by-law of the old Colborne district and was dedicated as well, by Stayner, a former owner. It is true there is no evidence of any expenditure of public money on the street, but there is nothing to shew that any was needed, and it is shewn that the road was rocky and so had no need of repairs. It has been used as a highway for more than forty years. There is no conveyance of "Water street" to Smith. The property in the soil of the street is vested in the corporation of Fenelon Falls: *Harrison's* Municipal Manual, 4th ed., p. 674 sec. 487, and p. 475, sec. 489. Smith has no rights here now, his affidavit of claim specially excepted Water street, and it is too late now to enlarge his claim: see 31 Vic. ch. 12, sec. 34, (D) &c.; 37 Vic. ch. 13, secs. 1 & 2, (D), and *Mytton* v. *Duck*, 21 U. C. R. 64.

McCarthy, Q.C., and *Barron*, for R. C. Smith. Is the fee simple in Smith or in the corporation? Was the Master's finding that the right to the soil was in Smith? The act of the Dominion Government in expropriating determined the rights of the corporation to the land as a street, because it ceased to be a street when stopped up: *Bailey* v. *Jamieson*, 1 C. P. D. 329. The soil is in Smith subject to the by-law and acts of dedication: *Leigh* v. *Jack*, 5 Ex. D. 264. The by-law was never carried out as contemplated, and the pathmaster never acted on it. The Municipal Council then had no power to open a road: 4 & 5 Vic. ch. 10, sec. 39. There is no proof that a copy of the by-law was sent to the Secretary of State, and it could not be of any effect until thirty days after that was done: sec. 47. The by-law, even if valid, did not divest the soil, as there was no provision in the statute for compensation: *Cæsar* v. *Orton*, 9 U. C. R. 100. No by-law at all is legally proved, and no presumption arises from its being thirty years old: *Dennis* v. *Hughes*, 8 U. C. R. 444. Even dedication does not divest the soil from the owner: *The Vestry of St. Mary, &c.* v. *Jacobs*, L. R. 7 Q. B. 47; *In re Morton, &c.*, 6 A. R. 323; *Lafferty* v. *Stock*, 3 C. P. 19.

Blackstock, in reply, referred to *Coverdale* v. *Charlton*, 4 Q. B. D. 104; *Re Lawrence and the Corporation of the Township of Thurlow*, 33 U. C. R. 223.

C. Robinson, Q.C., and *Nelson*, appeared on both appeals for the Dominion Government, and

McMichael, Q.C., and *Creelman*, for two mortgagees in same interest as Smith.

January 20, 1886. BOYD, C.—Water street was established as a public highway by the municipal authorities of Colborne in 1842, and the line of road, 40 feet wide, was defined in the plan and field rules of Deputy Provincial Surveyor Reid, and by a by-law of the corporation passed in that behalf. The owner of the soil where the road was situate was then James Wallis, who was examined as a witness. He was

then resident at Fenelon Falls; he had acquired an undivided half interest in the half lot in question in 1836, and a partition was made in 1842 by which he obtained the land on the east side of the river. His title to this part was confirmed by the trustees of Jameson, his co-owner in 1853, and in 1854 he procured a map and plan to be made by Mr. Caddy, a lithographed copy of which is put in. Upon that plan by lines and dots a considerable part of the site of Water street is delineated, though it is not marked by any name on the map.

The Wallis title was afterwards acquired by Thomas S. Stayner in 1862, and he procured a map and plan of the premises to be made in 1865 by Mr. Deane, which was filed in the Registry office in the next year. Upon this plan Water street so designated is found accurately delineated according to the description in the by-law, and various lots are laid out fronting on this street. Dickson's plan of 1875 is substantially identical with that of Dean as to Water street and the lots thereon.

The present claimant, R. C. Smith, derives title under Stayner, and in his affidavit of claim made on the 14th April, 1884, he sets forth his immediate title as under deed from Geo. Kempt to him dated 13th November, 1876, by which is conveyed among other lands lots 1, 2, 3, 4 and 5, north of Water street. It appears by a later conveyance that there was some error as to the site of lots 3, 4 and 5, and that they should have been described as "Block K" (*i.e.*, north of Water street.)

Mr. Smith also relies upon a confirmation deed of 11th May, 1883, from Margach, which conveys the part of lot 23 now under consideration by reference to Mr. Deane's plan of 1866 (*i.e.*, as filed). It is under this deed that he claims the soil of Water street.

In presenting his claim to the Court, Mr. Smith expressly disclaims the ownership of "the street having a width of forty feet, and known as Water street." See his affidavit, par. 3, and for further elucidating what he claims, he refers to plan "A" as an exhibit (see par. 4 of affidavit), upon

which plan Water street is delineated, as in Deane's and Dickson's plans. The order on further directions made upon this claim by my brother Ferguson on the 23rd April, 1884, refers it to the Master with the same exception as to Water street, so that the finding now in appeal is a variation of this order by reporting the land covered by Water street as vested in Mr. Smith, who then made no claim to it. The finding is a departure from the order of reference, and in contravention of it.

Mr. Smith has lived in the neighbourhood of Fenelon Falls for the last seventeen years and well knew the locality. He says in his evidence, p. 66: "It (*i.e.*, Water street) was used as a street, and I supposed it was one when I put in my claim. I saw it was fixed at forty feet by the by-law: when I instructed my solicitor I supposed a forty foot road had been opened there. Since I made my claim I have been advised that it is not a legal road: that it is on my land and that I am the owner of it." Upon such evidence the Master thought it competent for him to vary the order of reference by enlarging Mr. Smith's claim and finding the ownership of the soil of Water street to be vested in him.

This Water street was laid out by by-law under 4 & 5 Vic. ch. 10, sec. 39 and 51. The authority given by that Act is sufficient, in my opinion, to justify opening and making or establishing a new road; *In re Brown and The Municipal Council of the County of York*, 8 U. C. R. 596. It was held in *Cæsar* v. *Norton*, 9 U. C. R. 100, that a road laid out under that act against the consent of the owner and without any compensation being paid to him (for which the act appears to make no provision) did not vest in the Crown. The Court there assumes that the owner of the soil had not lost all his rights therein, but the measure of those rights is not defined—whether such an interest as entitled him to compensation or continuing proprietorship, with the right of the public to use it as a highway.

It was urged that there was no evidence of any compliance with sec. 47, of 4 & 5 Vic., which provides that

an authentic copy of the by-law is to be transmitted to the Secretary of the Province, and that no by-law shall be of force till thirty days after such transmission, and the intent of this appears to be that the Governor in Council may exercise his power of disallowance. I do not feel pressed by this objection: the by-law was signed by the Warden, whose duty it was to transmit the copy, and after such a lapse of time and user it is to be presumed that all the statutory formalities were duly observed: *Williams* v. *Eyton*, 2 H. & N. 771.

As to this street being only forty feet wide that was not an unusual thing in early times. We find a ratification of the practice in 12 Vict. ch. 81, sec. 189 (1849), which enacts that no road thereafter laid out shall be more than ninety nor less than forty feet in width, "provided always, that nothing in that section shall extend or be construed to extend to affect any road now established under the provisions of any Act theretofore in force." See also 22 Vict. ch. 99, sec. 307.

4 & 5 Vict. ch. 10, was in some respects an extraordinary Act, and was not long allowed to continue in force, as was pointed out in *Regina* v. *Rankin*, 16 U. C. R. 304.

Water street being, as I have found it, a public highway, the only matter which remains is to determine as to the ownership of the soil and freehold of that highway. Whatever may have been the position in this regard prior to 1858, the statute of that year in secs. 301 and 302 provides for all possible highways, and this must fall under one or the other section. These sections are continued as sections 525 and 527 of the Municipal Act of 1883, and though many judicial opinions have been expressed upon their scope and effect, I think that a satisfactory solution of their meaning has yet to be pronounced by an Appellate Court.

The intermediate history of these sections is this: After 1858 they appear in the Consolidated Statutes of U. C., 1859, as secs. 314 and 336: the former under the

heading "Highways vested in the Crown;" the latter under the heading "Highways in cities, townships, towns, and incorporated villages." They next appeared in the Canada Act of 1866, 29, 30 Vic., cap. 51, as secs. 316 and 338, under like heads.

After Confederation there is a striking change in the manner of their first appearance in the Ontario Statutes of 1873: 36 Vic., cap. 48. Sec. 405, corresponding to sec. 316 of the Act of 1866, is headed "Freehold in the Crown"; and sec. 407, corresponding to sec. 338 of the Act of 1866, is headed "Possession in Municipality." From this they are carried into the Revised Statutes of Ontario of 1877, as secs. 487 and 489 of cap. 174, under the same heads as in 36 Vic. cap. 48; and under the same heads they are found in the last Municipal Act of 1883, as I have already cited them.

With regard to the decisions of the Courts, the later opinion appears to be that the sec. 527 (*i.e.* 336 of C.S.U.C., cap. 54) is restricted to streets in municipalities originally dedicated to the public by or derived for value from private proprietors, and as to these the soil is vested in the municipality and not in the Crown. That I understand to be the effect of *Mytton* v. *Duck*, 26 U. C. R. 61 (1866), a decision which adopts and approves of the view expressed to the same effect by Burns, J., in *The Corporation of the Town of Sarnia* v. *Great Western R. W. Co.*, 21 U. C. R. 64 (1861). McLean, J., had a somewhat different opinion, holding that the property vested in the municipality was qualified, and not a freehold in its large sense. In *Kronsbien* v. *Gage*, 10 Gr. 573 (1864) Vankoughnet, C., suggested a solution of the difficulty by holding that the freehold may be in the Crown quite consistently with the road being vested in the municipality, which was charged with the custody and repair of it. A very persuasive argument in favour of this being the true view may be derived from the manner in which these sections have been classified and entitled by the Ontario Legislature. It is to be observed, also, that the latter section does not speak of the soil and

freehold being vested in the municipality, but only that the road, street or other highway shall be so vested. This is language commonly used in English statutes, and its meaning is exhausted by confining it to the surface, and to such depth thereunder as may be required for the purposes of the particular street, according to its location and the requirements of the inhabitants. The latest judgment on this point is that of Field, J., in *Gaslight & Coke Co.* v. *Vestry of St. Mary's, &c.*, 1 Ca. & Ell. 368, which was affirmed in appeal, 15 Q. B. D. 1, and is based upon *Corrodale* v. *Charlton*, 4 Q. B. D. 104. Unless the soil and freehold of the street be vested in the village of Fenelon Falls, I find no authority for awarding them any compensation in respect of the public easement as a highway being destroyed by expropriation of the land. Each individual whose property is specially injured may recover damages, but probably not a corporation in whom is vested a roadway for the general use of the public. No land belonging to the municipal corporation is taken, and the injury to the easement is not one in which the corporation as such is pecuniarily interested. No means are available for ascertaining the extent of damage to the public who use the street, which might be recoverable by the corporation as trustees for the public. Upon questions germane to this: *Rolls* v. *The Vestry of St. George, &c.*, 14 Ch. D. 785, may be profitably consulted.

But in the view I take of this case it is not needful to pursue this inquiry further. Originally it may be that the soil and freehold of this street remained in the private owner, subject to the public easement, but since 1858, at all events, I am compelled to think that it became vested in Her Majesty by virtue of 22 Vic. cap. 99, sec. 301. I have not fully investigated whether there was not some earlier enactment to a like effect, but this section appears to me to embrace the present case. Under 4 & 5 Vic. no provision is made for compensation to the owner, and it is not to be inferred that compensation was actually made to him. He was a witness and

was not asked and did not say anything upon the point This street was not, upon all the evidence, one laid out directly or inferentially by the individual proprietor so as to make sec. 322 of the Municipal Act of 1858 applicable. On the other hand, it is within the definition of a highway given in sec. 300, as being a road "laid out by virtue of an Act of Parliament of Upper Canada," and there being no other provision as to the freehold, it is within section 301 as being a highway "laid out according to law."

I suppose, therefore, that this road is vested in the Crown as representing the Province of Ontario, and that the Attorney-General should be added as a party in order to give protection to the Dominion in expropriating this particular piece of land. This aspect of the case was not presented or argued, and it may be I have overlooked some statute which would alter the result, but at present I think that the Attorney-General of this Province should be brought into the proceeding, and upon that being done I am willing to hear further argument if the parties desire it. I may say that I regard all the evidence, which was used in argument to indicate a dedication, as going rather to shew a recognition of, and an acting upon, the by-law by all parties interested in the lands abutting on the road called Water street, and Mr. Smith's personal observation of the user of this road for seventeen years, and his attitude in launching his claim are very cogent evidence that the *locus in quo* was to all intents and purposes a highway for public convenience and use. The fact that no statute labour was done and no municipal money was expended upon it, is not singular when it is remembered that it is all a level rocky surface which cannot be improved for the purposes of a thoroughfare.

My conclusion does not detract from the result I have arrived at as to the ownership of the bed of the river adjoining this Water street being in Mr. Smith. Though the soil of the highway is vested in the Crown, no presumption will arise in the circumstances of this case,

that such ownership is to extend to the middle of the river bed.

The facts of the case as to the "Road to the Wharf" are pretty much the same as in reference to Water street. It was laid out by the Council as a highway in 1845, under the same Municipal Act of 1841, and I think the proper conclusion is that the soil and freehold of that road is in the Crown for the purposes of the Province of Ontario, and the same direction should be observed in adding the Attorney-General as a party.

The conclusion of the Master as to both these streets will be, therefore, set aside without costs, and if no further argument is desired it will be declared that the soil and freehold of both is vested in Her Majesty on behalf of the Province of Ontario.

Nice questions may arise upon the equity of the case as to whether the Crown is a royal trustee of the fee in the land, or its value, when the public easement is extinguished for the municipality or the original owner, who was deprived of the land without compensation, but upon these I need not enter. As a matter of title I simply hold that the Attorney-General of Ontario representing the Crown should be before the Court.

The Attorney-General of Ontario was subsequently made a party, and the matter was re-argued on February 24, 1866, before Boyd, C.

The following counsel appeared:

McCarthy, Q.C., and *Barron*, for Smith.
Irving, Q.C., for the Ontario Government.
G. T. Blackstock, for the Village of Fenelon Falls.
Nelson, for the Dominion Government.
McMichael, Q.C., and *Creelman*, for mortgagees, and the same line of argument was followed.

May 5, 1886. BOYD, C.—The additional evidence which I directed to be furnished now makes it plain as a matter

of fact that no compensation was paid to the owner upon the expropriation of the land mentioned in the by-law. He made no claim therefor, but intended to relinquish all interest therein and in the land as a gift to the village. This goes to confirm my previous opinion that the soil of the roads is vested in the Crown, represented by the Attorney-General of Ontario. To him as a public officer is the compensation payable, and even if I had the jurisdiction I do not think I should interfere with his discretion, or rather that of the Lieutenant-Governor in Council, as to the ultimate disposition of this fund.

It appears to me that the canon of the construction urged by Mr. McCarthy that private rights are not to be considered as interfered with by statutes apparently affecting these rights unless compensation is given to the individual proprietors, is not of much force in this case. The material injury arose when the land was first taken in 1842 for the purposes of the highway: it was a comparatively minor matter after that was done to declare in 1858 that the soil of the street should be vested in the Crown. The land under the highway is of no value to the original owner and instead of conserving individual titles, it may well be deemed better for all purposes to have the titles to such land in a uniform condition of tenure, which can only be secured by vesting all in the Crown. When no longer needed for public use, the infallible justice of the Crown will regard the rights of all interested, whether individuals who have received no compensation for the land once theirs, or corporations who have spent public money in the construction and maintenance of the road. In *unique* cases such as this, where the individual has intended to make a present to the corporation, and the latter has made no expenditure on the street, the Crown can as well as the Court administer the money which represents the land and street, so as to do justice in the premises.

As to costs.—I will not disturb my former judgment as to costs, *i.e.*, that no costs should be given except that as to the re-argument, the Attorney-General of Ontario should get his costs out of the fund in question.

G. A. B.

[QUEEN'S BENCH DIVISION.]

WEIR v. THE NIAGARA GRAPE COMPANY AND THE NIAGARA WHITE GRAPE COMPANY.

Registry Act, R. S. O., ch. 3, sec. 74—Sale of land—Subsequent conveyance—Registration—Priority—Jurisdiction.

Held, (following *Truesdell* v. *Cook*, 18 Gr. 532, and *Dynes* v. *Bales*, 25 Gr. 593,) that the grantee in a subsequent conveyance, registered before the registry of a previous conveyance from the same grantor, of which the grantee had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that this Court had power so to order upon such terms as seemed just.

STATEMENT of claim :—

3. That on or about 31st March, 1884, the plaintiff became and still was the owner in fee of the south-west quarter of lot number thirteen in the third concession of the Township of West Flamboro. 4. That he became such owner without notice of the agreement hereinafter mentioned. 5. That on or about the 4th March, 1885, the defendants, without colour of right and without permission, and without having any title to said lands, registered a certain agreement, dated the 7th of February, 1882, and made between the Niagara Grape Company and one John Kievell as against the said land. 6. That the said agreement was a cloud on the title to said land. 7. That he was unable to sell the said land so long as this cloud remained on his title. 8. That he had applied to and tendered a release of said agreement to the defendants for their signature, but they refused to sign it. 9. That before action the Niagara Grape Company transferred all their interest in said

registered agreement to the defendants, the Niagara White Grape Company, with notice that the plaintiff was a *bonâ fide* owner of said land, and without the plaintiff having any knowledge of the said agreement. 10. That the defendants, the White Grape Company, were organized with the same officers and stockholders as formed the said Niagara Grape Company, and that the only change made was by the insertion of the word "White" in their incorporated name; and in fact the said companies were identical; and the plaintiff claimed to have the said agreement delivered up to be cancelled and the registration thereof vacated in so far as the same formed a cloud on the title to the south-west quarter of lot number thirteen in the third concession of the township of Flamboro' West; and further and other relief.

The defendants, the Niagara Grape Company, denied the 3rd, 4th, 5th, 7th, and 8th allegations of the plaintiff, and said that if the plaintiff did become the owner in fee of the said land, he became so by release of the equity of redemption by the said John Kievell and without payment of any money consideration whatever, the plaintiff being the mortgagee, and the said John Kievell, the mortgagor of the said land: that the plaintiff, if he became the owner of said land, became so with full knowledge of the said agreement: that long before this action they transferred all their interest in said registered agreement to the Niagara White Grape Company, who were then the parties entitled to all benefits thereof. They set out the agreement, and said that under it they delivered to the said John Kievell 400 one and two-year old single eye vines of the grape called the "Niagara Grape," of which one-third were two years old, to be planted as set forth in said agreement, and that said John Kievell accepted, received and planted said vines under the terms and conditions of said agreement on said land, but did not perform any of the conditions or promises of said agreement to be by him performed, nor pay the price or any part thereof, the whole amount thereof being still due and owing to defendants,

who had offered the plaintiff to carry out their part of the said agreement, or to take possession of said vines as set forth in said agreement, but plaintiff had refused to carry out the part of said agreement to be performed by John Kievell, or to allow defendants to take possession of said vines by reason of said default as set forth in said agreement, plaintiff thereby wrongfully endeavouring to deprive defendants of their property without giving any consideration therefor: that defendants were, under the terms of the agreement with said John Kievell, joint owners with said John Kievell of said vines, and as such entitled to the possession thereof: that under said agreement the property in said vines never vested in the said John Kievell, or if it did, it became divested by reason of the default of said John Kievell in the performance of his part of said agreement: that defendants offered to have the registration of said agreement vacated if the plaintiff would allow them to take possession of said vines, as they were entitled to do under the terms of said agreement.

The defendants submitted that they were entitled, under the terms of said agreement, to take possession of and remove said vines from the said land, and to be paid their costs of suit.

The defendants, The Niagara White Grape Company, denied the 3rd, 4th, 5th, 7th, 8th, 9th and 10th allegations of the plaintiff, and that at the time of the assignment to them by the defendants, The Niagara Grape Company, they had any notice or knowledge that the plaintiff was a *bonâ fide* owner of said lands, and that they were organized with the same officers and shareholders as formed the Niagara Grape Company, and the companies were identical, and set up in other respects the same defence as the defendants the Niagara Grape Company.

Issue.

The case was tried at the last winter sittings of this court at Hamilton by Galt, J., without a jury.

It appeared that by indenture of mortgage, dated September 1, 1876, John Kievell conveyed to John Weir,

the elder, the west half and the north-east quarter of lot number thirteen in the third concession of West Flamboro' for securing the sum of $4,500, and interest at eight per cent., payable as therein set forth: that by indenture of mortgage, dated 3rd March, 1880, the said John Kievell conveyed to the plaintiff the west half of lot number thirteen in the third concession of West Flamboro' for securing the sum of $800 and interest at 8 per cent., payable as therein set forth: that by indenture of bargain and sale, dated 31st March, 1884, the said John Kievell conveyed to the plaintiff the south-west quarter of said lot thirteen for the expressed consideration of $4,255: that the plaintiff had become entitled to the first mentioned mortgage, and that the consideration money of $4,255 was made up of the moneys secured by the said mortgages, and then due for principal and interest: that the following writing was entered into between the plaintiff and John Kievell:—"West Flamboro,' 31st March, 1884. I hereby agree to lease to John Kievell fifty acres of land, being south-west quarter of lot 13, 3rd con., West Flamboro', for one year, for the sum of $300 per year, said rent to be paid half yearly, namely, on the 1st April, 1884, and the 1st October, 1884, said John Kievell to work the place in a good and workmanlike manner, taking good care of the fruit trees upon the said property. I also agree to allow the said John Kievell, his heirs or executors, to sell the above named property, south-west quarter of lot No. 13, 3rd con. of West Flamboro' upon, within eleven months from the date of these articles, payment to me of the sum of four thousand two hundred and fifty-five dollars, with interest thereon at the rate of 7 per cent. per annum. Failing to execute deed as above required, I will pay the sum of one thousand dollars. We hereby agree to the above. John Weir, L. S. John Kievell, L. S."

Under an agreement, dated 7th February, 1882, made between the Niagara Grape Company, of the first part, and the said John Kievell, of the second part, four hundred one and two-year old single eye vines of the grape called

the "Niagara Grape" were agreed to be sold, and were delivered to the said John Kievell, and were by him to be set out, and were set out, upon the said land mentioned in the said agreement as being a part of the west half of Lot 3, 3rd Concession of West Flamboro', under the provisions of the said agreement, the only other part of which material to be set out was the following: "And it is further agreed by and between the said parties that said party of the first part shall be and remain joint owners of said vines, and all grapes produced thereon for ten years from this date, and shall receive one-half of the net value thereof or amount received for all the grapes produced from year to year from and after said vines shall commence to bear, such annual payments to be made on the 15th day of November in each year, or as much sooner as said party of the second part shall, from time to time, receive pay for the grapes sold; provided, however, that in case the said grapes are all marketed, the net amount received therefor shall be the gross amount so received, deducting freight from place of shipment, and commission for selling only: in case the grapes are not so sold, the net value shall be the market value at the best market reasonably accessible, deducting ordinary freight and commissions for selling; provided further, that when, at any time, the payments made to the party of the first part shall amount in the aggregate to the sum of $1.42\frac{1}{2}$ for each vine furnished, together with six per cent. annual interest on the same, from time to time unpaid after January 1st, 1885, then such joint ownership shall cease, and thenceforth all the grapes produced shall belong to said party of the second part. And it is further agreed by and between said parties that in case for any reason whatsoever, the premises upon which said vines may be set shall pass from the actual possession, occupancy or control of said party of the second part, without the written consent of the party of the first part, or in case any judgment order or decree for the sale of said premises shall be made or granted, or in case any legal or statutory steps for

the sale of said premises shall be commenced or taken, then, in either event, the whole sum then unpaid upon this contract shall, at the option of the said party of the first part, its successors or assigns, be and become fully due and payable immediately thereupon, and shall be a lien, charge, and incumbrance upon the said land and premises, with its hereditaments and appurtenances, so adjudged, ordered, decreed, or threatened to be sold, as well the lands upon which said vines are situate as the balance or remainder thereof. And it is mutually covenanted and agreed by and between the parties to these presents, that all and singular the covenants and agreements herein contained to be performed by the party of the second part shall bind the heirs, personal representatives, grantees, and assigns of the said party of the second part, and shall run with the land on which said grape vines shall be so planted and as appurtenant thereto, and all and singular the grapes which shall from time to time be produced by said vines are hereby pledged to the parties of the first part as security for the faithful performance of each and every of said covenants."

The said mortgages were registered respectively on the 15th September, 1876, and the 6th March, 1880, said deed on 2nd April, 1884, and said agreement on 4th March, 1885, and before the expiration of the lease, granted by the plaintiff to Kievell. The plaintiff swore that the registration of the agreement of 7th February, 1882, had affected him in his dealing with the land: that he had agreed to sell the property the previous spring, and met in Mr. Wardell's office with the party to whom he was to sell it, and made all arrangements for the papers to be prepared: that he thought they were drawn out, and then Mr. Wardell found that this agreement had been registered against the property, and in consequence the party would not purchase the property.

The learned Judge gave judgment as follows: "In my opinion the plaintiff is entitled to have the agreement removed, as being a cloud on his title, for the following

reasons. I consider that, bearing in mind the position of the parties at the time when the conveyance was made from Keivell to the plaintiff, namely, that then their position was that of mortgagor and mortgagee, it was the intention of the parties that that position should be changed, and that Weir should become the purchaser of the property, and that Kievell should be relieved from his covenant to pay the money. It is true that Mr. Weir, the plaintiff, subsequently, according to the evidence of Mr. Kievell, entered into an agreement by which he bound himself to allow Kievell to redeem within eleven months, otherwise that he Weir would pay the sum of $1,000. I do not think it was the intention of the parties that this should change their position, and should again constitute Weir mortgagee and Keivell mortgagor. I find that at the time when Weir took the conveyance of the equity of redemption he had no notice of the agreement now claimed by the defendants. Therefore, in my opinion, the judgment should be in favour of the plaintiff that the agreement in question should be removed from the register, as forming a cloud on Weir's title, and that the defendants should pay the plaintiff's costs."

On the 30th of May, 1886, *Bell* moved to set aside the judgment directed to be entered for the plaintiff and to enter it for the defendants, on the ground that the judgment so directed was wrong.

Osler, Q. C., showed cause.

June 29, 1886. ARMOUR, J.—I do not think that the evidence established, as was contended, that the relation of mortgagor and mortgagee continued to subsist between Kievell and the plaintiff after the conveyance of the 31st of March, 1884, and that Kievell still continued, notwithstanding that conveyance, to be entitled to the equity of redemption of the said land, subject to the payment of the consideration money mentioned in that conveyance, but I think that that conveyance and the instrument of lease of the same date shewed the true relations thereafter subsisting between them.

The learned judge found, upon the evidence, that the plaintiff was a subsequent purchaser for value without actual notice of the agreement of the 7th of February, 1882. Such agreement must therefore be, under section 74 of the Registry Act, adjudged fraudulent and void against the plaintiff.

The question, however, arises whether, under the circumstances of this case, this court has jurisdiction to grant the relief prayed for.

This agreement was entered into by the parties to it in good faith and without any fraud of any kind, and was a valid agreement, and one capable of registration, as and being an instrument whereby land was charged, encumbered, or affected, and the defendants at the time they registered it had a legal right to register it.

If it had been registered prior to the conveyance of the 31st of March, 1884, the plaintiff could have only taken the land subject to it: having been registered after that conveyance it is to be adjudged fraudulent and void as against the plaintiff.

In *Ross* v. *Harvey*, 3 Grant 649, the bill was filed by the plaintiffs against Harvey and Thompson, alleging that the plaintiffs had obtained a conveyance of certain land from Harvey which they had neglected to register: that afterwards Harvey, "intending to defraud the plaintiffs of their security," conveyed the said land in fee by an indenture purporting to be for a valuable consideration, when no consideration was in fact paid, and that Thompson had caused this indenture to be registered, whereby "he acquired the legal estate in the premises in fraud of the plaintiffs." The bill prayed that Thompson might be postponed to the plaintiffs, and that his deed might be delivered up to be cancelled, and that he might be decreed to execute any instrument that might be necessary to relieve the plaintiff's title. The bill was taken *pro confesso*. The court said: "It is considered that the mere circumstance of Thompson having received a conveyance of the land in question, purporting to be for valuable con-

sideration, and having registered it while the plaintiffs neglected this precaution, although he suffered Harvey to remain in possession of the land, did not constitute any ground for the interference of the Court. It is asserted, however, in the bill and admitted by both the defendants, that Harvey executed the conveyance in question for the purpose of defrauding the plaintiffs of their security, and that Thompson caused it to be duly registered on the day of its execution, whereby he had acquired the legal estate 'in fraud of the plaintiffs.' We think these passages in the bill amount to an allegation that the defendants executed and received and registered respectively the deed under which Thompson claims, for the purpose of fraudulently acquiring a real or apparent priority over the plaintiffs, and as the deed in question purporting to be for valuable consideration, has every appearance of conferring such priority, and as the existence of a cloud upon a title is recognized by this Court as a sufficient ground for its interposition, we think that the bill discloses a sufficient case to warrant the relief which is sought."

In *Hurd* v. *Billinton*, 6 Gr. 145, the plaintiff gave to one T. a power of attorney to make contracts for the sale of lands, but the power did not authorize T. to convey the lands or to receive the purchase money. T., as such attorney, entered into contracts for the sale of the said lands and subsequently executed a conveyance purporting to convey the lands to the purchaser, the defendant, and received the purchase money. The plaintiff filed his bill for the purpose of setting aside these contracts, and for an order that the deed executed in pursuance thereof should be delivered up to be cancelled, as forming a cloud upon the plaintiff's title, and that the registration of the deed might be enjoined. Esten, V. C., said: "We entirely acquit the defendant Billinton of all actual fraud in this transaction, with which he is not indeed charged. * * We do not think the circumstances of the case are sufficient, on the ground of constructive fraud, to warrant the Court in decreeing the cancellation of the contracts, and we think they must be

left in the defendant's hands to make the most of them at law if he should be so advised. * * It is understood to be the practice of the Court not to decree the destruction of instruments, as forming a cloud upon title, when they are void on the face of them. In the present case reference must necessarily be had to the power of attorney in order to support the deed, and when the power is referred to it appears that the deed is void. It is true that a memorial registered may be supposed to form a cloud on the title, as a party seeing it might naturally conclude that the attorney had authority to execute the conveyance. No case of this sort has, so far as we know, arisen. Upon a reasonable examination into the facts of the case it will appear that the deed registered is a void deed, and therefore forms no cloud upon the title. We do not therefore think that we should decree the cancellation of this deed or enjoin its registration."

In *Harkin* v. *Rabidon*, 6 Gr. 405, after 30 years' possession of land by a person to whom the owner, one Thibodo, who was the grantee of the Crown, had conveyed the property in exchange for other lands, the vendor discovered a defect in the title by reason of the non-registry of the conveyance in the proper office, and executed a deed to the defendant, who was in possession of a portion of the property for several years under the vendee's heir. The Court (Esten, V. C.,) held, on a bill filed for the cancellation of this deed, that it must be cancelled, regarding the transaction between Thibodo and the defendant, evidenced by this deed, as a gross fraud.

On re-hearing, 7 Gr. 243, the Chancellor said: "This is a suit to have a deed of bargain and sale, executed on the 19th July, 1855, by which the premises in question in this cause were conveyed by the defendant Thibodo to the defendant Rabidon, set aside for fraud, and as forming a cloud upon the plaintiff's title. It occurred to me at the hearing that it might be found that the plaintiff had a good legal title by estoppel, and, assuming the plaintiff to have a good title at law, it occurred to me to doubt whether the

Court could interfere to cancel a deed which would be pronounced void and ineffectual in a Court of law. * * But, assuming the plaintiff to have a valid legal title, I am clear, nevertheless, that this Court has jurisdiction, and that it is bound, under the circumstances of this case, to direct the deed of July, 1855, to be cancelled. In this country the registry office is practically the root of every man's title. Now, what do we find here? The plaintiff's title has not been registered, but a conveyance from Thibodo, the patentee of the Crown, to Rabidon has been placed upon record. Now, would this Court have refused to decree the cancellation of that deed, even though it had been established that the plaintiffs would prevail at law, and that Rabidon had acted in good faith? Would it have been a reasonable answer to such a bill that the plaintiffs could defend themselves at law? Would not the plaintiffs have had a right to say, 'True we can defend ourselves at law, but we have a right to come into equity for relief which we cannot have at law; we ask to have that deed cancelled for the purpose of being placed beyond the reach of those dangers and annoyances which the improper use of it would at any moment entail, and for the further and more material purpose of having that removed which forms not only a cloud upon our title, but in effect an incumbrance, detracting as it does most materially from the market value of our property'? I cannot say I have much doubt upon that point. But in the present case, where the deed has been procured by gross fraud, the duty and the jurisdiction of the Court are, I apprehend, very clear."

In *Shaw* v. *Ledyard*, 12 Gr. 382, the bill alleged that the plaintiff was the owner in fee of certain land: that the sheriff of the county had assumed to convey it to the defendant Ledyard for arrears of taxes: that there was no sale of the lot by the sheriff to authorize the conveyance, and that the conveyance was wholly illegal and unauthorized, and that it had been registered: that Ledyard had executed a mortgage of the land to one Meredith, which had been registered, and praying for a cancellation of both

said instruments, and that the registration might be vacated.

A general demurrer was filed for want of equity. Mowat, V. C., said: "The first objection was, that the bill does not allege any privity between the plaintiff and the defendants, or any fraud by the defendants, and that the bill, in the absence of such privity or fraud, will not lie. I am against this objection. No authority was cited in its support, and certainly reason is opposed to it. If two strangers, even through a mere mistake of fact or law, claim a man's property, and put on registry an instrument setting forth such claim, or purporting to deal with it, such a claim, however unfounded, must prejudice the sale of the property, and may create embarrassment otherwise; and I would be very sorry, unless compelled by the authorities, to hold that the owner is, in such a case, without remedy. But a deed by a sheriff, in his official capacity, professing to convey what he has no right to convey, presents grounds for relief which may not apply to a transaction between two entire strangers. * * I suggested at the close of the argument whether the bill was not open to another objection not taken at the bar, viz., that the bill does not allege possession in the plaintiff, or excuse the want of such an allegation by shewing that the land is wild and unoccupied by any body."

In *Buchanan* v. *Campbell*, 14 Gr. 163, the bill was filed praying to have a deed executed by the defendant Alexander Campbell to his son, the other defendant, the registration of which took place on the 9th of February, 1858, declared fraudulent and void, on the ground that the same was voluntary and as such void as against the plaintiff, who was a *bonâ fide* purchaser for value. VanKoughnet, C., said: "This bill is filed to set aside and remove from registration a deed made without valuable consideration, followed by a deed to the plaintiff for valuable consideration. I was under the impression at the hearing (though I made a query in my note book at the time) that this Court had, at the instance of a purchaser and grantee for value, removed from off the registry and declared void a

deed to a voluntary grantee, as forming a cloud upon the title of the purchaser for value. I have only seen, however, one case in which this was done, *Ross* v. *Harvey*, and the circumstances there differed from the ordinary naked case stated here. It was there alleged and confessed that the voluntary deed had been prepared and executed for the purpose of practising a fraud upon the plaintiff, to whom it was also intended at the time to convey the land, and that this voluntary deed had been kept secret and was afterwards set up and used to embarrass the plaintiff. The Court thought a conveyance made in pursuance of such a deliberate scheme ought to be removed out of the way. In this case it is not alleged that the voluntary conveyance purported to be for value, and I understand in fact it does not so purport. It is proved that the plaintiff was aware of its existence when he took the deed to himself for value. It is not alleged that this voluntary deed was made in fraud. Is there any authority then for making such a decree as plaintiff asks? In *De Hoghton* v. *Money* Lord Romilly asks if any one had ever heard of such a decree. In *Oxley* v. *Lee* Lord Hardwicke says he does not remember any case in which this Court had decreed a voluntary conveyance to be set aside, at the instance of a purchaser for value, unless there were circumstances of fraud attendant. It is of the doctrine of this Court not to set aside an instrument void upon the face of it, or the invalidity of which can be readily ascertained; and it was held in *Hurd* v. *Billinton* that the registration of such an instrument made no difference in the application of the rule. Here any one looking at the deed attacked would see that it was voluntary upon the face of it, and the registration of course shews the same thing."

In *McGregor* v. *Robertson*, 15 Gr. 543, Mowat, V. C., held that the plaintiffs having the legal title to land, of which defendants had been in possession for many years, were not entitled before establishing their right at law to set aside in equity, as clouds on their title, instruments to which they were not parties under which they made no claim, and which they did not allege to be fraudulent.

In *Truesdell* v. *Cook*, 18 Gr. 532, the plaintiff, being the owner of land, put his father into possession of it. The father conveyed it to one John Cook, who reconveyed it to the father and his wife for life, and the remainder to one William Henry Cook. The bill prayed that the conveyances made to and by the defendant John Cook might be delivered up to be cancelled and removed from the Registry. Strong, V. C., said: "On behalf of the defendants Mr. Moss objected, first, that this was a mere ejectment bill, which the Court has no jurisdiction to entertain; and secondly, that the Statute of Limitations was a bar to the plaintiff, William Truesdale, the father, having acquired a prescriptive title to the land; or, at all events, that the plaintiff's right was barred by reason of his having been out of possession for more than twenty years. I am of opinion that this bill must be dismissed on both grounds. I am of opinion that in a proper case, where the plaintiff, having a legal title, has done all he possibly can to assert his title at law, a bill may be maintained in this Court to compel the delivering up of a deed which appears to be void at law, provided it is a registered instrument. I find no authority for saying that the existence of an unregistered deed, passing no interest, and not appearing to be a link in the title, can give ground for the jurisdiction; but the registration has such a tendency to embarrass the title of the true owner, that there would be a great want of remedy if this Court could not decree cancellation in such a case."

In *McDonald* v. *The Georgian Bay Lumber Co.*, 24 Gr. 356, one Dodge was adjudicated a bankrupt in the State of New York on November 15, 1873. On the 14th February, 1874, the bankrupt conveyed all his estate to the trustee in bankruptcy, and on the 24th September, 1874, the bankrupt conveyed, by way of further assurance, his lands in Canada, specifying them. Execution against lands upon a judgment obtained by the defendants against the bankrupt was placed in the hands of the proper sheriff on the 26th of August, 1874, and was duly renewed. The plaintiff, the

trustee in bankruptcy, filed his bill, charging that the execution was void, and of no effect against the lands, but was retained by the defendants in the sheriff's hands, and formed a cloud upon the title of the plaintiff, who had applied to the defendants to have the same removed, but which they had refused to do. Proudfoot, V. C., held that the title of the plaintiff to the lands was sufficiently made out by the deed of February 14, 1874, its defects having been supplied by the deed of September 24, 1874, and said: "The retention of the execution in the sheriff's hands seems to bring the case within the principle of *Ross* v. *Harvey*, where it was held that a deed which conferred no title on the grantee, but was registered before that to the plaintiff's, formed such a cloud on the title that the Court should decree a sale, in which the first registered grantee should join. There will, therefore, be a declaration that the lands specified in the bill are not liable to the operation of the writ of execution of the defendant's, and an injunction restraining the defendants from selling or attempting to sell them, or interfering with the plaintiff's enjoyment of them, and an account of the damages sustained by the plaintiff by reason of the writ of execution being retained by the defendants in the sheriff's hands."

The decision of this case, on the main ground of the title of the plaintiff to the lands as against the execution creditor, was reversed in 2 A. R. 36, and it became unnecessary to determine the question whether an execution against lands would be removed as a cloud upon title, Burton, J. A., saying: "It becomes also unnecessary to consider whether relief would in any case be granted for the removal of a writ of execution, on the ground that its retention in the hands of the sheriff operated as a cloud upon the plaintiff's title to certain lands."

In *Dynes* v. *Bales*, 25 Gr. 593, Spragge, C., said: "After some hesitation, I have come to the conclusion that the allegations in the plaintiff's bill are sufficient, the bill being taken *pro confesso* against both defendants, to entitle him to a decree as prayed for by him. He shews title in him-

self by a duly registered conveyance from one seised in fee, and alleges a subsequent conveyance to the defendant Bales from one Scott, and that Scott had no title: that Bales subsequently, having himself no title, mortgaged to Briant: that the deed to Bales and the mortgage to Briant are both registered: that the plaintiff, ever since the conveyance to him, has been in possession: that the conveyance to Bales, and the mortgage to Briant have been actual impediments in the way of his selling his property: that he has applied to the defendants to execute proper instruments to remove these, what he terms clouds upon his title, and that they have refused, and that they threaten and intend still further to incumber the land in question unless restrained by injunction, and he prays for a declaration that Scott and Bales respectively had no title: that the conveyance and mortgage may be declared to be a cloud upon his title and be delivered up to be cancelled, and their registration vacated." The learned Chancellor proceeded to distinguish the case from *Hurd* v. *Billinton*, on the ground that an examination of the registered deeds would not shew whether or not Scott had title e. g. by descent. He also referred to *Ross* v. *Harvey* and *Harkin* v. *Rabidon*, and quoted what is above quoted from *Truesdell* v. *Cook*, and said: "The learned Judge did not think the plaintiff entitled to succeed in that case, and the observation I have quoted is therefore a dictum only, but it places. as I think, the title to relief upon the the true ground." In *The Ontario Industrial Loan Company* v. *Lindsey*, 3 O. R. 66, 4 O. R. 473, it was held that an instrument declaring that the subscriber claimed certain lands, and intended, upon the decease of a person who was then a lunatic, to institute proceedings for the recovery of them, and notifying and cautioning the public against dealing with the said lands, or committing waste or damage to them, and which he had caused to be registered against the said lands, was an instrument incapable of registration, was wrongly placed upon the register, and was a cloud upon the plaintiff's title which ought to be removed.

These cases are all distinguishable from the present. In *Ross* v. *Harvey* and *Harkin* v. *Rabidon* the deeds were fraudulent in themselves, and were entered into for a fraudulent purpose. In *Shaw* v. *Ledyard* the deed was wholly illegal and unauthorized in itself. In *Dynes* v. *Bales* the deed was from a person who had no title to or interest in the land; and in *The Ontario Industrial Loan Co.* v. *Lindsey*, 3 O. R. 66, the instrument was incapable of registration, and was registered by a person who had no title to or interest in the land, and the act of registry was a wrongful act, for damages for which the action was also brought. *McDonald* v. *The Georgian Bay Lumber Co.* was reversed on appeal, and in the other cases referred to the relief sought was refused. *Buchanan* v. *Campbell* is the nearest in principle to the present case. There the prior deed was prior also in registry, but was voluntary, and was by the execution of the subsequent deed, as against the grantor therein, "to be deemed, taken, and adjudged to be void, frustrate, and of none effect by virtue and force of this present Act" (27 Eliz. c. 4). Here the prior deed is, by the registration of the subsequent deed, to be adjudged fraudulent and void as against the grantee in the subsequent deed by virtue of the Registry Act. If relief is to be granted in this case, it ought to have been granted in that; being refused in that, it ought to be refused in this.

The plaintiff's claim to relief is founded upon the Registry Act, and upon that only, and the embarrassment alleged to be caused to him by the registry of this prior agreement in disposing of the land. If the plaintiff is entitled to relief, then if A. makes a mortgage to B. on the first of the month, and another to C. on the tenth of the same month, and C. registers his mortgage, and subsequently B. registers his, and C. has no actual notice of B.'s mortgage, C. will be entitled to maintain a bill to vacate the registry of B.'s mortgage, because it is by the Registry Act to be adjudged fraudulent and void as against him, and being of a prior date to his mortgage, it causes him embarrassment in disposing of his mortgage.

I have been able to discover no authority binding us to grant the relief asked for here, and but for the strong expressions of opinion of the learned Vice-Chancellor in *Truesdell* v. *Cook*, concurred in and approved by the learned Chancellor in *Dynes* v. *Bales*, I should have thought it ought to be refused; but I think we ought to defer to those opinions, leaving the question to be settled by an appellate Court.

The relief specially prayed by the plaintiff is that the agreement of the 7th of February, 1882, may be delivered up to be cancelled and the registration thereof vacated.

There is no pretence for cancelling the agreement and I do not think the registration of it ought to be vacated; but under the general prayer, for further and other relief, I think the plaintiff entitled to a decree declaring that the deed of the 31st of March, 1884, has priority over the agreement of the 7th of February, 1882; but this relief is only granted upon the terms precedent thereto, that the plaintiff shall pay to the defendant one half of the value of the vines mentioned in the said agreement, and of the profits and the produce thereof since the 31st day of March, 1884, to be ascertained, having due regard to the terms of the said agreement, by the Master of this Court at Hamilton; and the defendant shall be entitled to this relief against the plaintiff, whether the plaintiff accepts of the relief granted to him or not; and the costs of the trial of this motion, and the reference will be reserved till after the said Master shall have made his report.

O'CONNOR, J., concurred.

WILSON, C. J., not having been present during the argument, took no part in the judgment.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

TUCKER v. MCMAHON ET AL.

Corroborative evidence—R. S. O. ch. 62, sec. 10.

Plaintiff, after her husband's death, and about twenty-five years before action brought, went to live with testator, her son-in-law, and resided with him up to the time of his wife's death, about twelve years before action. She alleged that after her daughter's death testator agreed to pay her wages if she would continue to live with him and take care of his family. She accordingly did so till his death in 1855, up to which date she had received nothing from him. In an action against his estate for wages plaintiff relied on the evidence of a witness to the effect that testator, about two years before his death, told witness plaintiff should be handsomely paid for her services; and also on the evidence of another son-in-law, that two or three years before his death testator told witness that he would pay her well. It also appeared that by his will testator directed all his property to be converted into money and invested in mortgage security, and the whole income paid to plaintiff during her lifetime; but there was no evidence as to the value of this bequest, and it was suggested that after payment of debts the residue would be very small:—*Held*, that there was no sufficient corroborative evidence within R. S. O. ch. 62, sec. 10.

The plaintiff, by writ issued on the 30th day of September, 1885, sued defendants as executors of the last will and testament of one Aaron Hudson, deceased, and her statement of claim was "for money payable by defendants, as such executors, to plaintiff for work which was done and rendered by plaintiff, and which plaintiff did do and render for the said late Aaron Hudson in his lifetime, and at his request, and as his hired help and servant, and for wages and money earned by plaintiff as such hired help and servant to the said late Aaron Hudson in his lifetime," and plaintiff claimed $600 and costs.

The particulars of plaintiff's claim were as follow: (1) Ten years' wages of plaintiff, as the hired servant of the late Aaron Hudson in his life time, at the rate of $100 per year, $1,000. (2) For work and labour and services done, rendered and performed by the plaintiff for the late Aaron Hudson in his life time, for ten years, at the rate of $100 per year, $1,000. (3) To interest, $200.

The defendants denied the allegations contained in

plaintiff's statement, and plaintiff joined issue thereon.

The cause was tried at the last spring sittings of this Court at Cobourg, by Cameron, C.J., and a jury.

It appeared by plaintiff's evidence that she was the widow of James Tucker, who died 31 years before this trial, but who owned a farm of fifty acres, which he devised to her for life: that at the time of his death it was mortgaged to Aaron Hudson for about $200: that she had nine children, and her eldest daughter was married to Hudson: that there was one house on this farm, and sometime after her husband's death Hudson and his family moved into it with her: that he took the farm to pay up the mortgage: that she afterwards built another house on the farm for herself to live in after he got the mortgage paid up or got paid for it: that about two years after she built this house Hudson and his family moved into it with her, and they lived together for five years: that in this time he got the deed of the farm out and out, and promised her a life-lease: that she gave him a deed but never got a life-lease: that at the end of the five years he bought a lot in Centreton, about a quarter of a mile from the farm, where he carried on the work of a blacksmith, carrying on the farm at the same time that she went to live with him at Centreton: that after living there for two years her daughter, Hudson's wife, died, on the 3rd of July, 1872, leaving three young children.

Q. Were you at home—that is at Mr. Hudson's—when your daughter died? A. I was.

Q. Did you remain there after her death? A. Oh yes, I remained there.

B. Why did you do that? A. Because the day after she died we were fixing to come to Grafton.

Q. You and who? A. Mr. Hudson.

Q. The day after your daughter died you and Mr. Hudson were arranging to go to Grafton? A. Yes.

Q. Well? A. And when he was standing at the table getting ready to go I says, "I suppose my home is broke up?" and he said, "Oh, no." Says he, "What can I do

with my family?" Says he, "I want you to stop on here and do for my family, and take care of the house."

Q. What did he say about his children and family? A. He said he had got to have somebody to take care of his children, and I was the most fit, for I had always been with him; and he said if I would stop with him he would pay me wages.

Q. He said if you would stop with him he would pay you wages? A. Yes.

Q. Did he say why he did not hire a girl—a stranger? A. Oh he said the children were used to me, and I was more capable of taking care of his family than anybody else would be.

Q. You were a comparatively young women then? A. Well I was young of course, 13 years ago.

Q. What are you suing these executors for? A. I am suing them for my wages, He agreed to give me wages and never gave me none. I told him I would sue for my wages.

Q. You told him that in his lifetime? A. Yes, when the will was drawn, when he had a will drawn.

Q. I believe he was paralyzed before his death some time? A. Yes, he had a paralytic stroke.

Q. And you told him then if he did not pay you your wages you would sue him? A. Yes, I said I would sue him for my wages.

Q. Then after he said he would pay you your wages did you consent to remain on? A. Yes, I consented to remain on.

Q. And was it at his request you remained on? A. Yes.

Q. Where would you have gone? A. I would have went among my children.

Q. You have several children? A. Yes.

Q. Children that are married and able to support you? A. Yes. I hope so.

Q. Mr. Gleeson is married to one of your daughters? A. Yes.

Q. How long did you remain in that way? A. I remained thirteen years.

Q. Up to the time of Mr. Hudson's death? A. Yes.

Q. And how long after his death? A. He died the 6th or 7th May. I will not be sure which.

Q. Of last year? A. Yes, this last year; and I stopped there till after the day of the sale.

Q. Until the day after the sale of his chattels? A. Yes.

Q. The executors' sale? A. Yes.

Q. What did you do during all these years? A. Why, there is no kind of work but what I would be doing.

The plaintiff proceeded and specified the work she was doing, and that she considered it worth $100 a year: that he kept no hired girl: that she did all the work: that she was his money-keeper: that she always kept his money: that she had asked him for wages, and for money, and for other things, and he would say, "go and get them": that she did not go and get them because he told the merchants and told people not to trust anybody; for if they did he would not pay it, and that she did not want to expose herself to rebuff: that she never got anything on account of wages.

On cross-examination she stated that her daughter, Mrs. Hudson, was a sickly delicate woman: that up to the time of her death Hudson kept no hired girl: that while she lived with Hudson before his wife's death, she had hard work to do, and during that time was getting no wages and expected none. She was asked: Q. "At all events you continued on there just in the same condition as to work after Mrs. Hudson died as before, doing the work about the place?" A. "Yes, after he promised me."

The following evidence was also given:

Joseph Tucker:

Q. You are a son of Mrs Tucker, the plaintiff? A. Yes.

Q. You live in Haldimand? A. I live in Cramahe.

Q. Did you know the late Aaron Hudson? A. Yes.

Q. He was married to your sister? A. Yes.

Q. Did you ever hear him say anything about your

mother living at his place? A. Yes; I heard him say something about that.

Q. Where was he when you heard him? A. Why, it was near his own place where he lived.

Q. How long ago? A. Well, it is about two years the first of last September; two years along the first sometime; I would not say what day.

Q. State to the Court and jury what you heard him say, if it has any bearing on this case. A. Well, being away—I had been away for a number of years—I came back, and went to see my mother. Well, I stopped with him for a couple of days. We started off to take a walk, him and me; and I says: "I think my mother would be better of a little rest, she looks worn out." "Well," says he, "you could not get her to lay still." He says: "Another thing, I do not know what I would do without her." He says in this way: "Of course," says he, "I couldn't get anyone to come, no young woman to come and keep house with me." That is the words he said to me. Well, I told him I thought it was about time she did not work any more. "Oh, well," he says, "*she shall be handsomely paid for what she does for me.*" That was the substance of the words he used.

Q. "Handsomely paid for the work she does for me," were those the words? A. Yes.

Q. "Handsomely paid for what she does for me"; those are the exact words? A. Yes; anything further than that, I do not think he ever said anything to me about it.

Q. Did you ever hear your mother say anything to him or the executors about this claim? A. No.

Q. It was his own voluntary statement at that time he made to you? A. It was.

Louis Gleeson:

Q. You are a farmer? A. Yes.

Q. Reside in Haldimand? A. Yes.

Q. Son-in-law of the plaintiff? A. Yes.

Q. Do you recollect when Mrs. Hudson died? A. Yes.

Q. Do you know how long it is since? A. It is somewheres about thirteen years.

Q. When did Mr Hudson die? A. He died this spring sometime, last spring; I do not know just the time.

Q. Last year? A. Yes.

Q. Had you ever any, and if so, more than one conversation with Mr. Hudson about Mrs Tucker? A. Nothing particular but the once; just once, I think. I heard him repeat different times about her services, but nothing of any consequence.

Q. What did you hear him say about her wages not of any consequence? A. Well, that she was trusty and saving, and took good care of what there was about the place.

Q. Do you know in what capacity she was? A. Working do you mean?

Q. Yes? A. Oh, she was there as a working person, yes.

Q. You speak of some particular occasion; what did he say on that occasion? A. Well, he went on to state about her sewing and making clothes and cutting and so on, and looking after the household.

Q. Where was he then? A. He was in his shop.

Q. Blacksmith shop? A. Blacksmith shop, yes.

Q. What were you doing there? A. I went over to get some blacksmithing done.

Q. What further did he say, if anything? A. Well, he went on to show me a pair of pants that she had made for him, and said that she had cut them and made them, and that it never cost him anything for sewing since she had been with him.

Q. What else did he say? A. Well, he said that he could not have kept his family together without her.

Q. Did he say anything else? A. Well, he said she was a good butter-maker, and I think he said she had four crocks in the cellar; it was three or four crocks; I do not mind which.

Q. Did he say anything else? A. I do not just mind now; there was quite a bit of conversation passed between us.

Q. Did he say how she was working there? A. He did not say how she was working there; *but he said that he*

would pay her well for her services, for he could not have kept his family together without her.

Q. How long do you think that was before his death? A. I guess about two years, or something to that effect; may be three and a half.

Q. And it was in his blacksmith shop? A. Yes.

Re-examined.

Q. That, you say, was about three years ago, before he had the attack of paralysis? A. Oh, yes; it will be four years now in December, I think.

Q. He bid then fair to live when he got well? A. I think so; he seemed to have good spirits.

Q. He was a good deal younger than Mrs. Tucker? A. Yes; I thought so.

Mr. *J. W. Kerr* put in the probate of the will.

By his will Hudson directed that all his property, real and personal, should be converted into money, and after payment of his debts and funeral and testamentary expenses, the residue should be let out at interest, and the interest thereof paid to the plaintiff during her life for her sole and only use.

The learned Chief Justice ruled that the evidence of the plaintiff had not been corroborated by any other material evidence, nonsuited the plaintiff, and gave judgment, dismissing the action, with costs.

21st May, 1886. *Aylesworth* moved to set aside the said judgment and costs, and for a new trial upon the grounds: That the plaintiff upon the evidence given on her behalf showed herself entitled to recover: that the evidence was such as could not properly have been withdrawn from the consideration of the jury, but should have been submitted to them: that the evidence of the plaintiff in respect of the contract for the payment of wages alleged by her, and as to her right to recover for such services upon a *quantum meruit,* was sufficiently corroborated by other

material evidence; or for such other order as to the Court should seem just.

G. T. Blackstock, shewed cause.

June 29, 1886. ARMOUR, J.—The plaintiff lived with the testator as a member of his family, and not as a servant, for several years prior to the death of his wife, and having continued to live with him after his wife's death, the presumption would be, that she continued to live with him in the same relation that she had lived with him before until it was shewn that such relation had been changed.

The plaintiff testified that after the death of the testator's wife her relation to the testator was changed, and from being a member of the testator's family, merely, she became his hired servant; that he then agreed to pay her wages, and that thereafter the relation between the testator and her was that of master and servant, and this is the very ground of her claim.

The question is, has what she so testified to been corroborated by any other material evidence, so as to satisfy the requirement of R. S. O., ch. 62, sec. 10?

It is contended that the evidence of her son, Joseph Tucker, of the statement made by the testator to him, "She shall be handsomely paid for what she does for me," and the evidence of her son-in-law, Louis Gleason, of the statement made by the testator to him, that "he would pay her well for her services," made as and when they were made, was other material evidence corroborating what she had so testified to.

In order to satisfy the statute, the corroborative evidence must be such as would tend to prove what she testified to as being the ground of her claim.

These statements do not in my opinion tend to prove the ground of the plaintiff's claim. They do not tend to prove that the relation of the plaintiff to the testator as a member of his family merely, which existed prior to his wife's death, was changed after that event to that of a hired

servant, nor do they tend to prove that he then agreed to pay her wages, nor do they tend to prove that thereafter the relation existing between the testator and the plaintiff was that of master and servant, nor do they tend to prove that the relation existing between the testator and the plaintiff at the time the statements were made was that of master and servant.

They are, in my opinion, quite consistent with the view that she continued to live with the testator after his wife's death in precisely the same relation that she had lived with him before that event; that is, as a member of his family, and not as a hired servant, and quite as consistent with that view as with the view that the relation was then changed and became that of a hired servant instead of a member of the family merely.

There is no doubt that the plaintiff's services were of great value to the testator; but that is of no consequence if he was under no legal obligation to pay for them.

The statements made by the testator were undoubtedly indicative of an intention on his part to pay the plaintiff for her services, but they afforded no evidence of the motive of that intention, and were quite as consistent with an intention moved by moral obligation as with an intention moved by legal obligation.

That the testator felt himself under some obligation to the plaintiff is evidenced by the provision made by him for her in his will; but whether his making that provision arose from his feeling himself under a moral obligation or under a legal obligation to provide for her, the fact of his making it affords no evidence.

In *Finch* v. *Finch*, 23 Ch. D. 267, Lindley, L. J., said: "Evidence which is consistent with two views does not seem to me to be corroborative of either;" and I think the same is to be said with regard to the statements deposed to, that they are equally consistent with the absence as with the presence of any legal obligation upon the testator to pay the plaintiff for her services.

The motion must therefore, in my opinion, be dismissed, with costs.

O'CONNOR, J., concurred.

WILSON, C. J., not having been present during the argument, took no part in the judgment.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. SHAVELEAR.

Sale of liquor without license—Canada Temperance Act, 1878 (41 Vic. ch. 16, D.)—Meaning of "County" in Act—Indian Act, 1880 (43 Vic. ch. 28, D.)

The defendant was convicted of having sold intoxicating liquors on 16th December, 1884, at the township of Oakland, in the county of Brant, being the day on which the vote for the passage of the Canada Temperance Act for the county of Brant was taken.

The townships of Oakland and Burford, in the county of Brant, had been for the purposes of Dominion elections separated from the county of Brant and annexed to the adjoining county.

Held, that the word "County," as used in the Canada Temperance Act, 1878, means county for municipal and not for electoral purposes.

Certain portions of the county of Brant consist of Indian lands, and the sale of liquor in these lands is regulated by the Indian Act of 1880 and amendments thereto.

Held, that under the eighth objection to the conviction,—that it did not appear that the votes of the electors on the Indian lands in the county were taken upon the petition for the Act, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it,—the present proceedings did not properly bring the matter before the Court.

V. McKenzie, Q. C., obtained from Galt, J., in single Court, an order *nisi* calling upon William Thompson and A. W. Ellis, two of her Majesty's justices of the peace for the county of Brant, and also upon William Thompson, Jr., to shew cause why the conviction against Timothy W. Shavelear, the now defendant, upon the information and complaint of said William Thompson, Jr., for that the said Shavelear did on the 16th of De-

cember, 1884, a day on which a vote in accordance with the provisions of the Canada Temperance Act of 1878, was being taken, unlawfully sell liquor between the hours of six o'clock of such a day and six o'clock of the following day, should not be quashed upon the several exceptions taken to the said conviction.

The information was laid on 10th January, 1885, for that Shavelear did at the time before stated, "at the township of Oakland, in the county of Brant, in his premises, being a place where liquors may be sold by retail, unlawfully, sell liquors without any requisition for medical purposes being produced by the vendee or his agent."

The conviction was on the 16th December, 1885, following the terms of the information, but adding that the sale of liquor by Shavelear was made "within the limits of a polling sub-division." The vote was taken under the Temperance Act of 1878. Under 45 Vic. ch. 3 (D.) the townships of Oakland and Burford belong to the South Riding of the county of Oxford, for Dominion electoral purposes.

McKenzie, Q.C., for the defendant, supported the order *nisi*.
Aylesworth, contra.

The facts, with the objections taken to the conviction, appear in the judgment.

June 29, 1886. WILSON, C. J.—The papers filed shew that certain electors of the county of Brant, qualified and competent to vote at the election of a member of the House of Commons in the county of Brant, petitioned the Governor General that an Order in Council might be passed, declaring the second part of the Canada Temperance Act of 1878 to be in force and to take effect in the said county; and that the petitioners desired that the votes of all the electors of the county should be taken for the said Act being also in force and taking effect in the city of Brantford; and that the votes of the electors of the city be taken for or against the adoption of the petition; and

the Order of the Governor in Council recites that the signatures of one-fourth or more of all the electors of the city were appended to the notice addressed to the Secretary of State containing the petition, and that an Order of the Governor in Council was passed directing that the votes of all the electors of the city be taken for or against the adoption of the petition. The Order in Council then directed a poll to be taken in the city on the 11th December, 1884, for taking the votes of the electors for and against the petition.

The like recitals are then made as to the signatures to the notice relating to the county of Brant, being one-fourth or more of all the electors of the county, being genuine; and that an Order of the Governor in Council was passed for taking the votes of the electors of the county for or against the adoption of the petition, and a poll is directed to be taken for the county on the 11th December, 1884.

The elections were accordingly held, and the Temperance Act was duly declared to be in full force and effect.

It is said that the Township of Tuscarora, which is part of the County of Brant for judicial purposes, and that part of the Township of Onondaga which is also for judicial purposes, in the County of Brant, are unsurrendered Indian lands, and that no steps, facilities, or opportunities for recording votes, which are offered and prescribed by the Temperance Act 1878, were taken or provided for having the votes of the electors of the Township of Tuscarora polled at Brantford.

The objections to be considered are the following, as stated in the order *nisi*:

2. That the territory and constituency in and to which the Temperance Act, 1878, should be submitted is an electoral district for the purposes of an election of a member to serve in the House of Commons, or sub-divisions in the whole of a county for such purposes.

3. The Temperance Act does not provide that when a vote is taken for or against the adoption of the Act in or by an electoral division or in sub-divisions of the whole

county, which are made for the election of a member to serve in the House of Commons, to include within such electoral division a city which is within the limits of the county, but which is not entitled to elect a member for the House of Commons.

4. The petition is illegal because it prays that the Temperance Act shall be in force in the whole county of Brant, which conflicts with the Indian Act, 1880, and amendments.

8. It does not appear the votes of the electors of the Township of Tuscarora were taken upon the submission of the petition, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it.

The first and the rest of the nine objections are either covered by those I have stated, or do not require to be considered. The second and third objections above stated I shall consider together, as they raise that same question, whether the voting on the petition for or against the establishment of the Canada Temperance Act, 1878, should be according to the divisions under the Municipal Law, or according to the divisions of the Dominion Electoral Law; in which latter case the voters in the township of Oakland should not have been permitted to vote, as that township is within the county of Brant for municipal but not for Dominion electoral purposes.

That depends upon the construction of the Temperance Act.

Section 2 of that Act enacts "that the word *county* includes every township, parish and other division or municipality, except a city within the territorial limits of the county, and also a union of counties where united for municipal purposes."

The Act throughout shows a city within the territorial limits of the county is, if the electors of the city desire to have the Temperance Act established within the city, to make an application by itself quite independently of the county for that purpose, and so also the county shall,

apart from the city within the county, make a like separate application for the like purpose.

The provisions of the Temperance Act shew the electors to vote under it are to vote according to the subdivisions of the county [except any city within it] according to the municipal organization and see also 42 Vic. ch. 50, secs. 2, 4, D.

That question arises in this manner. The Temperance Act, sec. 2, excepts cities *generally* from inclusion within the meaning of the word *county*, while sections 5 and 12 of the Act refer to and restrict the Act to such cities only the electors of which "vote at the election of a member of the House of Commons," and all the schedules of the Act restrict the application of the Act in like manner to such cities as return a member to the House of Commons.

No city, whether returning or not returning a member of the House of Commons, is, for municipal purposes, part of the county, and the result is, that if section 2 of the Temperance Act is construed as excepting all cities generally from the meaning of the word *county*, that cities which do not return a member to the House of Commons cannot have the Temperance Act extended to them, because when the Act is applied to a county the Act does not apply to any city within the limits of the county, and it is only such cities which return a member to the House of Commons which can have the Temperance Act applied especially to them; and it was argued that if the voting was held to be according to the Dominion Electoral Division, the election of cities which do not return a member to the house would have the right to vote for or against the Temperance Act as a division of the county.

I do not see how we could declare the electors of cities not returning a member to the House of Commons to have the right to vote as a division of the County Electoral Division when the Act declares that cities shall not be included in the word *county*.

The only way of dealing with the Act is to construe sec-

tion 2 of the Temperance Act as excepting those cities only from inclusion within the word *county* which do return a member to the House of Commons, which will be consistent with sections 5 and 12 of the Act, and with all the schedules of it also, and which construction will give to the electors of cities, which do not return a member to the House of Commons, the right to vote under that amendment as voters of a city as a division of the county for municipal purposes—for there is no doubt, in my opinion, the voting under the Temperance Act is to be according to the municipal organization, and not according to the Dominion electoral organization—and cities not returning a member to the House of Commons, will not then be excluded from having the benefit of voting for or against the Temperance Act, or for or against the removal of the further operation of the act.

It was, I presume, from the doubt whether Brantford, as a city not returning a member to the House of Commons, was, according to section 2 of the Act, upon the one side, and sections 5 and 12 and the schedules of the Act also on the other side, that there was an Order of the Governor in Council for a poll to be held for the city and for the rest of the county separately. In my opinion the just and proper construction of the Act is, to read the exception of cities in the 2nd section as such cities only which return a member to the House of Commons, and there is no difficulty; and thus the words of section 2, that the word *county* shall include "every town, township, parish, and other division or *municipality* except a city, with the added or understood words, "which city does not return a member to the House of Commons," will include cities which do not return a member to the House of Commons under the term *municipality* now in the Act.

The votes of all the electors of the county of Brant were taken by a separate Order in Council for the county without the city of Brantford, and for the city without the rest of the county.

A vote for the whole county was taken, and that was

the proper course; and whether it was by one order for the whole county, including the city, or by a separate order for the county and for the city, is, I think, of no consequence.

The voting was properly made, and was properly made in Oakland, as part of the county of Brant for municipal purposes.

The fourth objection is, that the petition for the Act is illegal, because it prayed that the Act should be extended to the whole county; and it conflicted in that respect with the Indian Act of 1880, and the amendments thereto.

I do not see anything in the Indian Acts, 43 Vic. ch. 28, sec. 90, and 44 Vic. ch. 17, sec. 10, (D.,) which conflicts with the Temperance Act of 1878.

Intoxicating liquor is prohibited now in the county of Brant by reason of the Temperance Act being carried into operation; and such liquor is prohibited by the Indian Act from being sold on the Indian lands within that county.

The eighth objection of the defendant is, that it does not appear the votes of the electors on the Indian lands in the county were taken upon the said petition, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it.

In answer to the objection, it does not appear before us that the votes of the electors on these lands were not taken, nor that there were such electors to give their votes.

In any case we should not be willing to give effect to this objection, if it be one, on a motion of this kind.

The defendant is convicted of selling liquor upon a polling day appointed for taking the vote for or against the adoption of the Temperance Act, and after a conviction upon the merits he seeks to avoid the conviction, because, he says, it does not appear that some persons, without any proof of it, who were voters on the Indian lands, voted, or were allowed or enabled to vote. It appears to me such an objection should have been taken before the proclamation was issued by the Governor calling the Act into operation

in the county; or, if after the proclamation, that a specific motion should have been made, calling upon the Crown to defend the proclamation—if that course even would have been available to the defendant—probably by moving for a *certiorari* upon the Secretary of State, as in *The Queen* v. *Sir George Grey*, L. R. 1 Q. B. 469, or it may be, perhaps upon his Excellency the Governor General, if he is amenable in a case of this kind, to shew cause why the proclamation, and all other proper proceedings, should not be removed by *certiorari* into this Court as a preliminary proceeding to supersede the Order in Council, or to quash the conviction.

The motion must be dismissed, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

BAKER ET AL. v. ATKINSON ET AL.

Determination of lease by forfeiture—Right to distrain—8 Anne ch. 14, secs. 6, 7—Money paid, right to recover back—Provision for a year's rent payable on insolvency—Validity of.

Defendants, in 1881, by indenture under the Short Forms Act, leased certain premises to O., for ten years, at a yearly rent, payable quarterly in advance, with a covenant that if the lease should be taken in execution, or if the lessees should make any assignment for the benefit of creditors, the lease should immediately become forfeited and void, and the next ensuing one year's rent should be at once due and payable. There was also a proviso for re-entry on nonpayment of rent, or seizure or forfeiture of the term for any of the causes aforesaid.

In August, 1883, O. assigned to B., as trustee for the benefit of creditors, who went into possession, whereupon defendants distrained for six months' rent then in arrear, and one year's rent payable in consequence of the assignment. Three executions were soon after placed in the sheriff's hands, and the solicitors for the plaintiffs under the first and third executions paid the rent claimed to prevent the sale of the goods by defendants and B., though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitors.

Held, that the distress was illegal, for the statute 8 Anne ch. 14, sec. 6, applies only to cases where the tenancy has been determined by lapse of time, and not by forfeiture; and that the plaintiff B. was entitled to recover the amount received by defendants.

Graham v. *Lang*, 10 O. R. 248, not followed.

Per ARMOUR, J.—The year's rent became due only by virtue of the forfeiture, the distress was an unequivocal act indicating the intention to forfeit, and evidence of such an intention previously formed; so that before the distress defendants had elected to treat the term as forfeited and having done so their right to distrain was at an end. Moreover they had not distrained during the possession of the tenants from whom the rent became due, and even if defendants had a right to distrain, the provision making one year's rent payable was fraudulent as against creditors.

Quære, per WILSON, C. J., as to this latter point.

Per ARMOUR, J.—The execution creditors for whom the money was paid, in order to enable the sheriff to seize under their executions, might also recover; WILSON, C. J., doubting.

THIS was an action tried before Cameron, C. J., at the last Spring Assizes at Chatham, and was brought to recover back money paid to the defendants under the following circumstances.

Archibald C. and Abel O. Brown, in April, 1881, became tenants of the defendants of certain premises in Chatham, to hold for ten years from from 4th June, 1881, under an indenture of lease made in April, 1881, in pursuance of the

Act respecting short forms of leases, at a yearly rental of $825, payable in quarterly instalments in advance at the commencement of each quarter of a year of the said term, reckoning from the commencement of the said term. The lease contained a covenant on the lessees' part not to assign or sublet without leave, and also this covenant, "that if the lease hereby granted shall be at any time seized or taken in execution or in attachment by any creditor of the said lessees, or if the said lessees shall make any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the said lease shall immediately become forfeited and void, and the full amount of the next ensuing one year's rent shall be at once due and payable." The lease also contained a "proviso for re-entry by the said lessors on non-payment of rent or non-performance of covenants, or seizure or forfeiture of the said term for any of the causes aforesaid."

On 31st August, 1883, by indenture of that date, made between the said Archibald C. and Abel O. Brown, of the first part, and the plaintiff Baker, of the second part, the said Archibald C. and Abel O. Brown granted, bargained, sold, assigned, transferred, conveyed, and assured unto the said plaintiff Baker, his heirs, executors, admistrators, and assigns forever, "all and singular the personal estate and effects, stock in trade, goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever, and whether upon the premises where said debtors' business is carried on, or elsewhere, and which the said debtors are possessed of or entitled to in any way whatsoever," to hold the same upon the trusts therein set forth, of which the principal one was, after paying the expenses of the trust, "to pay and apply the balance in or towards the payment of the debts of the said debtors in proportion to their respective amounts without preference or priority."

Immediately upon the execution of this assignment, the assignee, the plaintiff Baker, went into possession of the demised premises thereunder, and into possession of the stock of goods in the said premises contained.

Afterwards, on the same day, the defendant Atkinson came into the demised premises and demanded the rent (he was claiming a year's rent in advance at that time), and afterwards, and on the same day, the defendants issued a distress warrant to their bailiff, directing him to distrain for $1,237.50, "rent due to us on the same, on the 31st day of August, 1883, six months in arrear, and one year's rent by their having assigned for the benefit of creditors." Under this warrant the bailiff entered into possession of the premises and seized the goods therein, and took and kept the key of the said premises and locked them up at night, and kept possession of the goods until the payment of the rent claimed, as hereinafter mentioned.

On the 6th day of September, 1883, a writ of execution against the goods of the assignors at the suit of Hull and Keddie, for the sum of $396.46, debt besides costs, was placed in the hands of the sheriff of the county in which the said premises were. On the 11th day of September, 1883, another writ of execution against the goods of the assignors at the suit of Heffron and Cochrane for the sum of $303.16 debt, besides costs, was placed in the hands of the same sheriff; and on the 13th day of September, 1883, another writ of execution against the goods of the assignors at the suit of the plaintiffs, the Merchants Bank, for the sum of $964.65 debt, besides costs, was placed in the hands of the said sheriff. Messrs. Scane, Houston & Craddock were the solicitors for the execution creditors, Hull and Keddie, and The Merchants Bank. Under these writs of execution the said sheriff seized the goods contained in the said premises on the 17th day of September, 1883, Messrs. Scane, Houston & Craddock having paid the rent distrained for to enable him to do so, and to prevent the sale of the goods by the defendants and the assignee, which was to have taken place on that day. Mr. Craddock's

account of the payment was as follows: that his firm was acting for Hull and Keddie and the Merchants' Bank: that he became aware of the claim for rent and and the nature of it from the defendant Atkinson: that he was aware they were claiming a year's rent in advance: that he thought they were not entitled to collect it, or rather he did not think they were not entitled to collect, it but he thought there was a doubt as to whether they had a right to collect it: that he paid it with his firm's money to the bailiff on account of his clients: that the defendant Atkinson was present: that he asked the defendant Atkinson if he intended going on with the sale and he said he did: that he told him that if so he would be obliged to pay the rent: that he thought he asked Atkinson for a statement of the amount due, and that amount was furnished either by him or the bailiff: that while the bailiff was making out the statement he turned to Atkinson, who was on the other side of him, and told him that they did not recognize his right to the rent; in fact that they thought he had no right to the rent, but that they were obliged to pay it under the circumstances, and would pay it, and in fact paid it under protest—paid it under protest most distinctly: that he paid the money for the first and third execution creditors, their clients for whom they were acting: that he did not think he had any communication upon the subject with Baker: that he was not quite sure but he thought not; that there were a great many communications with Baker about that time relative to the rights of the execution creditors as against Baker, but that he did not know whether anything was mentioned about the rent or not.

On cross-examination he said that he was acting for the execution creditors, and adversely to the assignee: that he had some doubt as to whether Atkinson had a right to this year's rent, and he thought he told him so: that they had some conversation about it on the previous Saturday: that he was clear he told him about it on the 15th, and perhaps they had some conversation to the same effect before: that he made no charge of the payment to any one: that he

advanced the money for the execution creditors: that he had no instructions from Hull and Keddie, nor from the Merchants' Bank, to make the payment: that they looked upon the repayment as certain, because the goods would realize more than that: that it was not with the expectation of getting it back from Atkinson they undertook to make the payment: that they expected to get it back out of the proceeds of the goods: that if they succeeded in recovering it from Atkinson there would be so much more for the execution creditors: that this was done without any positive instructions from either of their clients: that he thought they had general instructions from Hull & Keddie to do anything that was necessary: that he could not recollect the exact words he used to Atkinson when he paid him: that he did not think he used the words "under protest": that he said to Atkinson or told him that they did not consider he had any right to the money, but as he was going on with the sale it was necessary to pay him the rent: that when he said they did not consider he had any right to the money he meant the rent—the additional rent: that he did not dispute in his own mind his right to the rent that was overdue: that that was not disputed at all: what he referred to was the rent he was claiming by virtue of the penalty: that he did not recollect his saying to him if he did not like paying it he had better let the sale go on: that in fact Atkinson, after he had spoken to him to the effect already mentioned, waived any further explanation, as if that was all understood between them: that it was after this he paid the money to him.

The defendant Atkinson's account of the payment was, that on Saturday, the 15th September, Mr. Craddock came to his office and asked him if he would take their firm's undertaking to pay the rent and let them sell, as they were going to contest the validity of the assignment: that he said no, that he would not take part against the creditors in a matter of that kind; if he was going to fight them he would be neutral, he would not take part one way or the other, and if that would be their position he would sell;

but thinking it over he told him he would see his partner and if he consented to it perhaps he would have no objection; and he said anyway they would have to pay him off, because if they sold there would be nothing left for his clients, and he left to call in the afternoon after he saw Charteris, but he did not come: that Mr. Craddock got a statement from him on the Saturday: that he saw Mr. Craddock on the Monday: that the bailiff and a sheriff's officer were present: that Craddock asked for a statement: that he said why he had the statement, and he and the bailiff figured everything up, and he paid the bailiff then: that as the money was paid to the bailiff he turned to leave to go back to his office, and Craddock said that they paid them this year's rent not because they thought they were entitled to it, but because they thought they were forced to, for they had to: that this was after the payment that he said why didn't he let the bailiff sell then: that his reply was that they would not do that; if they let them sell there would be nothing left for them: that Craddock told him on whose behalf he was paying, that it was Hull & Keddie.

On cross-examination he said what Mr. Craddock said was, after the money was paid, that they did not pay them this because they thought they were entitled to it, but because they were forced to, or because they could not help themselves: that this is what he swore before the examiner: "No, but we don't admit that you are entitled to it, but we will pay you rather than let you sell:" that this was his recollection then, "We don't admit that you were entitled to it, but we will pay you rather than let you sell," or words to that effect: that he was then asked, "Do you remember him, Craddock, using these words, 'I will pay you because I have to:'" that he answered he could not say, but they might have been used, but nothing stronger than that: that it was their intention to have gone on and sold that day if he had not paid them: that he said in his examination that it did not make any difference whether he paid it under protest; he would have gone on anyway: that that is what he said, and he said so then:

that he did not think that if he had put in the most formal protest it would have stopped him from claiming what he believed to be his right, and that if he had done that in the most formal way it would not have made any difference to him.

The execution of Hull & Keddie was said to have been paid for on the 24th September, 1883, by the Merchants Bank, and was agreed to be held for them. The sheriff sold on the 2nd of October, and realized in all $1603.56, not enough to pay the executions, and out of this the sheriff repaid to Messrs. Scane, Houston, & Craddock the amount they had advanced to pay the rent.

The defendant Atkinson said that the defendants distrained for six months rent as being in arrear, and for one year's rent in addition. Vouchers were produced shewing the payment of $1,407.50 by the Browns on account of rent.

The learned Chief Justice, after stating the facts, gave the following judgment:

Upon the facts established by the evidence the case might very well be disposed of without reference to the legal questions involved, on the assumption that the defendants had been paid by the plaintiffs or one of them, under the pressure of an illegal distress, the moneys claimed, for, in my opinion, the moneys paid to the defendants were not paid by the plaintiffs, or either of them, but by Messrs. Scane, Craddock & Houston, upon the understanding with the sheriff that out of the proceeds of the sale of the goods by him he should repay the money by them paid in settlement of the claim for rent. The money could then in no sense be held to be the money of the plaintiff Baker, and its payment, instead of giving him a right of action against the defendants, had the effect of relieving his goods, if the assignment by the debtors A. O. Brown & Co. legally transferred the goods to him, from the distress, and left him free to control the right of the execution creditors to take the goods as against him. Then, notwithstanding that

the persons paying the rent were solicitors for two of the execution creditors—that is to say, Hall & Keddie, whose judgment the Merchants' bank acquired, and the Merchants' Bank—that did not make the payment made by them a payment for or on account of the bank. As solicitors they would have had no authority to make a payment of this kind, so as to give them a claim to be repaid by the bank, and according to the evidence of Mr. Craddock the bank was not consulted in the matter. They advanced the money upon the faith of being repaid out of the sale of the goods by the sheriff, and were so repaid. The sheriff realized upon the whole of the debtor's goods under the executions in his hands, and if he did not make a legal disposition of such proceeds no liability attaches to the defendants by reason thereof. On the merits, treating the case as one between landlord and execution creditor, I think the defendants have received more than under the law they were entitled to. The rent actually in arrear on the 4th of August, without on that day including the rent payable in advance for three months, was $380. The rent was running from the 4th June, 1881, which made the amount accrued up to the 4th August, 1883, two years and two months, in all $1,787.50, of which the tenant had paid $1,407.50 at the time the distress was levied. But, as the rent, by the terms of the lease, was payable quarterly in advance, on the 4th June, 1883, the rent for the quarter ending 4th September, 1883, had become payable, so that instead of there only being two years and two months rent due on the 31st August, when the distress was made, there were in fact two years and three months due, making the actual arrears for which, in the absence of any question of forfeiture of term, the defendants would have had a right to distrain $448.75. The defendants added to the arrears the year's rent which they claimed to be due by reason of the lessee having made the assignment under which the plaintiff Baker claimed. By the Statute of 8 Anne, ch. 14, all that a landlord is entitled to, as against an execution, is one year's arrears; so that the most

the defendants were entitled to as against the executions, was $825, assuming they had a right to be paid on the basis of a year's rent becoming due immediately on the lessees making the unauthorized assignment. The defendants were paid $1,237.50, which is $412.50 more than they could have legally claimed, conceding that the rent of the year next after the assignment was properly distrained for. If, then, the execution creditors had caused to be tendered to defendants a year's rent, they would have been entitled to have maintained the action against the defendants if they had gone on with the distress; but the solicitors for the execution creditors chose, knowing the nature of the defendants' claim, to pay the amount claimed, not by such payment intending to acknowledge or admit the defendants were entitled to distrain for the arrears actually due or for a year's rent, while at the same time it was not paid under protest in such way as to give the right to any one to recover the amount, or any portion of it, back. As against the tenant, the execution debtor, the defendants had a right to be paid the actual arrears and a year's rent in addition. This they were claiming, and the money was paid to them with full knowledge of their claim, and was, I think, a voluntary payment made to get the distress out of the way, so as to enforce the executions against the interest and in defiance of the rights of the plaintiff Baker, as trustee for the creditors of the tenants. It is not necessary, therefore, to decide the questions raised as to whether, where a landlord levies for more rent than is due and realizes the amount he claims without a tender of the amount actually due, an action will lie for the excess levied over the amount due. Trespass may not lie, nor an action for an excessive distress, but I cannot understand why, as matter of principle, an action for an account, or for money had and received, may not be maintained. If the landlord distrains a horse worth more than the amount claimed for the rent he receives the surplus for the use of the tenant, and an action for such surplus will lie at the suit of the tenant. It would not be more

inequitable to allow the landlord to retain this surplus than it would be to allow him to obtain a larger amount than is due to him by making a false claim. The tenant does not, it seems to me, admit the amount claimed by not tendering the true amount. To so hold is to deny to a poor man, without the means of paying his rent in ready money, the right of disputing his landlord's claim, be it never so unjust, if there was any rent due at all, no matter how small or insignificant compared with the claim made; and yet this was what was strenuously argued on behalf of the defendants before me, and is certainly not without the colour of authority to support the contention. *Glynn* v. *Thomas*, 11 Ex. 870, and *Gulliver* v. *Cosens*, 1 C. B. 788, and the case of *Owen* v. *Taylor*, 39 U. C. R. 358, while they are cases that shew no action as for a wrongful distress can be maintained where there is some rent due, and that payment of the amount claimed will preclude the party paying from recovery of the excess where the amount is excessive, do not go the length of deciding that where, without payment of the claim, the amount is actually levied by the sale of the goods distrained and the excessive amount actually received by the distrainor, an action may not be maintained for such excess. The case of *Owen* v. *Taylor* certainly goes the full length of holding that the Court could not treat the action as an informal one for money had and received, where an excessive amount had been levied, upon the assumption that the judgment of the Court in *Glynn* v. *Thomas* was against the right of recovery at all, overlooking the distinction between an actual enforcement of the excessive demand by the sale of the distrained goods, and the payment of such claim to avoid a sale of the goods. The count attacked in Error in *Glynn* v. *Thomas* shewed such a payment, not a sale of the goods for an excessive amount. Coleridge, J., in delivering the judgment of the Court, distinctly points this out. At page 875 he said: "The count before us shews a *taking* of goods not alleged to be more than sufficient to cover the real arrears with the charges, but on an untrue

claim of larger arrears than were due. It does not go on to allege a sale of more than would cover the real arrears with costs, but it alleges what it asserts to be a compulsory payment of those larger supposed arrears in order to regain possession of the goods distrained, of which the defendant remained in possession until such payment.

The question, therefore, is whether this allegation is equivalent in effect to an allegation of the sale of the goods by the defendant for more than the rent really due. If the payment of the money is to be considered voluntary, as it was clearly made with a full knowledge of the facts, it cannot be contended that a right of action can be grounded on it. * * Nothing that we here lay down at all interferes with the many well known and established decisions in which it has been held that where goods are unlawfully detained, or an injurious act is about to be done to them, or some act which it was the duty of the party to do in respect of them be refused to be done unless money be paid, and the money be paid under protest as the only means of avoiding the immediate injury which would result from the detainer, the injurious act, or the wrongful refusal, the money so paid may be recovered back. These cases stand on a principle entirely distinct from the present, and quite reconcileable with it. In all of them will be found an unlawful act on the part of the defendant, and a necessity on the part of the plaintiff: he must pay or he cannot have his goods; or they will be injured; or he will sustain damage by the defendant's refusal. This is simply the case of a landlord distraining, not excessively, for rent in arrear, and holding possession by virtue of that distress. Being so lawfully in possession, he demands a larger sum for arrears than the plaintiff admits to be due; but that alone does not make the distrainer unlawful; and the plaintiff must be taken to know that neither the validity of the distress nor of the distrainer depends on that demand; and that if he wishes to make the latter unlawful he should tender the sum which he alleges to be really due. It would be very inconvenient to hold that without this the tenant, suffer-

ing no injury, should be at liberty to pay the larger demand, and at any interval of time after within the Statute of Limitations, bring his action to recover back the money so paid."

Gulliver v. *Cosens*, C. B. 788, was also the case of payment of a claim made on a distress for damage feasant. Up to the time that the landlord sells for more than is due to him the goods distrained his act is lawful. The payment of the rent claimed, with knowledge of all the facts, is a voluntary payment, and it may well be held that the party making such payment cannot be allowed to say he made it by wrongful distress of his goods; but that is a different thing from saying that the landlord may make what claim he likes, and sell his tenant's goods without accounting to him for the amount he realizes in excess of the rent actually due to him. I do not wish to be held as accepting that view of the law; and the language of Parke, Baron, in *Tancred* v. *Leyland*, 16 Q. B. 678, is opposed to the law being so declared. See also *Loring* v. *Warburton* E. B. & E. 508, and *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.

The authorities just referred to are sufficient, however, to shew that the plaintiffs, on the facts disclosed in this case, are not entitled to recover, because they did not pay the defendants anything, nor was anything paid for them or on their behalf, and if the payment had been made by them or either of them, it was voluntary. The only possible claim of the plaintiff Baker would, therefore, be for seizing the goods and detaining them till the sheriff took possession upon the assumption that by the defendants' distraining for the penal rent, so to call it, as well as the arrears, he thereby elected to forfeit the term, and deprived himself of the right of distress altogether for the arrears as well as the penal rent. I do not think the distress could have that effect. The lease provides that if the tenant assigns without leave the term should immediately become void and forfeited, and the next ensuing one year's rent should be at once due and payable. These are provisions in favour of the landlord which he had a right to

avail himself or not as he thought fit. The act of distraining after a forfeiture by breach of any of the covenants would be a waiver of the forfeiture; and I do not think, notwithstanding the observations of Mr. Justice Gwynne, in *Griffith* v. *Brown*, 21 C. P. 13, as to the effect of claiming the penal rent under a provision similar to the one in question here, that the distress for such penal rent worked a forfeiture, and the case is not an authority against the defendants, as the learned Judge gave judgment in favour of the landlord, upholding the distress for the arrears, though not for the penal rent. The present case is somewhat stronger in favour of the plaintiffs' contention, that a complete forfeiture must occur before the penal or additional forehand rent becomes payable, as the provision of the lease in question in that case was that the rent for the then current quarter should immediately become due and payable and the term become void, while in the lease here the avoidance of the term in the order of expression precedes the accrual of the next ensuing year's rent, the arrangement being, "the said term shall immediately become forfeited and void, and the full amount of the next ensuing one year's rent shall be at once due and payable." But in both cases I think the option of enforcing both penalties, so to speak, or only one of them, rests entirely with the lessor, and the assertion of a right to the year's rent by distress or otherwise would not amount to an election to forfeit the term also. On payment of an additional year's rent in advance the landlord might well be content to waive the forfeiture of the term, and the tenant could not reasonably complain that by his own act he had an additional burden provided for by his contract imposed upon him. It not being necessary I do not express any opinion as to whether the defendants could have distrained for the full next ensuing year's rent, nor as to what the next ensuing year's rent was; that is, whether it meant the rent accruing from the 4th June, 1883, to the 4th June, 1884, or the rent of the year 1834, or a year's rent after the 31st of August, questions not unattended with difficulty in arriving at their proper solution.

I shall direct the plaintiff's action to be dismissed with costs, including the costs of former Courts, on the ground that the payment of the moneys claimed was voluntary, and the distress made by the defendants was, at the time it was made, lawful, whether for an excessive amount or not, and nothing was done by the defendants afterwards to render that lawful act unlawful. I have had some doubt, as the defendants have really been paid more than they lawfully had the right to receive as against both plaintiffs, whether I ought not to dismiss the plaintiffs' action without costs; but having regard to the way in which the cause of action has been stated, I do not feel justified in departing from the general rule of giving to the successful party the costs.

On December 1st, 1885, *Moss*, Q.C., moved to set aside and reverse the said judgment, referring to *Grimwood* v. *Moss*, 41 L. J., C. P. 239, S. C. L. R. 7 C. P. 360; *Cox* v. *Leigh*, L. R. 9 Q. B. 333; *Glynn* v. *Thomas*, 11 Ex. 870.

Robinson, Q.C., and *Atkinson*, Q.C., *contra*, cited *Griffith* v. *Brown*, 21 C. P. 12; *Young* v. *Smith*, 29 C. P. 109; Woodf. L. & T. 12 ed. 421; *Owens* v. *Taylor*, 39 U. C. R. 358.

June 29, 1886. ARMOUR, J.—The provision of the Statute of 8 Anne, ch. 14, sec. 6, is: "And whereas tenants *pur autre vie*, and lessees for years or at will, frequently hold over the tenements to them demised after the determination of such leases; and whereas after the determination of such or any other leases no distress can, by law, be made for any arrears of rent that grew due on such respective leases before the determination thereof, it is hereby further enacted by the authority aforesaid that from and after the said first day of May, 1710, it shall and may be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases in the same

manner as they might have done if such lease or leases had not been ended or determined." Section 7: "Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

In *Doe dem. David* v. *Williams*, 7 C. & P. 322, Patteson, J., said: "The Statute of Anne, which allows a distress to be made after the tenancy has expired, applies only to cases in which the tenancy has been determined by lapse of time, or perhaps by notice to quit, and not to cases where it has been put an end to by the tenant's own wrongful disclaimer."

In *Greenwood* v. *Moss*, as reported in 41 L. J. N. S. C. P. 239, Willes, J., said: "The subsequent distress was idle, and indeed was a simple act of trespass unless it were justified by the Statute of Anne, which, however, according to my impression, applies to a determination by effluxion of time and not by forfeiture." As reported in 27 L. T. N. S. 268. "With regard to the subsequent distress it would have been simply an act of trespass but for the Statute 8 Anne, ch. 14. My impression is that it was an unlawful distress, but this is a point which it is unnecessary for us to decide." As reported in 20 Weekly Reporter 972: "It is quite clear that if, instead of bringing his action, the landlord had entered, such entry would have been justified by each act of forfeiture up to the time of trial. If so, the subsequent distress would have been idle, and would not defeat a prior entry, but would be a simple act of trespass, unless it were justified by the Statute of Anne, as to which it is unnecessary to enquire; but even if it is valid under the statute, it is not so by reason of any term which is asserted to continue, for that is put an end to." And as reported in L. R. 7 C. P. 360: "It is quite clear if the landlord, instead of bringing ejectment, had entered, he could have justified in an action of trespass by reference to any act of forfeiture which he could prove. In my opinion the subsequent

distress can make no difference. If the landlord had entered, a distress on the goods of the tenant would not have defeated the effect of his entry. Apart from any statute it would be a simple act of trespass, and whether it be justified by the Statute of Anne or not is immaterial. My impression is that it would be unlawful for the reason suggested by Patteson, J., in the case of *Doe Williams* at *Nisi Prius*, viz: that the statute only applies to the case of the determination of the tenancy in the ordinary course, and not by a forfeiture. But even assuming that the distress were invalid, it would make no difference, for it would be valid, not by reason of any continuance of the lease (the landlord having determined that by entry for the forfeiture), but only by virtue of a statute giving the right of distress within a certain period after the determination of the lease."

I think, having regard to the preamble or recital in the sixth section of the statute, and to the opinions of the eminent judges above quoted, that the statute of Anne does not apply to the determination of leases by the lessors for forfeiture.

The provision of the lease is, that if the said lessees shall make any assignment for the benefit of creditors, the said term shall immediately become forfeited and void, and the full amount of the next ensuing one year's rent shall be at once due and payable.

According to the decision in *Griffith* v. *Brown*, 21 C. P. 12, the next ensuing one year's rent became due and payable only by virtue of the forfeiture, and, as a consequence, upon that event having taken place.

The defendants could not therefore elect to distrain for the next ensuing one year's rent without first electing to forfeit—to do that upon which their right to claim the next ensuing one year's rent depended.

The distraining the goods was an unequivocal act, indicating the intention of the defendants to forfeit the lease. It was also evidence of an intention previously formed to forfeit it, and the issuing the distress warrant and the

delivery of it to the bailiff to be executed were equally unequivocal acts indicating the intention of the defendants to forfeit it: See *Jones* v. *Carter*, 15 M. & W. 718; *Toleman* v. *Portbury*, L. R. 6 Q. B. 245; *S. C.* L. R. 7 Q. B. 344; and *Grimwood* v. *Moss*, L. R. 7 C. P. 360.

So that before the goods were distrained the defendants had elected to treat the term as forfeited, and having done so their right to distrain at all was at an end.

Besides, they did not distrain during the possession of the tenant from whom the rent distrained for became due, and, the next ensuing one year's rent did not grow due on the lease before the determination thereof.

As to the plaintiff Baker, the defendants were wrongdoers. The payment made by Messrs. Scane, Houston & Craddock was not made for him or on his behalf, and his goods were sold in consequence of the illegal and wrongful claim and act of the defendants in seizing them, and he is entitled to recover the amount received by them, as damages, in an action of trespass or trover, or as for money had and received.

As to the plaintiffs the Merchants Bank, the money paid by Messrs. Scane, Houston & Craddock was paid on their behalf, and they have adopted the act of their solicitors in paying it and claim to recover it.

The goods were in the possession of the defendants, and they refused to give them up unless their claim was paid. In order to get them out of the defendants' possession, so that they might be seized by the sheriff under their executions, their solicitors were compelled to pay the defendants their claim, and I think the result of the evievidence is, that it was paid under protest, if that were necessary.

The money paid under these circumstances may, I think, be recovered back by the plaintiffs the Merchants Bank.

Whether the plaintiff Baker, or the plaintiffs, the Merchants Bank, is or are entitled to the money recovered, as between themselves, it is not necessary to determine; they have both joined in this action and the recovery can only be for the amount paid to the defendants.

Assuming that the view I have taken as to the legality of the distress be erroneous, and that the defendants had the right to distrain, I still think the plaintiffs the Merchants Bank would be entitled to recover the $825, the next ensuing one year's rent, made payable immediately by the provision of the lease above quoted; for I think that this provision, for making this rent payable, is fraudulent and void as against creditors: See *Higginbotham* v. *Holmes*, 19 Ves. 88; *Ex parte Mackay*, L. R. 8 Chy. 643; *Ex parte Williams*, L. R. 7 Chy. D. 138; *Re Stockton Iron Furnace Co.*, L. R. 10 Chy. D. 335; *Ex parte Jackson*, L. R. 14 Chy. D. 725.

The case was argued upon the evidence, and without special reference to the pleadings, and I have dealt with it in the same way; but the pleadings ought, if necessary, to be amended to meet the matters in legal controversy.

I think that judgment ought to be entered for the plaintiffs for the amount paid to or received by the defendants in respect of the amount distrained for, with interest thereon from the time of payment or receipt (such amount, if not agreed upon, to be ascertained and computed by the Registrar of this Division), with full costs of suit.

WILSON, C. J.—It was said at *Nisi Prius*, by Patteson, J., in *Doe d. David* v. *Williams*, 7 C. & P. 322, that "the Statute of Anne, which allows a distress to be made after the tenancy has expired, applies only to cases in which the tenancy has been determined by lapse of time, or perhaps by notice to quit, and not to cases where it has been put an end to by the tenant's own wrongful disclaimer."

In that case the disclaimer was in March, the landlord distrained in November: *Held*, the distress was a waiver of the disclaimer, and the landlord could not therefore maintain his action of ejectment. That was the matter which was decided. The statement that the Statute of Anne was limited to the ending of the term by the efflux of time or by notice to quit was *obiter* only.

It is plain, too, that if the disclaimer were waived by the distress, the tenancy was a continuing tenancy at the time of the distress, and that which was said about the statute was quite apart from the case.

In *Grimwood* v. *Moss*, L. R. 7 C. P. 360, Willes, J., in referring to the above case, said: "My impression is, that it would be unlawful, for the reason suggested by Patteson, J., that the statute only applies to the determination of the tenancy in the ordinary course, and not by forfeiture."

In *Alford* v. *Vickery*, Car. & Marsh. 280, it is said the notice there given to quit put an end to the tenancy, and that consequently the relation of landlord and tenant did not exist after the time had expired to which the notice had relation; and that a distress for a subsequent year's rent was not justifiable, for no new tenancy was created; and that the remedy for any subsequent possession by the person who had been tenant was by action for use and occupation, and not by distress; and that the mere continuance in possession by the tenant after the notice to quit had expired, was not a waiver by him of the notice which had been given.

There is no *decision* that the statute of Anne is confined to terms which expire by effluxion of time only, although the opinions to that effect, which were expressed by the two judges, are entitled to the highest respect, and may be accepted as the correct exposition of the law upon the subject; although, I must say, I see nothing in the words of the act which restrict it in the manner stated, the act being remedial, and entitled to be liberally construed.

I have no such strong opinion upon the point to warrant me in acting upon it contrary to the opinions which have been stated of these two eminent judges; and the opinion which I expressed in the case of *Graham* v. *Lang*, 10 O. R. 248, so far as it may be different from the references above made, must be modified or over-ruled.

If the distress made by the landlord for rent upon the termination of the term by forfeiture be avoided, the other question is whether the money paid to the landlord by the

solicitors of two of the execution creditors, who had delivered their writs to the sheriff after the distress had been made by the defendants, to prevent the goods being sold under the claim for rent, can be recovered by the plaintiff who made the payment with a full knowledge of all the facts, and not expressly under protest. The payment was made as follows, as the solicitors said: They doubted whether the landlord was entitled to the rent, and they said to the landlord they did not recognize his right to the rent; in fact, he had not, they thought, any right to it; but that they were obliged to pay it under the circumstances, and they paid it; the solicitors looked to being paid from the sale of the goods, which would sell for more than their payment; and that it was not with the expectation of getting the money back from the defendant Atkinson they made the advance: that they told the defendant Atkinson they did not consider he had any right to the money, but as he was going on with the sale it was necessary to pay him the rent.

Atkinson, the defendant, said the solicitors said, after making the payment they had made it not because they thought Atkinson entitled to it, but because they were forced to do it and could not help themselves. "We don't admit you are entitled to it, but we will pay you rather than let you sell"; and the defendant said if the solicitors had said they paid the money under protest it would have made no difference to him, he would still have sold if they had not paid him.

The solicitors paid the money for the first and third execution creditors, and not for the assignee, under the deed made by the tenants for the benefit of their creditors; and such payment does not prevent the assignee from claiming compensation from the defendant for the seizure of his goods.

The defendants did receive the previous rent by virtue of legal proceedings, which they had no right to receive if they could not distrain at the time they did for that rent.

They believed they had the legal right so to distrain and

to receive the money which was paid to them. The payers of the money were in doubt whether the defendants were entitled to that money or not. It was not unconscientious of the defendants to claim that money, and on being paid it to retain it. It was paid with a full knowledge of the facts. The assignee of the tenants and debtors had nothing to do with the payment. It was not his money that was paid, nor was it paid for him, but his goods were taken by the defendants, and they gave them, in effect, over to the execution creditors or to the sheriff, and the goods were then sold.

There is no reason why Baker, the owner of the goods, should not recover for the taking and sale of his goods for the rent in question. I am not satisfied the bank can recover the money which was paid for them under the circumstances.

My brother Armour is of opinion the assignee can recover, upon the ground that the claim of the defendants for a year's rent in the case of their making an assignment, &c., is a fraudulent provision against creditors, and he has referred to several cases in support of that proposition.

The assignment is not a bankruptcy proceeding; nor is the agreement so unreasonable a one that it should be treated as void; nor does it appear that it was made with or for any fraudulent intent or purpose; nor that it has or will have that effect.

The defendants could bring an action against the tenants and recover judgment upon the covenant against them for and in respect of that rent. That could not be done in the cases referred to on that point.

The defendants' claim, as I have said, is not unreasonable, for there may be a difficulty in reletting the premises, or they might have to be altered to be suitable for a different business from that which the former tenants carried on, although they were adapted for their business; or there may be other reasons which might make the clause not unreasonable. I give no opinion on that part of the case.

As, therefore, there could be no distress in this case, from the authorities cited, and as I doubt the right to recover the money they paid for the rent claimed; but as that is no bar to Baker, the assignee of the goods, recovering for the wrongful seizure made of them, I am of opinion he is entitled to recover for the seizure and sale made of them for the rent distrained for by reason of or after the time of the forfeiture of the term.

O'CONNOR, J., concurred.

Judgment accordingly.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

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

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ACCOUNTANT'S OFFICE.

See PRIORITY.

ADMINISTRATION.

See MORTGAGE, 1.

ADMIRALTY RULES.

See SALVAGE.

APPEAL.

Finality of to County Judge as to assessment.]—*See* ASSESSMENT AND TAXES, 2.

APPOINTMENT.

Power of.]—*See* VENDOR AND PURCHASER, 1.

ARBITRATION AND AWARD.

Municipal corporations—Arbitration and award—Compensation—Reference to a Judge.]—A portion of a drain constructed by a township corporation having been dug on the plaintiff's land, an arbitration was had under the Municipal Act to ascertain the compensation plaintiff was entitled to by reason of the damage alleged to have been sustained by him: (1) for land taken for the drain; (2) for the throwing of earth on the land on the site of the drain; (3) the building of bridges by the plaintiff to cross the drain; and (4) the backing of water into the plaintiff's cellar. The arbitrators found that the plaintiff had not sustained any damage, and they made an award against him, imposing on him a large portion of the costs.

Held, by CAMERON, C. J., that the evidence sustained all the grounds of damage except the last, as to

which the evidence was not very satisfactory. The learned Judge was therefore of opinion that he could not ascertain the compensation himself, but set aside the award, and intimated that unless the parties would agree on new arbitrators, he was disposed to direct a reference to the County Judge.—*In re Hodgson and the Corporation of the Township of Bosanquet*, 589.

See INSURANCE, 1.

AGENCY.

See MORTGAGE, 2.

AGENT.

See MORTGAGE, 2.

AMENDMENT.

See FORECLOSURE.

ARREST.

Re-arrest and discharge under Habeas Corpus—Further arrest on original conviction.]—*See* CONVICTION.

ASSESSMENT AND TAXES.

1. *Assessment—Non-resident land—Mistake in payment—Sale for taxes—Avoidance of sale—Incurable defects.*]—By R. S. O. ch. 180, secs. 108, 109, the county treasurer is to furnish the clerk of each municipality with lists of lands three years in arrear for taxes, and such clerks are to keep the lists in their offices for inspection, and are to give copies to the assessors who are to notify the occupant and owner, if known, by means of the assessment notice, that the land is liable to be sold for arrears of taxes. By secs. 155 and 156 a tax deed is to be final and binding on the former owners and all claiming under them if the lands are not redeemed in one year, and the deed is to be valid against all parties if not questioned by some interested person within two years from the time of sale. The land in question was, in 1879, assessed as non-resident Defendent became the owner in 1878 and having come to reside thereon in the former year, improperly paid these taxes to the collector instead of to the treasurer. No notice of arrears was given to the then owner and occupant, and they were not, entered on the roll for 1882, as required by the Act. The defendant paid all taxes subsequently demanded, including those of 1882, but the land was, notwithstanding, put up and sold for the taxes of 1879, a trifling sum, on the 30th December, 1882. The treasurer's deed was dated 15th February 1884.

Held, that the sale could not be supported, as the notice required by sec. 109, that the land was liable to be sold for taxes, had not been given, and that such irregularity was not cured by secs. 155 and 156, of the Act.

Hutchinson v. *Collier*, 27 C. P. 249; *Church* v. *Fenton*, 28 C. P. at p. 404, doubted by Wilson, C. J.

Per ARMOUR, J.—The substantial compliance with the provisions of R. S. O. ch. 180, secs. 108-111 inclusive, is a condition precedent to the right to sell non-resident land for taxes

Quære, per WILSON. C.J. whether there was not evidence that the land was not sold in a "fair, open, and candid manner."

Observations on the impropriety of tax sales as now conducted under legislative authority. *Deverill* v. *Coe*, 222.

2. *Assessment—Income—Mutual Insurance Company — Appeal to County Judge—Finality.*]—The defendants assessed the plaintiffs for $590.52 on an alleged income of $26,000, being the balance of moneys received by the plaintiffs, a mutual insurance company, for premiums, &c., after payment of the current year's losses and expenses. The plaintiffs contended that there was no income for that the said balance, under the statute relating to the plaintiffs, was to be applied in reduction of the amounts on the premium notes for the ensuing year, and they appealed to the Court of Revision who confirmed the assessment. They then appealed to the County Judge who dismissed the appeal. The plaintiffs then paid the amount under protest, and brought this action to recover same back.

Held, that the decision of the County Judge was final; and this action was therefore not maintainable. *The London Mutual Fire Ins. Co. of Canada* v. *The Corporation of the City of London*, 592.

Revision of.] — *See* MUNICIPAL LAW, 2.

ASSIGNMENT.

For the benefit of creditors.]—*See* BANKRUPTCY AND INSOLVENCY—PRIORITY.

ATTORNEY-GENERAL.

See PUBLIC WORKS.

BAILIFF.

See INTERPLEADER.

BANKRUPTCY AND INSOLVENCY.

Assignment for benefit of creditors —Release of debtor—R. S. O. ch. 118. sec. 2—Fraudulent preference.] —An insolvent debtor informed his creditors of his difficulties, and on the 19th March, 1885, all but two of the creditors signed a memorandum to the effect that the best thing he could do was to sell out his stock and effects for a sum named and agreed to be paid by one of the creditors, and which would pay all his creditors 50 cents in the dollar on certain terms, and those who signed agreed to accept 50 cents in full of their claims.

The debtor afterwards accordingly by bill of sale, dated the 9th of April following, sold and conveyed his assets to one of the said creditors, who had signed the memorandum, for the sum and on the terms named therein, which were that the money was to be payable in four and eight months, and the purchaser was to endorse the vendor's notes, so that he could transfer them to the creditors.

The bill of sale referred to the previous agreement, and recited that "the creditors" had agreed to accept these notes "in full satisfaction and discharge of their respective claims" against the debtor, and also provided that the balance, if

any, "after deducting the debt of the purchasers" (who were among those agreeing to accept the 50 cent composition), should be paid to the debtor.

Held, that this amounted in effect to a condition that any creditor receiving the 50 cents in the dollar of his claim, should release the debtor, and that the sale was therefore void as against the two non-assenting creditors under R. S. O. ch. 118, sec. 2.

Per O'CONNOR, J.—The reservation to the purchasers of "the amount of the debt" was ambiguous, and might mean their whole debt, in which case the sale was preferential, and so void.—*Jennings et al* v. *Hyman et al.*, 65.

BAWDY HOUSE.

See CONVICTION.

BILLS OF LADING.

Parol evidence—Admissibility of to explain ambiguity—Consignor and consignee—Costs.]—The plaintiff's agent at Gravenhurst shipped two car loads of shingles on defendants' cars. The shipping bill was in the usual form, and requested defendants to receive the undermentioned property, &c., addressed to N. Dyment (the plaintiff), Wyoming, to be sent subject to their tariff, &c. Then, in the appropriate columns, followed the description of a car load of shingles, giving the number of the car, &c. Then under this were the words, "To Henry James, Mitchell," and then another car load of shingles was described. Parol evidence was admitted at the trial to shew that the meaning of the shipping bill was that the first-named car load was to go to the plaintiff at Wyoming, and the other to Henry James, at Mitchell, and that the agent so told the defendants' station agent when shipping the goods.

Held, that the evidence was properly admitted.

An objection was taken in the Divisional Court, that the action should have been brought by the consignee James, because, as was alleged, the evidence shewed that the property had passed to him. The objection was not taken at the trial or in the pleadings, otherwise it would have been shewn that the property was still in the plaintiff; and in any event the consignee James consented to be added as a co-plaintiff.

Held, that the objection could not now be raised; and, even if there were anything in it, the court would allow James to be added as a co-plaintiff.

At the trial the learned Judge only allowed County Court costs. On shewing cause to the defendants' motion, the plaintiff, who had not moved, asked to have the direction as to costs varied, and full costs allowed; but the Court, in the absence of a substantive motion therefor, refused to interfere.—*Dyment* v. *The Northern and North-Western Railway Company*, 343.

BILLS OF SALE AND CHATTEL MORTGAGES.

Fraudulent conveyance—Chattel mortgage—Intent to prefer—R. S. O. ch. 118, 47 Vic. ch. 10, sec. 3 (O.)]—A chattel mortgage given as secur-

ity for a *bona fide* debt cannot be avoided under R. S. O. ch. 118, by simply shewing that the debtor was insolvent, and intended to give the mortgagee a preference, but there must be knowledge on the part of the creditor taking the mortgage so as to constitute a concurrence of intent on the part of the debtor and creditor; and the amendment made by 47 Vic. ch. 10, sec. 3 (O.) does not affect the matter.

Burns v. *McKay*, 10 O. R. 167 followed.

In this case there was no knowledge on the part of the mortgagee of the debtor's insolvency; and it also appeared that the mortgage was given in pursuance of a previous promise to give security for the debt. The mortgage was therefore upheld.

Quære, whether, where the statute may be defeated by shewing an antecedent promise to give security, it must be such as the promise indicated.—*McRoberts* v. *Steinoff*, 369.

BOARDING-HOUSE KEEPER.

See LIEN.

BONUS.

Power to repeal—Promulgation.]—*See* RAILWAYS AND RAILWAY COMPANIES 3.

BY-LAW.

Drainage.]—*See* MUNICIPAL LAW, 2.—LICENSES, 2.

CANADA TEMPERANCE ACT, 1878.

1. *Canada Temperance Act, 1878, secs. 105, 111—Justices of Peace—Jurisdiction—Certiorari—Appeal to Quarter Sessions — Conviction quashed.*]—When a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety.

In cases where a magistrate has jurisdiction *certiorari* is absolutely taken away, but an appeal to the Sessions still exists, which however is itself also taken away by sec. 111 of the "Canada Temperance Act, 1878," where the conviction is before a stipendiary magistrate.

It is imperative, under sec. 105 of the above Act, that an information thereunder be laid before two justices, and that they both be named in the summons. Where, therefore, a summons stated that an information had been laid only before the justice who signed it, and yet called upon the defendant to appear before another named justice as well.

Held, that the justices had no jurisdiction, and that the defendant's appearing before them did not confer it. A conviction was therefore quashed.—*Regina* v. *Ramsay*, 210.

2. *Sale of liquor without license—Canada Temperance Act, 1878 (41 Vic. ch. 16 D.) — Meaning of "County" in Act—Indian Act, 1880 (43 Vic. ch. 28 D.)*]—The defendant was convicted of having sold intoxicating liquors on 16th December, 1884, at the township of Oakland, in the county of Brant, being the day on which the vote for the passage of the Canada Temperance Act for the county of Brant was taken.

The townships of Oakland and Burford, in the county of Brant, had been for the purposes of Dominion elections separated from the county of Brant and annexed to the adjoining county.

Held, that the word "County," as used in the Canada Temperance Act, 1878, means county for municipal and not for electoral purposes.

Certain portions of the county of Brant consist of Indian lands, and the sale of liquor in these lands is regulated by the Indian Act of 1880 and amendments thereto.

Held, that under the eighth objection to the conviction—that it did not appear that the votes of the electors on the Indian lands in the county were taken upon the petition for the Act, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it—the present proceedings did not properly bring the matter before the Court. —*Regina* v. *Shavelear*, 727.

CASES.

Allan v. *McTavish*, 2 A. R. 278, followed.] *See* FORECLOSURE.

Burns v. *McKay*, 10 O. R. 167, followed.] *See* BILLS OF SALE AND CHATTEL MORTGAGES.

Black v. *Wesley*, 8 U. C. L. J. 277, followed.] *See* PROHIBITION.

Canada Atlantic Railway Company v. *Corporation of Ottawa*, 12 A. R. 234, followed.] *See* RAILWAYS AND RAILWAY COMPANIES, 3.

Church v. *Fenton*, 28 C. P. at p. 404, doubted.] *See* ASSESSMENT AND TAXES, 1.

Citizens Insurance Company v. *Parsons*, 7 App. Cas. 66, commented on.] *See* INSURANCE, 2.

Dominion Loan Society v. *Darling*, 5 A. R. 577, referred to.] *See* VENDORS AND PURCHASERS, 1.

Dynes v. *Bales*, 25 Gr. 593, followed.] *See* REGISTRY LAW.

Gallagher v. *Bathie*, 2 U. C. L. J. N. S. 73, followed.] *See* PROHIBITION.

Graham v. *Lang*, 10 O. R. 248, not followed.] *See* LEASE.

Holmes v. *Reeve*, 5 P. R. 58, followed.] *See* PROHIBITION.

Howeren v. *Bradburn*, 22 Gr. 96, commented on.] *See* FORECLOSURE.

Hutchinson v. *Collier*, 27 C. P. 249, doubted.] *See* ASSESSMENT AND TAXES, 1.

Paradis v. *Campbell*, 6 O. R. 632, distinguished.] *See* WILL, 3.

Parsons v. *Queen's Insurance Company*, 2 O. R. 45, followed.] *See* INSURANCE 1.

Queen's Insurance Company v. *Parsons*, 7 App. Cas. 96, commented on.] *See* INSURANCE, 2.

Regina v. *Arscott*, 9 O. R. 541, dissented from.] *See* CONVICTION.

Reid v. *Reid*, 29 Gr. 372, commented on.] *See* DOWER.

Sutton v. *Sutton*, 22 Ch. D. 511, not followed.] *See* FORECLOSURE.

Truesdell v. *Cook*, 18 Gr. 532 followed.] *See* REGISTRY LAW.

Van Egmond v. *Seaforth*, 6 O. R. 599, distinguished.] *See* MUNICIPAL LAW, 4.

Wilson v. *Wood*, 9 O. R. 687, disapproved of.] *See* PLEADING.

CERTIORARI.

See CANADA TEMPERANCE ACT, 1878, 1—COUNTY COURTS—PROHIBITION.

COLONIZATION ROADS.

See PROHIBITION.

COMMISSION.

To Land Agent.]—*See* PRINCIPAL AND AGENT.

COMPANY.

1. *Company—Increase of capital stock—Notice by Provincial Secretary for publication—Ministerial Act—Mandamus—27 & 28 Vic. ch. 23, sec. 5, sub-sec. 18.*]—The M. Manufacturing Company passed a by-law increasing the capital stock by $300,000, making the capital stock $500,000, and declaring the number and amount of the shares of the new stock to be 3000 shares of $100 each. They then applied to the Provincial Secretary to issue a notice under his signature for publication as required by sub-sec. 18 of sec. 5 of 27 & 28 Vic. ch. 23, filing a duly authenticated copy of the by-law; and declaring that none of the stock had been subscribed for, and nothing paid thereon. On objection by the minority of the shareholders the application was refused, when a mandamus was applied for.

Held, that the Provincial Secretary of this Province is now the officer appointed to perform the duties of the office of Provincial Secretary named in 27 & 28 Vic. ch. 23: that his duty in issuing the notice was merely ministerial; and that on the requirements of the statute being complied with he had no discretion in the matter, but must issue the notice.

Held, also, that mandamus was the proper mode of enforcing the issue of the notice. *Re The Massey Manufacturing Company*, 444.

2. *Winding-up Acts—Evidence of insolvency—Insurance Company—Debt due—45 Vic. c. 23, secs. 9, 10, 11 (D.)—47 Vic. c. 39 (D.)—Pleading—Acknowledgment of insolvency—Manager of Company—Agreement as to winding-up proceedings—Ultra vires.*]—C. F. S. applied for an order for the winding-up of the B. company under 45 Vic. c. 23 (D.) and amending Acts, and as evidence of the insolvency of the company shewed that, being entitled to the beneficial interest in a certain policy on the life of her deceased husband, she had demanded payment thereof from the company, but it had been refused, that the suspension of the company had been announced in the papers, and that the manager of the head office in Canada had stated that he was instructed from the head office in England not to make any payments on behalf of the company. It appeared, however, that the policy provided for payment in three months after proof of the death of the insured had been received by the company, while the above demand

for payment was made a fortnight after the death, and no other demand had ever been made.

Held, that the debt was not due when the demand was made, and therefore non-payment was not evidence of insolvency within the meaning of 45 Vic. c. 23, secs. 9, 10, 11 (D.), nor would the fact that the company had not paid claims amount to an acknowledgment of insolvency within s. 9 (*d*) of that Act, nor otherwise was there sufficient evidence here of the insolvency of the company, and the petition must be dismissed.

Held, also, that as a matter of pleading, if it had been intended to rely upon the acknowledgment of insolvency, it should have been stated in the petition.

Semble, that even if a general manager of a company positively agreed that any winding-up proceeding that should be necessary should be taken in Ontario rather than elsewhere, this would not bind the company, for the business of the manager is to manage a going concern. It is no part of his duty nor within his power to arrange about putting an end to it.—*In re Briton Medical and General Life Association (Limited.)*, 478.

COMPENSATION.

See ARBITRATION AND AWARD—PUBLIC WORKS—VENDORS AND PURCHASERS, 4—WATERS AND WATERCOURSES, 1.

CONDITION.

See DEED.

CONDITIONS OF SALE.

See VENDORS AND PURCHASERS, 3.

CONSIGNOR AND CONSIGNEE.

See BILLS OF LADING.

CONSTITUTIONAL LAW.

See INSURANCE, 1.

CONTEMPT OF COURT.

Contempt of Court—Publication of letter by solicitor pending appeal—Right of a relator to make the motion — Apology — Costs.]—A judgment was delivered by the Master-in-Chambers on a *quo warranto* proceeding on March 23rd, 1886, and an article referring to it was published in "The Mail" newspaper on the next day. On March 26th O'B. who was the solicitor for the defendant, gave notice of appeal against the judgment, and on the same day wrote a letter in answer to the article, commenting on the conduct of the Master in reference to the case, which letter was published in "The Mail" on the following day.

On a motion made by F. the relator to commit O'B. for contempt, notice of which was given on the same day as the notice of the abandonment of the appeal. It was

Held, that the nature of the charge against O'B. must be determined at the time of the publication of the letter, and could not be effected by the fact of the abandonment of the appeal on the same day that the notice for the motion to commit was

given; that O'B. could not take advantage of his double character of citizen and solicitor; that it is not allowable for a solicitor engaged in a cause to comment thereon in the press during the pendency of the case; that the relator in the *quo warranto* proceeding had a right to make the application; and that the letter was not only an injudicious but an improper one, and was a contempt of Court.

An affidavit was put in and read on the argument containing an explanation by O'B., which was coupled with statements by his counsel as to the character, ability, and conscientiousness of the Master-in-Chambers, and a denial of any intention to impugn any of these.

Held, that as the appeal had been abandoned and no prejudice could now arise to the applicant a proper disposition of the case would be to refuse the motion which was done, but upon payment of the costs by O'B. the solicitor. *Regina ex rel. Felitz* v. *Howland, Re O'Brien*, 633.

CONVERSION.

Conversion—Measure of damages—Condoning conversion — Judicature Act.]—B. having possession of certain goods of S., S. demanded them of him on December 23rd. B. refused to allow the bulkier of them to be removed until after Christmas, on the ground that it would interfere with his own trade. On December 24th, S. commenced this action for damages, on the ground of wrongful conversion and detention of the goods by B. On December 26th, B. notified S. that he could remove the remainder of the goods. S. thereupon sent for them, but finding some of them had been seized under process of attachment out of the Division Court, removed the rest, and afterwards contested in the Division Court the ownership of those seized.

Held, affirming the judgment of the Master in Ordinary, that S. was entitled to damages for the detention of the goods on December 23rd, but the measure of that damage was nominal and not the value of the goods detained. S. acted on the letter of December 26th, and there did not appear to have been any disposal of the goods in the sense of their destruction or removal adverse to the plaintiff's property, but the plaintiff was ultimately prevented from getting the goods, not because of the defendant's misconduct, but because the claim of attaching creditors intervened.

The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent has he sustained damage.—*Stimson* v. *Block*, 96.

CONVICTION.

Conviction for keeping bawdy house—Release of plaintiff pending appeal—Re-arrest and discharge on habeas corpus—Further arrest on original conviction—Action for penalty under 31 Car. II. ch. 2, sec. 6—Warrant of justice the order and

process of court—Practice—Regularity of conviction and warrant.]—The defendant L., a magistrate, had convicted the plaintiff for being the keeper of a bawdy house, and sentenced her to six months' imprisonment. Plaintiff, after undergoing two days' imprisonment, was released on bail, pending an appeal to the sessions.

The appeal was dismissed and plaintiff subsequently arrested upon a warrant issued by the defendant L. under advice of defendant H. the County Crown Attorney.

Upon return to *habeas corpus* she was discharged from custody under the latter warrant, upon the ground that it did not take into account the two days' imprisonment she had suffered prior to her appeal. Thereupon she was detained under a third warrant, on which nothiug turned, and she was again arrested upon a fourth warrant issued by defendant L. upon the original conviction,

In an action brought by the plaintiff for the penalty of £500 awarded by the 6th section of the *habeas corpus* Act 31 Car. II. ch. 2,

Held, reversing the judgment of CAMERON, C. J., at the trial, that the 6th section of the *habeas corpus* act, 31 Car. II. ch. 2, has no application to a case in which the prisoner is confined upon a warrant in execution.

Held, also, that the warrant in execution, issued by the convicting justice upon the discharge of the prisoner from custody for defects in the former warrant, was the legal order and process of the court having jurisdiction in the cause.

Semble, that the warrant issued after the dismissal of the appeal by the sessions, and which followed the original conviction in directing imprisonment for six months, without making allowance for the two days' imprisonment already suffered, was not open to objection.

The course to be taken by the court, on return of a *habeas corpus*, shewing prisoner detained under a defective warrant in execution of a conviction of a justice of the peace, discussed.

The conviction and warrants charged that plaintiff "did unlawfully keep a certain bawdy house and house of ill-fame for the resort of prostitutes, and is a vagrant within the meaning of the statute," &c., not alleging that she did not give a satisfactory account of herself.

Held, sufficient.

Regina v. *Arscott*, 9 O. R. 541, dissented from. *Arscott* v. *Lilley and Hutchinson*, 285.

Action against magistrate under.]—*See* MAGISTRATE.

See also CANADA TEMPERANCE ACT, 1878, 1.—LICENSES, 1.—MUNICIPAL LAW, 3.

COSTS.

See BILLS OF LADING—CONTEMPT OF COURT—MAGISTRATE—PUBLIC SCHOOLS, 2.

COUNTY.

Meaning of.]—*See* CANADA TEMPERANCE ACT, 1878, 2.

COUNTY COURTS.

Provisional Judicial District of Thunder Bay—47 Vic. ch. 14, secs. 4, 5 (O.)—Title to land—Certiorari.]

—*Held*, that the jurisdiction conferred on the District Court of the Provisional Judicial District of Thunder Bay by 47 Vic. ch. 14, secs. 4, 5 (O.), is not subject to the exceptions to the general jurisdiction of the County Courts mentioned in R. S. O. ch. 43, sec. 18, and that, therefore, that District Court has power to try actions in which the title to land comes in question. *McQuaid* v. *Cooper et al.*, 213.

COURTS.

See CONTEMPT OF COURT.

COVENANT.

Action—Breach of covenants for title—Continuing damages—Survivorship of right of action—Motion to set aside order of revivor.]—S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order was now sought to be set aside on the ground that the right of action did not survive to her.

Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued since his death, for which *Semble*, the heir, or devisee, might bring an action.

In the case of such covenants running with the land where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death, passes to the heir or devisee; but where not only the breach took place, but damages accrued in the life-time of the ancestor, the remedy for these damages passes to the personal representative. *Platt* v. *The Grand Trunk Railway Company of Canada*, 246.

Action on.]—*See* FORECLOSURE.

To repair.]—*See* LANDLORD AND TENANT, 1.

CREDITORS' RELIEF ACT, 1880.

Creditors' Relief Act of 1880—Execution creditors—Priorities—Stop orders—Simple contract creditors—Ratable distribution.]—Since the coming into force of the "Creditors' Relief Act of 1880," March 25, 1884, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby, but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors they must have the same right with regard to funds in Court as they would have with regard to funds in the sheriff's hands, and in any case where an execution creditor obtains a stop order there must be a reference to the Master to ascertain if any other creditors desire to ask a share of the fund.—*Dawson* v. *Moffatt*, 484.

CROWN.

Soil of street vested in.]—*See* PUBLIC WORKS.

DAMAGES.

Measure of.]—*See* CONVERSION.

Reduction of by consent or new trial.]—*See* LIBEL, 1.

See also COVENANT—WATERS AND WATER COURSES, 2.

DEBENTURES.

See RAILWAYS AND RAILWAY COMPANIES, 3.

DEBTS.

Charge to pay.]—*See* WILL, 2.

Charged on residue of estate.]—*See* WILL, 6.

DEED.

Conveyance subject to a condition—Breach of condition—Will—Devise—Possibility—R. S. O. ch. 106, sec. 2—Right of entry for condition broken—Valid condition of re-entry—Heirs-at-law—Devisees.]—On September 26th, 1844, J. Le B. by deed bargained and sold, &c., to the municipal council of D. district, in consideration of five shillings, a certain lot for the purpose of erecting thereon a school-house for the use of the D. district. *Habendum*, for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso that the said council should within one year from its date erect a school house for the use of the said district or if the said council should at any time erect any other building save said school-house and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. Le B. and his heirs to re-enter and avoid the estate of the said municipal council.

J. Le B. by his will, dated July 23rd, 1847, devised all his real estate to certain nieces, and died in the year 1848, without having revoked or altered said will.

The municipal council complied with the condition by building a school-house, and at the time of the making of the will, the condition had not been broken, but the successors of D. district dealt with the land otherwise than was authorized by the deed, and broke the condition. The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. Le B. or his heirs-at-law were entitled to the proceeds thereof.

Held, that the word "possibility" in R. S. O. ch. 106, sec. 2, includes a "right of entry for condition broken," mentioned in sec. 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition no new estate was acquired, so as to require words applicable to after acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made, and the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession.

Held, also, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined,

and no other estate created in its room; and that the condition in this case was therefore perfectly valid.

The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it. *In re Melville*, 626.

DEVASTAVIT.

See WILL, 5.

DEVIATION.

In line of railway.]—*See* RAILWAY AND RAILWAY COMPANIES, 1, 4.

DEVISE.

Of land not owned by the testator.]—*See* WILL, 1.

See also, DEED.

DIRECTION.

To jury.]—*See* INSURANCE, 3.

DISTRESS.

See LEASE.

DISTRICT COURTS.

See COUNTY COURTS.

DISTRIBUTION.

See CREDITORS' RELIEF ACT, 1880.

DIVISION COURTS.

See PROHIBITION.

DOWER.

1. *Dower in equity of redemption —Husband and wife—Arrears of dower—Instalment mortgage—Administration.*]—Where one died entitled to an equity of redemption in certain real estate, which he had originally purchased subject to the mortgage still existing thereon, and the same having been sold in certain administration proceedings, his widow now claimed arrears of dower in respect thereof during the period between the death and sale, when she was in possession by herself or her tenants.

Held, that there being no assignment of dower, and the husband not having died seized in fee so as to give his widow legal dower, she was not entitled to arrears of dower as of right, but only upon the equitable consideration of the Court, and the proper mode of exercising the same was to deduct from the rents received by the widow plus an occupation rent charged against her, so much as she had properly applied in meeting necessary outlay and expenditure in respect of the land and buildings, and allow to her one-third of the residue as her arrears of dower. *Re Percy, Stewart* v. *Percy*, 374.

2. *Dower in equity of redemption —Mode of computing — Husband and wife—Mortgage.*] — D. being owner in fee of certain lands, on March 4th, 1884, mortgaged the same to secure payment five years after date of certain moneys. On March 15th, 1884, he married the

plaintiff, and died intestate on August 16th, 1884. He left no other estate.

Held, that the plaintiff could only claim dower in the equity of redemption, unless she contributed ratably to the amount of the mortgage incumbrance.

Method of arriving at the amount of dower in such cases pointed out.

Reid v. *Reid*, 29 Gr. 372, commented on. *Dobbin* v. *Dobbin*, 534.

DRAINAGE.

By-law.]—*See* MUNICIPAL LAW, 2.

Private.]—*See* MUNICIPAL LAW, 5.

EASEMENT.

Easement—Light and air—Implied grant—Equity of redemption.]—P., the owner of lots 8 and 9, by his will devised the same to trustees in trust to sell. In 1869 the plaintiff purchased from the trustees lot 8, on which there was a house with windows overlooking lot 9, immediately adjoining it, the said lot 9 being then open, and not built upon. In 1873 the trustees sold lot 9 to Mrs. Priestman, who sold to T., who erected a house thereon. T. sold to G., under whom defendant claimed. At the time P. acquired lot 9 he did so subject to a mortgage thereon, and the trustees sold to Mrs. Priestman subject to such mortgage, which was subsequently discharged by G., who obtained the usual statutory discharge, which was duly registered by him. The plaintiff claimed that he was entitled by implied grant to the right of both light and air to the said windows, and that the same had been infringed upon by the erection of T.'s house. In an action therefor the jury found that the light had been infringed, but not injuriously.

Held, that by reason of P.'s trustees, at the time they sold to the plaintiff, having merely an equity of redemption in lot 9, which in them never became converted into a legal estate, their equity, transmitted to G., through whom defendant claimed, was not burdened with an easement appurtenant to lot 8, and that no implied grant to light and air could arise.

By the discharge of the mortgage on lot 9 G. acquired the legal estate of the mortgagee, and the equity of redemption becoming merged therein, lot 9 never was in fact or in law a servient tenement to lot 8 in respect of the right to light claimed by the plaintiff. *Carter* v. *Grasett*, 331.

EJECTMENT.

Statute of Limitations—Possession—Evidence.—Squatter—Estoppel.]—In 1811 P., the owner of certain land, sold it to D., who went into possession and occupied till 1827 or 1828, when he was turned out by the sheriff under legal proceedings, the nature of which did not appear, taken by Dufait, who was put in possession, and remained in possession until 1864, when he conveyed to O., through whom the plaintiff claimed. D.'s actual possession had been only of about ten acres.

Held, that D.'s possession was of the whole land; and that he could not be treated as a squatter so as to enable him only to acquire a title to the ten acres actually occupied.

It was objected by the plaintiff

that the evidence of the recovery by legal proceedings was inadmissible, because no judgment was proved; and not being proved was no evidence against the plaintiff; but

Held, that though this might be so if the plaintiff's title were being inquired into, it was admissible for the defendant in respect of his possessory title.

T., to whom the patent of the land in question subsequently issued, by deed poll made prior thereto, bargained, sold, aliened, and confirmed the land in question to L. *habendum* to L. and his heirs; with a covenant of warranty.

Held, that on obtaining the patent T. was estopped by the deed from setting up title in himself under the patent. *Robertson* v. *Daley*, 352.

EQUITY OF REDEMPTION.

See DOWER.—EASEMENT.

ESCROW.

See MORTGAGE, 3.

ESTOPPEL.

See EJECTMENT.

EVIDENCE.

Corroborative evidence—R. S. O. ch. 62, sec. 10,]—Plaintiff, after her husband's death, and about twenty-five years before action brought, went to live with testator, her son-in-law, and resided with him up to the time of his wife's death, about twelve years before action. She alleged that after her daughter's death testator agreed to pay her wages if she would continue to live with him and take care of his family. She accordingly did so till his death in 1855, up to which date she had received nothing from him. In an action against his estate for wages plaintiff relied on the evidence of a witness to the effect that testator, about two years before his death, told witness plaintiff should be handsomely paid for her services; and also on the evidence of another son-in-law, that two or three years before his death testator told witness that he would pay her well. It also appeared that by his will testator directed all his property to be converted into money and invested in mortgage security, and the whole income paid to plaintiff during her lifetime; but there was no evidence as to the value of this bequest, and it was suggested that after payment of debts the residue would be very small: *Held*, that there was no sufficient corroborative evidence within R. S. O. ch. 62, sec. 10. *Tucker* v. *McMahon et al.*, 718.

Admissibility to explain ambiguity.]—*See* BILLS OF LADING.

Letter written without prejudice.]—*See* PRIVILEGED COMMUNICATIONS.

Discovery of new evidence.]—*See* INSURANCE, 3.

See also EJECTMENT—LIBEL, 2—LICENSES, 2—RAILWAYS AND RAILWAY COMPANIES, 2.

EXECUTORS AND ADMINISTRATORS.

Infants—Executors—Guardian—Payment of infants' legacies to Guar-

dian.]—One L., by her will, gave her real and personal property to her brothers and sisters, share and share alike, and appointed L. and E. executors. L. and E. converted the estate into money, and invested the proceeds on mortgage security, and afterwards as certain of the legatees came of age paid them over their shares, but paid the plaintiffs' shares, they being infants, to one F., who, with the concurrence of their parents, had been appointed their guardian by the Surrogate Court. F. absconded with the money.

The infants now suing L. and E. by their next friend for the amount of their shares,

Held, that by the actions of the executors the moneys in their hands had become trust funds of which they were trustees, and that the plaintiffs were entitled to judgment. *Huggins et al.* v. *Law et al.*, 565.

See WILL, 5, 6.

EXECUTION CREDITORS.

See CREDITORS' RELIEF ACT, 1880.

EXPROPRIATION.

See RAILWAYS AND RAILWAY COMPANYS, 1, 4.—PUBLIC WORKS.

FORECLOSURE.

Foreclosure suit—Computation of interest—More than six years' arrears—Action on covenant—Amendment—R. S. O. ch. 108, sec. 17—R. S. O. ch. 61, sec. 1.]—On an appeal from a report of a master who had allowed more than six years of arrears of interest in taking an account of what was due on a mortgage containing a covenant to pay interest.

Held, that in a foreclosure suit, interest when due for more than six years should be allowed in taking the mortgage account instead of allowing it for six years only, and compelling the plaintiff to bring another action on the covenant to recover the balance.

Held, also, that more than ten years' arrears of interest had been rightly allowed: *Howeren* v. *Bradburn*, 22 Gr. 96, commented on; *Allan* v. *McTavish*, 2 A. R. 278, followed.

When a decision of the Court of Appeal in England is at variance with one of the Court of Appeal of this Province, the latter should be followed here, as the former Court is not the Court of ultimate appeal for the Province: *Sutton* v. *Sutton*, 22 Ch. D. 511, not followed. *Macdonald* v. *McDonald*, 187.

FORFEITURE.

See LANDLORD AND TENANT, 1—LEASE.

FRAUD AND MISREPRESENTATION.

Fraudulent conveyance—Lapse of time no bar.]—One G. in 1873 made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance, brought this action to have the said conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become

extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors.

Held, that the plaintiff was entitled to the relief asked.

A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years. *Boyer* v. *Gaffield*, 571.

See BANKRUPTCY AND INSOLVENCY.

FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY — BILLS OF SALE AND CHATTEL MORTGAGES.

GUARDIAN.

Payment of infants legacies to.]—*See* EXECUTORS AND ADMINISTRATORS.

GUARDIANSHIP.

See WILL, 1.

HAWKERS AND PEDLARS.

See LICENSES, 1, 2.

HUSBAND AND WIFE.

See DOWER, 2.

IMPROVEMENTS.

See WILL, 4.

INCOME.

Of insurance company.]—*See* ASSESSMENT AND TAXES, 2.

INDIANS.

See CANADA TEMPERANCE ACT, 1878, 2.

INDIAN ACT, 1880.

See CANADA TEMPERANCE ACT, 1878, 2.

INFANTS.

Executor.]—*See* WILL, 5.

Legacy to.]—*See* EXECUTORS AND ADMINISTRATORS.

INJUNCTION.

See WATERS AND WATER COURSES, 2.

INSOLVENCY.

Evidence of.]—*See* COMPANY, 2

See also LEASE.

INSURANCE.

1. *Insurance (fire)—Misdescription of premises—Waiver—Arbitra-*

tion—Verdict—Variance—Statutory conditions—Variation.]—The plaintiff, in his application for insurance, described the building insured by an illegible word that was intended by him for *board*, but was read by the defendants as *brick*, and they issued their policy upon a brick building and at a premium rate for that class of building, and were not aware until after the fire that the building was a board one. Condition 17 of the statutory conditions on the policy provided: "The loss shall not be payable until thirty days after the completion of the proofs of loss, unless otherwise provided by statute or the agreement of the parties; and there was a condition printed upon the policy, in the manner required by the Fire Insurance Policy Act as a variation of conditions, that "The loss shall not be payable until sixty days after the completion of the claim." Action was commenced upon the policy more than thirty days but less than sixty days after the fire. After action the defendants demanded a magistrate's certificate under statutory condition 13*e*, and had an arbitration under statutory condition 16, and by the award on the arbitration it was found that the value of the building insured was $2,500, and the amount of the loss was $1,700. The jury found that the value of the building was $3,500, and the amount of the loss was $3,500.

Held, per WILSON, C. J., (1) That by reason of a misunderstanding as to the nature of the building, the parties never contracted together, but the defendants waived their right to object to the mistake by demanding the magistrate's certificate and the arbitration, and by doing so precluded themselves from asserting that no contract was ever made. (2) That the finding of the jury as to the value of the building must prevail, notwithstanding the award. (3) That the condition that the loss should not be payable until sixty days after completion of the claim, being in the policy and not dissented from by the plaintiff, constituted an agreement between the parties, and that it was a reasonable condition; but that it was unreasonable for the company to insist upon it, as they never intended to pay the loss.

Per ARMOUR, J. Following *Parsons* v. *Queen's Insurance Company*, 2 Ont. 45, any variation of the statutory condition is *primâ facie*, unjust and unreasonable. *Smith* v. *City of London Insurance Company*, 38.

2. *Insurance—Variation of statutory conditions—Fire Insurance Policy Act—Dominion Act—Mutual Insurance Company—Attorney-General—Minister of Justice—Constitutional law.*]—The defendant, a mutual insurance company, was incorporated by an Act of the Dominion Parliament, 41 Vic. ch. 40, by sec. 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto shall render the policy void."

Held, on demurrer, that the matters provided for by the above section were subject matters of the "Fire Insurance Policy Act" of Ontario, over which the province has exclusive jurisdiction; and although

they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act *per se*, but only by being used as required or modified by said Ontario Act, namely in the manner provided for variations to the conditions therein contained.

Citizen's Insurance Company v. *Parsons* and *Queen's Insurance Company* v. *Parsons*, 7 App. Cas. 96, commented upon.

The 28th section of the Mutual Fire Insurance Companies' Act, 1881, makes the Fire Insurance Policy Act applicable thereto, "except where the provisions of the act respecting Mutual Fire Insurance Companies are expressly inconsistent with, or supplementary and in addition to the provisions of the said Fire Insurance Policy Act."

Held, this includes all mutual insurance companies doing business in the Province; and it was not alleged in the pleadings herein, that there was anything in the defendants' act "expressly inconsistent with" the Fire Insurance Policy Act, but merely that the matters were variations of the statutory conditions.

Held, also, that the questions, so far as raised, were not of a constitutional character so as to require notice to the Attorney-General of the province and the Minister of Justice of the dominion. *Goring* v. *The London Mutual Fire Insurance Company*. 82.

3. *Life insurance — Suppression by insured—Right to begin at trial —Discovery of new evidence—Direction to jury—New trial.*]—At the end of questions in an application for insurance, made in December, 1883, and forming part of the application, was an agreement signed by insured stating that he warranted and guaranteed that the answers to the said questions were true to the best of his knowledge and belief, and he also agreed that the application should be the basis of his contract, and that any misstatement or suppression of facts in the answers to said questions, or in his answers to the medical examiner, should render the policy null and void. The proposals and declaration were also made the basis of the contract.

Endorsed on said application were answers given to questions by a medical examiner, and at the end thereof a certificate, signed by insured stating that he had made full, true, and complete answers to the questions propounded by said examiner and agreed to accept the policy on the terms mentioned in the application.

In answer to a question whether he had had any serious illness, local disease, or personal injury, and if so of what nature, insured answered, "No, except a broken leg in childhood."

There was an answer to a question giving one T.'s name as that of his usual medical attendant, and in answer to another question, whether he had consulted any other medical man, and if so for what and when, insured replied, "Dr. A., for a cold."

Insured had been thrown from a load of hay, and on his examination, in a suit for damages against the municipality, he swore he had been five weeks in bed suffering from his chest and was at that time unfit for work of any kind, and had been attended by three doctors. No mention was made of this accident or of the doctors.

In reply to a question whether his grand-parents, &c., brothers, &c., ever had pulmonary or other con-

stitutional disease, he replied "No;" and he also stated, in reply to questions as to what disease his brother had died from, that he had died from over-growth.

It was shewn that an elder brother had been treated by Dr. A., some years before, for pulmonary affection and that insured had said that the brother who had died had bled at the lungs and had been ill for some months before he died. Insured, also, in answer to a question whether any material fact bearing on his physical condition or family history had been omitted, replied "No."

Defendants admitted policy, proofs of death, probate, &c., and accepted burden of proof at the trial, and claimed the right to begin, which was refused.

On motion in Term, copies of letters and documents, signed by insured, sent to the government for leave to remain off a homestead in the North-West, and shewing that he had been suffering from congestion of the lungs and illness, from the spring of 1883 to the spring of 1884, were produced. It was shewn that the existence of some such documents had been suspected and that they had been searched for in all the government offices but could not be found, and that defendants received them the day after the trial.

Held, that the plaintiffs had the right to begin, notwithstanding such admissions.

WILSON, C. J., reserved the consideration of the admission of the new evidence.

Per ARMOUR, J. It could not be received, as it was merely corroborative, and its suspected existence would have been ground for asking to have the trial postponed.

Per WILSON, C. J. There should be a new trial. There was evidence to go to the jury as to the truth of of answer given respecting the health of the deceased brother. The jury should have been asked to say whether the answer as to inquiries was a misrepresentation in fact: that the certificate meant the answers were given upon a knowledge of the facts and upon insured's belief in the truth of those facts; and a statement made without knowledge would not be protected by the formula, "best of knowledge and belief," if insured had no knowledge; nor would such statements be protected if made regardless of insured's belief in the truth of such knowledge as he had. The proposal was a warranty that the answers were true according to *the best* of his knowledge.

Per ARMOUR, J. The direction to the jury, whether insured had stated to the best of his knowledge and belief the truth in regard to deceased's brother, was sufficient.

As to the accident, it was one which ought to have been mentioned, but it was probably considered of too little importance by insured, or else had escaped his memory at the time of the application, and it was sufficient for the jury to have found insured did not wilfully withhold the fact, but answered to the best of his knowledge and belief; and the proposals were not warranties.

The Court being equally divided the motion for a new trial was dismissed, with costs. *Miller* v. *Confederation Life Assurance Company*, 120.

Assessment of Income of Insurance Company—*See* ASSESSMENT AND TAXES, 2.

INTEREST.

Computation of.] — *See* FORECLOSURE—WILL, 4.

INTERPLEADER.

Trespass—Seizure — Interference with—Bailiff — Sheriff — Notice of action—Goods in custody of law.]—A bank placed an execution against M. the plaintiff's son and one C., in the hands of B., a Division Court bailiff, under which B. seized a stallion as belonging to M., which plaintiff claimed as her property, and which pending interpleader proceedings instituted by her, was placed with an innkeeper. Subsequently an execution by P. against the same parties was placed in the sheriff's hands. P.'s solicitor informed the sheriff of all the circumstances, and he, on the 3rd October, obtained from the innkeeper a written undertaking to keep the horse—stated to be under seizure by the sheriff—until further orders from the sheriff. On 14th October the sheriff on notice of plaintiff's claim interpleaded. On 31st October, the Division Court interpleader was decided in the plaintiff's favor. Whereupon the sheriff at once notified the innkeeper that he did not claim any further right to hold the horse. Before being so notified, the plaintiff demanded the horse, but the innkeeper refused to deliver it up until his charges for keeping it were paid, but did not assert any right to hold for the sheriff. On 18th November, part of the charges were paid, but it did not appear whether by the bank or P.; and the balance was subsequently paid by B. On the 3rd November an order was made barring P.'s claim, and directing the sheriff to forthwith deliver the horse to plaintiff. On 14th November this action was commenced against the bank, P., the sheriff and bailiff, for conversion, and disobedience of the order of the Court directing redelivery, claiming the value of the horse, loss of earnings, &c. About 3rd December, after the commencement of the action, the horse was tendered to plaintiff who refused to accept it unless damages and costs were paid. No notice of action was given.

Held, that there could be no recovery against any of the parties for the reason (1) that the bailiff should have had notice of action; (2) that there was nothing to connect the bank or P. with the seizure; (3) that though there was what constituted a seizure by the sheriff, so as to entitle him to interplead and make the innkeeper liable if he had not kept the horse for him, the sheriff in no way interfered with the bailiff's possession or control over it, or in any way converted it to his own use, it being at the time in the custody of the law. *Pardee* v. *Glass et al.*, 275.

JURISDICTION.

See CANADA TEMPERANCE ACT, 1878, 2—REGISTRY LAW.

JURY.

Direction to.]—*See* INSURANCE, 3.

Withdrawal of case from.]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

JUSTICES OF THE PEACE.

See CANADA TEMPERANCE ACT, 1878, 1.

LAND AGENT.

See PRINCIPAL AND AGENT.

LANDLORD AND TENANT.

1. *Statutory lease — Covenant to repair — Alterations by tenant — Waste — Waiver — Forfeiture.*]—On December 5th, 1882, plaintiff by lease, made according to the Act respecting "Short Forms of Leases," R. S. O. ch. 103, demised to defendant certain premises for a grocery and liquor store, for a term of years. In April, 1883, defendant made a door through an inner brick wall, to get access from the store to a portion of the premises previously reached only from the outside. Plaintiff at first objected to this, but afterwards practically assented to it. A partition, partly glass and partly wood, in which was a door, separated the office from the store. In April, 1885, defendant proceeded to move this partition nearer the centre of the store, substituting wood for the glass, closing up the door, and converting a front window into a door, so as to make the office a liquor store, to comply with the new law requiring a separation of liquors from groceries. Plaintiff claimed an injunction to prevent further waste, and a right to re-enter for breach of the covenant to repair. The Judge at the trial found that no damage was done to the premises.

Held: 1. That the breaking through the brick wall, for the purpose of making the door, was a breach of the covenant to repair, but was not a continuing breach, and had been waived by the landlord.

2. That under the statutory covenant to repair, the tenant was bound to keep in repair not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make: that the right to erect such fixtures is to this extent, viz., that they shall not be such as to diminish the value of the demised premises, nor to increase the burden upon them as against the landlord, nor to impair the evidence of title.

3. The plaintiff's reversion not being injured by the acts complained of, there was no waste and no forfeiture. *Holderness* v. *Lang*, 1.

2. *Landlord and tenant—Receipt of rent after action brought—Waiver—Intention.*]—In ejectment plaintiff alleged a demise to defendant as a monthly tenant. Defence, a yearly tenancy. After notice to quit, and after action brought, plaintiff received from defendant a payment on account of rent, which he shortly afterwards returned to defendant: *Held*, affirming the judgment of ROSE, J., at the trial, that there is no distinction in principle between the effect of payment of rent, as such, after action brought, upon the determination of the tenancy by notice to quit and by forfeiture, and that therefore the payment of rent in this case after action brought, had no effect upon this action, either as a bar to it or as a waiver of the notice to quit.

Held, also, that the intention with which the rent was received must be considered. *Laxton* v. *Rosenberg*, 199.

LEASE.

Determination of lease by forfeiture —Right to distrain—8 Anne, ch. 14, secs. 6, 7—Money paid, right to recover back—Provision for a year's rent payable on insolvency—Validity of.]—Defendants, in 1881, by indenture under the Short Forms Act, leased certain premises to O., for ten years, at a yearly rent, payable quarterly in advance, with a covenant that if the lease should be taken in execution, or if the lessees should make any assignment for the benefit of creditors, the lease should immediately become forfeited and void, and the next ensuing one year's rent should be at once due and payable. There was also a proviso for re-entry on nonpayment of rent, or seizure or forfeiture of the term for any of the causes aforesaid.

In August, 1883, O. assigned to B., as trustee for the benefit of creditors, who went into possession, whereupon defendants distrained for six months' rent then in arrear, and one year's rent payable in consequence of the assignment. Three executions were soon after placed in the sheriff's hands, and the solicitors for the plaintiffs under the first and third executions paid the rent claimed to prevent the sale of the goods by defendants and B., though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitors.

Held, that the distress was illegal, for the statute 8 Anne, ch. 14, sec. 6, applies only to cases where the tenancy has been determined by lapse of time, and not by forfeiture: and that the plaintiff B. was entitled to recover the amount received by defendants.

Graham v. *Lang*, 10 O. R. 248, not followed.

Per ARMOUR, J.—The year's rent became due only by virtue of the forfeiture, the distress was an unequivocal act indicating the intention to forfeit, and evidence of such an intention previously formed; so that before the distress defendants had elected to treat the term as forfeited, and having done so their right to distrain was at an end. Moreover they had not distrained during the possession of the tenants from whom the rent became due, and even if defendants had a right to distrain, the provision making one year's rent payable was fraudulent as against creditors.

Quære, per WILSON, C. J., as to this latter point.

Per ARMOUR, J.—The execution creditors for whom the money was paid, in order to enable the sheriff to seize under their executions, might also recover: WILSON, C. J., doubting. *Baker et al.* v. *Atkinson et al.*, 735.

See LANDLORD AND TENANT, 1.

LEGACIES.

Interest on.]—*See* WILL, 4.

LIBEL.

1. *Libel—Privilege—Judge's charge —Excessive damages—Reduction of by consent of plaintiff, or new trial.*] —In an action of libel the libel consisted of letters of a very gross character published in the defendants' newspaper reflecting on the plaintiff as warden of the Central Prison. The defendants refused to give the name of the writer of the letters, and assumed responsibility

therefor. The learned Judge told the jury that "every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose * * such comments are not libellous however severe in their terms unless they are written intemperately and maliciously." The jury found for the plaintiff with $8000 damages.

Held, that the libel was not privileged or published on a privileged occasion; that no exception could be taken to the Judge's charge: nor could it be said that the libel was a fair comment upon a public matter in which the public had an interest: but *Held*, per CAMERON, C. J., and GALT, J., that the damages were excessive, and they were directed to be reduced to $1000; provided such sum was paid by a named date and plaintiff elected to take such sum, otherwise a new trial was directed.

Per ROSE, J., that under the circumstances the damages were not excessive; but as plaintiff's counsel had intimated that a smaller amount would be accepted if paid within a reasonable time, he would accede to the reduction, on plaintiff accepting such amount, otherwise the motion for a new trial should be dismissed. —*Massie* v. *The Toronto Printing Co.*, 362.

2. *Libel—Circumstantial evidence—Sufficiency of evidence—Rejection of evidence—Style of composition—Practice.*]—Action for libel contained in anonymous circulars written on a type writer imputing unprofessional conduct to the plaintiff in sending "bummers" round "touting" for business, and inducing other solicitors clients to leave them and employ plaintiff's firm. The evidence which was circumstantial, was that on the 13th October, P., M. and McK., members of the legal profession in Hamilton, received through the post the above circulars all of the same import though not copies, marked with the 2 p.m. post mark, and must have been posted between 2 and 3 p.m. as the practice was to change the post mark as the hour struck. The defendant and a firm of C. & W. had their office in the same building the latter having a caligraph which the defendant, who was an expert writer thereon, was in the habit of using. About 12.30 on the day in question the defendant borrowed the caligraph and had it away long enough to write the circulars. About 2.30 after the defendant had returned the machine, he came back with a piece of paper in his hand which looked like foolscap with the edge torn off and similar in appearance to one of the circulars, which he put into the machine and wrote something on, He then went out, and returned in about three minutes and got an envelope, which resembled an envelope enclosing one of the circulars, which he put into the machine. It appeared, however, that the envelope was one of a job lot which a clerk in M.'s office had disposed of amongst the profession. In the type writer there were peculiarities, namely, in certain of the letters being blurred, which were found in the circulars. The circular also contained expressions similar to those used by defendant in speaking about plaintiff. After C. had been supœnaed to produce the machine, the defendant advised him not to do so; and a brother of C.'s, of whom the defendant was legal adviser, wrote to C. also advising him not to produce it but he said he did not write at defendant's request. The plaintiff also tendered evidence as to the defen-

dant's style of composition, which was rejected.

Held, ROSE, J., dissenting, (1) that the evidence was not sufficient to be submitted to the jury and it was therefore properly withdrawn from them and (2) that the evidence of style of composition was properly rejected.

In moving against the ruling of the Judge at the trial with respect to the reception or rejection of evidence, or on the ground that he has misdirected the jury, it is still necessary to state the grounds in the notice of motion or rule. *Scott* v. *Crerar*, 541.

See PLEADING.

LICENSES.

1. *Hawkers and pedlars—46 Vic. ch. 18, sec. 495, sub-sec, 3—48 Vic. ch. 40, sec. 1 (O.)—Electro-type ware—Sale of without license—Conviction quashed.*]—"The Consolidated Municipal Act, 1883," (46 Vic. ch. 18) sec. 495, sub-sec. 3, empowers the Council of any County to pass by-laws for licensing, &c., hawkers, &c., going from place to place, &c., with any goods, wares, or merchandize for sale, and by 48 Vic. ch. 40, sec. 1 (O.) the word "hawkers" shall include all persons who, being agents for non-residents of the county, sell or offer for sale tea, dry-goods or jewelery, or carry and expose samples of any such goods to be afterwards delivered, &c.

Held, that electro-type ware was not jewelry within the above enactment, and a conviction for selling this without license was therefore bad, and in this case was quashed, though the fine imposed had been paid.

Held, also, that the words "other goods, wares, and merchandise," in the conviction, were too general. *Regina* v. *Chayter*, 217.

2. *Hawkers and petty chapmen—Consolidated Municipal Act, 1883—48 Vic. ch. 40, sec. 1 (O.)—By-law—Agent of non-resident—Compelling accused to testify.*]—The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of section 1 of 48 Vic. ch. 40 (O).

The defendant, against the protest of his counsel, was called as a witness and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account: that he had formerly sold tea on commission for W., but purchased that in question for the purpose of evading the by-law.

The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:

Held, 1. That defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, sec. 495, sub-sec. 3, nor within 48 Vic. ch. 40 (O). 2. That the conviction was defective in not stating that P. W., was non-resident within the county, and that the expression "of the city of London" was not sufficient. 3. That defendant had been improperly compelled to give evidence against himself. 4. That the having a license is a matter of defence, and not of

proof by the prosecution. 5. That the intention to evade the by-law was immaterial so long as the agency did not in fact exist. *Regina* v. *McNicol*, 659.

LIEN.

Replevin — Boarding-housekeeper —Lien—R. S. O. ch. 147.]—J. and his wife took rooms in premises kept by defendant, R. A., called the "Shandon House," partly furnishing them, and agreeing to pay $50 per month for rooms and board. Subsequently they rented from plaintiff a piano. They left the "Shandon House" in debt for board and lodging to R. A., who thereupon detained the piano, which was claimed by the plaintiff. *Held*, that the relation between defendant, R. A. and J. was not that of inn-keeper and guest, but of boarding-house keeper and boarder. *Held*, also, that as the piano was not the property of J. and his wife, that defendant had no lien on it for board and lodging under R. S. O. ch. 147.

Quære, whether the house kept by defendant R. A. was an "inn" within the meaning of R. S. O. ch. 147, sec. 1. *Newcombe* v. *Anderson et al.*, 665.

LIGHT.

See EASEMENT.

LIMITATIONS, STATUTE OF.

See EJECTMENT—FRAUD AND MISREPRESENTATION.

MAGISTRATE.

Magistrate — Action against — Conviction not quashed—R. S. O. ch. 73, secs. 4, 17—41 Vic. ch. 8 (O.), O. J. Act, sec. 90, sub-sec. 2—Rule 428.]—*Held*, that the 4th section of R. S. O. ch. 73, as amended by 41 Vic. ch. 8 (O.), prevents an action being brought for anything done under a conviction, whether there was jurisdiction to make the conviction or not, so long as the conviction remains unquashed and in force.

Held, also, though doubting, that the 17th section of said Act, which entitles the magistrate to full costs as between solicitor and client where in such action he obtains a verdict in his favour, has been repealed by the O. J. Act. sec. 90, sub-sec. 2, and Rule 428; and that such costs are now in the discretion of the Court or Judge. *Arscott* v. *Lilley et al.*, 153.

MAINTENANCE.

See WILL, 5.

MANAGER.

Powers of.]—*See* COMPANY, 2.

MANDAMUS.

See COMPANY, 1—PUBLIC SCHOOLS.

MARRIAGE SETTLEMENT.

See VENDORS AND PURCHASERS, 2.

MINISTER OF JUSTICE.

See INSURANCE, 2.

MISDESCRIPTION.

See INSURANCE, 1—VENDORS AND PURCHASERS, 1.

MISTAKE.

Payment of taxes.]—*See* ASSESSMENT AND TAXES, 1.

In description.]—*See* VENDORS AND PURCHASERS, 1.

Of title.]—*See* WILL, 4.

See also WILL, 5.

MONEY.

In Court.]—*See* PRIORITY.

MORTGAGE.

1. *Short form mortgage—Power of sale—Departure from symbolical short form of power—Inability of assignee of mortgage to sell—R. S. O. ch. 104.*]—A mortgage deed, purporting to be made pursuant to the Short Form Act contained the following: "Provided that the said mortgagee on default of payment for two months, may, without giving any notice, enter on and lease or sell the said lands." The mortgage was assigned to G. and K., who assumed to sell under the above power.

Held, that they could not confer a good title upon the purchaser, for that in construing the above power resort could not be had to the long form in the Act, inasmuch as notice was dispensed with, which was not a mere exception from nor qualification of the short form given in the Act, but an abolition of one of its most important terms; and the power thus being left to its own force, no one but the *persona designata*, the original mortgagee, could exercise it.

A transfer of the estate does not involve the transfer of trusts or powers necessarily as inseparable incidents of the estate. *Re Gilchrist and Island*, 537.

2. *Mortgage—Right to rents after default—Appointment of receiver—Administration proceedings.*]—In an action by *cestuis qui trustent* against executors and trustees of a certain will, a decree had been made for the general administration of the testator's estate real and personal, a portion of the real estate being at the time under mortgage made by the executors. The conduct of the proceedings having been given to certain creditors, a receiver was, at their instance, appointed to collect the rents of the real estate. Afterwards the mortgagees commenced an action upon their mortgage (see 8 O. R. 539), making the executors and trustees and the tenants of the mortgaged property defendants, asking payment, possession, and foreclosure, when finding the receiver in possession, they, after some delay, applied for and obtained leave to proceed with their action, a defence, however, being made thereto, at the instance of the receiver, contesting the validity of the mortgage. The mortgagees having succeeded in establishing their mortgage and their right to possession, then applied to be added as parties to the reference in the administration proceedings, claiming to be entitled to all rents collected by the receiver between the commencement of the action on their mortgage,

and their obtaining possession from him. They were accordingly added as parties in the Master's office, who subsequently made his report, finding them entitled to the rents as claimed.

Held, on appeal, that the mortgagees were only entitled to the rents from the date of the application for the order allowing them to proceed with their action, notwithstanding the appointment of the receiver. *Wallace et al.* v. *Wallace et al.*, 574.

3. *Mortgagor and Mortgagee — Sale under power— Purchase by agent of mortgagee—Purchase of other lots —Mortgaged property included in deed—Concealment of agency—Escrow— Redemption.*]—I, being the owner of certain property, mortgaged it to McL, who sold under the power of sale in the mortgage to G., who attended the sale under instructions from McL., and purchased as his agent. McL. deeded the property to G., and G. reconveyed it to McL. I. was not aware that G. was McL.'s agent. McL. being aware that the sale might not be valid subsequently bargained with I. for the purchase of two other lots, and made it a condition that the deed should cover the two lots and the mortgaged property, and that I.'s wife should join in it, which she had not done in the mortgage. McL. swore that the bargain was that he was to get a clear deed of the mortgaged property. I. swore that nothing was said about a clear deed. Before the deed was delivered I ascertained that G. was McL.'s agent at the sale, and he refused to deliver it, and brought an action for redemption.

Held, that the plaintiff was entitled to redeem.

Per CAMERON, C.J.C.P.—Though it may be that a mortgagee is not, strictly speaking, a trustee for the mortgagor, but is entitled to enforce his security for his own benefit to satisfy the mortgage money, the right of the mortgagor to redeem is a very pronounced and decided right, and one that he cannot be deprived of by any dealing between him and the mortgagee that is not carried out in a full spirit of fairness without undue pressure, influence, or concealment of anything of which he should be informed by the mortgagee.

Per BOYD, C.—If the defendant did know, as a matter of fact, the legal effect of G.'s action in buying the property, he should have disclosed it to the plaintiff before he sought to acquire the equity of redemption from him by means of a conveyance of which the obvious intent was only to procure his wife's dower to be barred: if he did not know the effect of it the equity of redemption was not in his contemplation as a property to be acquired from the plaintiff. *Ingalls* v. *McLaurin*, 380.

Discharge of—Presumption of payment of old mortgage.]—*See* VENDORS AND PURCHASERS, 3.

See also DOWER, 1, 2.

MOTION.

To quash by-law.]—*See* MUNICIPAL LAW, 2.

To set aside order of revivor.]—*See* COVENANT.

MUNICIPAL ACT, 1883.

See MUNICIPAL LAW, 2, 6.

MUNICIPAL CORPORATIONS.

Bonus.]—*See* RAILWAY AND RAILWAY COMPANIES, 3.

Bridge.]—*See* WATERS AND WATER COURSES, 1.

See also MUNICIPAL LAW, 1, 2, 3, 4, 5.

MUNICIPAL LAW.

1. *Municipal corporations—Defective sidewalk—Negligence—Misdirection.*]—The plaintiff, while crossing a street in the city of L., stumbled against the end of a sidewalk, which was constructed of asphalt boxed in with boards, and was some four inches higher than the crossing, and falling was severely injured: *Held*, WILSON, C.J., dissenting, that there was evidence of negligence on the defendants' part that must have been submitted to the jury; and that they having found in favour of the plaintiff, their verdict could not properly be interfered with.

Held also, no misdirection to tell the jury that they might or might not, as they thought proper, infer from the evidence, though there was no evidence of it, that if the roadway was at that level when the accident occurred, it had been filled up between then and the examination of it by the defendants' witnesses, who stated that they found the depression much less than was stated to have been when the accident took place. *Goldsmith* v. *The City of London*, 26.

2. *Municipal corporations—Drainage by-law — Revision of assessments by Court of Revision—Necessity for alterations in by-law—Locus standi—Motion to quash, whether to Divisional Court or single Court—O. J. A., Rules 480, 524.*]—In a drainage by-law the assessments as made by the engineer, and contained in the schedule to the by-law, were revised by the Court of Revision, and alterations made, but the by-law was not amended before being finally passed so as to correspond with such alterations as required by sec. 571, sub-sec. 2, of the Municipal Act of 1883, and it was impossible to discover from the alterations as made the amount of the "total special rate" against each lot or part of lot, and therefore the amount to be annually levied, to be ascertained by dividing such total special rate by the number of years the by-law has to run, which in this case was fifteen years.

Held, that the defect was fatal to the by-law.

The *locus standi* of the applicant herein was objected to, but on the evidence the objection was overruled.

In moving to quash a by-law, the practice having been adopted of applying to a Judge sitting alone, an objection that the application should have been to the Divisional Court was not entertained; but such an application if required to be made to the Divisional Court, must be to the Common Law Divisional Courts, and not to the Chancery Divisional Court. *In re Funston and the Corporation of the Township of Tilbury East*, 74.

3. *Municipal corporations — By-law—Passing of in anticipation of statute — Variance — Conviction quashed—45 Vic. ch. 24 (O.).*]—A conviction for violating a by-law was quashed, the by-law having been passed on the 27th March, to go into force the 3rd April following, in

anticipation of an Act, 45 Vic. ch. 24 (O.), passed the 10th March, to go into operation the 2nd April then next ensuing.

Sub-section 2 of sec. 8 of the Act subjects "such vendors of articles in respect of which a market fee may be now imposed as shall voluntarily use the market place for the purpose of selling such articles," whereas the 12th section of the by-law in question was, "any person or persons who shall voluntarily come upon the said market place, &c., for the purpose of selling," &c.

Held, that "Vendors, who shall voluntarily use the market place for the purpose of selling," was not identical with or equivalent to "any person or persons who shall voluntarily come upon the said market place for the purpose of selling;" nor was the expression "use the market place for the purpose of selling" the same as "come upon the market place for the purpose of selling;" and that the conviction was bad on this ground also.

Held, also, that the conviction was bad, as differing from both statute and by-law, being for refusing to pay the fees on eight quarters of beef "exposed for sale," whereas the 13th section of the by-law applied only to cases of butcher's meat exposed for sale. *Regina* v. *Reed*, 242.

4. *Municipal corporations—Sewer connecting with creek — Fouling stream—Riparian proprietor.*] — A drain of the defendants for carrying off the surface waters of a street ran along the street and across it, and then through private property until it reached a creek. On the street there was a screw factory, the proprietors of which, by defendants' permission, connected a drain from their works with the defendant's drain, which had the effect of carrying noxious matter from the factory into the creek; but on complaint thereat, the proprietors used an old cellar as a reservoir for the noxious matter; but which, it was alleged, filtered through from the cellar into the drain and so into the creek. The drain, without the infilteration into it from the cellar from which it was twenty-six feet distant, conveyed nothing injurious into the creek. The plaintiff, a riparian proprietor on the creek, having a factory there, claimed that by reason of such fouling he was prevented from using the water of the creek for domestic purposes or for his factory, and brought this action against the defendants therefor.

Held, that defendants were not liable, but that the liability, if any, was on the screw factory.

Van Egmond v. *Corporation of Seaforth*, 6 O. R. 599, distinguished. *Gray* v. *The Corporation of the Town of Dundas*, 317.

5. *Municipal corporations—Private drain connecting with street drain—Obstruction in street drain—Flooding of cellar—Notice—Liability.*] —The plaintiff's house was drained by a private drain into the street drain, which was near to but did not extend as far as his house. L., who also had a house drain connected with the street drain, put a grating across it near the connection with the private drain, which obstructed the street drain, and dammed back the water and sewage through plaintiff's private drain into his cellar and damaged the plaintiff's premises. The nature of the obstruction was known to the plaintiff but not to the defendants, and the plaintiff did not notify them thereof. There was no by-law compelling property-

owners to drain their premises into the street drain, and their use of it was entirely voluntary. There was no complaint as to the insufficiency or construction of the street drain. In an action by the plaintiff against the defendants for the injury sustained by him

Held, that the defendants were not liable. *McConkey et al.* v. *The Corporation of the Town of Brockville*, 322.

6. *Municipal Act, 1883, sec. 503, sec. 497, sub-sec. 4-6—By-law—Sale of fresh meat less than by quarter carcass—Restrictions, &c,—Reasonable accommodation.*]—By section 503 of the Municipal Act, 1883, the council may, subject to the restrictions and exceptions c ntained in the six next preceding sections, pass by-laws as provided by the following sub-sections: (1) For establishing markets; (2) for regulating markets, &c.; (3) for preventing or regulating the sale by retail on the public streets, or vacant lots, &c.; of any meat, &c.; (4) for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed; (5) for regulating the place and manner of selling and weighing grain, meat * * and all other articles exposed for sale, and the fees to be paid therefor, &c.; (6) for granting annually or oftener licenses for the sale of fresh meat in quantities less than by the quarter carcass, and for regulating such sale, and fixing and regulating the places where such sale shall be allowed, and for imposing a license fee * * and for preventing the sale of fresh meat in quantities less than by the quarter carcass unless by a person holding a valid license, and in a place authorised by the council, &c. The restrictions and exceptions, so far as applicable, were those contained in sub secs. 4 and 6 of sec. 497. Sec. 4 applied to articles for sale brought into the municipality after 10 a.m., upon which market fees are not to be imposed unless they are offered for sale on the market; and sec. 6 applied to those persons who go to the market place before 9 a.m., between 1st April and 1st November and 10 a.m., between 1st November and 1st April with any article they may sell on the market place; and with regard to such persons that after these respective hours they shall not be compelled to remain on the market place, but may proceed to sell elsewhere on paying the market fee.

Held, that a by-law passed under sub sec. 6, need not be made subject to such restrictions, &c., the proper construction of the section being that sec. 503 is made subject to such restrictions so far as properly applicable, and that sub-sec 6 is in the nature of an exception from these general restrictions, &c.

Semble, that the Court might quash a by-law of this description when plainly insufficient accommodation is furnished, unless in the alternative the municipality should provide reasonably fit and full accommodation; but as a rule the municipality is the judge of its own business and affairs, and it is probably an extreme case in which the Court would interfere. *Re O'Meara and The Corporation of the City of Ottawa*, 603.

NAVIGABLE WATERS.

See WATERS AND WATER COURSES, 2.

NEGLIGENCE.

See MUNICIPAL LAW, 1.—RAILWAY AND RAILWAY COMPANIES, 2.—WATERS AND WATER COURSES, 1.

NEW TRIAL.

Unless reduction of damages consented to.]—*See* LIBEL, 1.

See also INSURANCE, 3,—WILL, 2.

NON RESIDENT LAND.

See ASSESSMENT AND TAXES, 1.

NOTICE.

Of action.]—*See* INTERPLEADER.

Of an equity.]—*See* VENDORS AND PURCHASERS.

Of exception to the jurisdiction of Division Court.]—*See* PROHIBITION.

To Accountant and to Court.]—*See* PRIORITY.

To corporation of damage by drain.]—*See* MUNICIPAL LAW, 5.

NUISANCE.

See WATERS AND WATER COURSES, 2.

PARTIES.

See BILLS OF LADING — PUBLIC WORKS.

PATENT.

Reservation in.]—*See* WATERS AND WATER COURSES, 2.

PEDLARS.

See LICENSES, 1, 2.

PENALTY.

Action for.]—*See* CONVICTION.

PLEADING.

Libel—Pleading in mitigation of damages.]—In libel a plea in mitigation of damages must in its nature be an admission that the plaintiff is entitled to recover some compensation; but it amounts to a contention that the amount of the plaintiff's recovery shall be limited to the value of the plaintiff's character, which value is affected by the facts pleaded.

Such a plea, based upon the plaintiff's bad character, must either shew that the plaintiff is a man of bad *general reputation or character*, or that the plaintiff has a bad character with regard to *some specific act which relates to the charge in the libel complained of.*

It is not permissible to a defendant to plead justification to a libel, and under that defence to offer evidence of the plaintiff's bad character in mitigation of damages: *Wilson* v. *Wood*, 9 O. R. 687, disapproved of. *Moore* v. *Mitchell*, 21.

See COMPANY, 2—WILL, 1.

POSSESSION.

Title by.]—*See* EJECTMENT.

POWERS.

Of appointment—Execution of—Of revocation.]—*See* VENDORS AND PURCHASERS, 2.

Of sale.]—*See* MORTGAGE, 3.

To sell — To Mortgage.]—*See* WILL, 6.

PRACTICE.

Motion to quash by-law—To what Court made.—See MUNICIPAL LAW, 2.

See also CONVICTION—LIBEL, 2.

PRINCIPAL AND AGENT.

Land agents — Commission from both sides—Notice and assent—Incumbrances,]—Land agents have no right to accept commission from parties with whom they deal without the fullest notice to their employers that they hold themselves at liberty to do so, and assent on the latter's part to such right; but neither express notice or assent is necessary. It is sufficient if from the nature of the circumstances the principal must have been aware of the fact, and by making no active objection must be deemed to intend to make none; and in the absence of specific agreement to the contrary commission must be estimated on the whole value of the property without regard to incumbrances.

In this case, where the defendants agreed to pay plaintiff, a land agent, one-and-a-half per cent. commission on the sale of their land; and it appeared that without notice to or knowledge by defendants, the plaintiff obtained one per cent. commission from the purchaser, he was held only entitled to charge the defendants the difference or a half per cent. commission; and there being no agreement to the contrary such commission was computed on the whole of the property without regard to incumbrances. *Culverwell* v. *Birney et al.*, 265.

PRINCIPAL AND SURETY.

Giving time — Reservation of rights.]—*See* PRIVILIGED COMMUNICATIONS.

PRIORITY.

Funds in court — Assignment — Notice to accountant—Stop order—Priorities—Notice to the court.]—H. M. C. being entitled to certain moneys in Court, obtained certain advances from A. H. and gave him a power of attorney to endorse any cheques issued to him by the Court and repay himself. Subsequently H. M. C. obtained another advance from W. H. and assigned all his interest in the funds in Court to H., which assignment was duly filed in the accountant's office and entered in the accountant's books and acted on for three years. W. H. had no notice of A. H.'s power of attorney. A. H. recovered a judgment against H. M. C. for the amount due him in December, 1883, and obtained a stop order in October, 1885.

On a motion for payment out to

A.H., which was resisted by W. H., who claimed all the moneys under his assignment, it was

Held, that the Court is the custodian of the fund and not the accountant, and that notice to the accountant of an assignment of funds in Court is not tantamount to notice of the assignment of a trust fund to a private trustee, and that a stop order is the proper way of perfecting such a security.

Per BOYD, C.—It was not necessary for A. H. to recover a judgment in order to entitle him to a stop order. Payments already made to W. H. under the assignment should not be interfered with, as the lodging of the assignment with the accountant was sufficient under the practice to justify payments out in the absence of any claim by A. H. under the first assignment.

Per FERGUSON, J.—A. H., having the earlier assignment, was first in point of time, and *primâ facie* would be preferred in law, and having obtained a stop order, which has been held to be the proper way of giving notice to the court, he thereby perfected his assignment. *Cottingham* v. *Cottingham*, 294.

Of mortgages.]—*See* WILL, 6. *See* also, CREDITOR'S RELIEF ACT, 1880—REGISTRY LAW.

PRIVILEGED COMMUNICATIONS.

Privileged communications — Letter written without prejudice, admissibility — Principal and surety — Discharge of surety by the giving of time—Reservation of rights against surety.] — All communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and wrong motives, are not admissible in evidence.

Where therefore a letter written without prejudice and coming within the above rule was admitted at the trial, and the Court not being able to say that the defendant was not prejudiced thereby, a new trial was directed.

After the maturity of a note for $300, and after an action had been commenced against the defendant, one of the endorsers thereof, alleged to be a surety, the principal debtor executed a document whereby he acknowledged his liability on the note, notwithstanding that defendant had been sued solely thereon, the Statute of Limitations or any legal or equitable defence that might be set up; and he covenanted to pay the note and interest by half-yearly payments of $50 each. There was contradictory evidence as to the acceptance of the document by the plaintiff.

Quære, whether the document, if accepted by plaintiff, constituted a discharge of the surety by the giving of time; and whether the statement of the pendency of the action against defendant could be looked upon as a reservation of plaintiff's rights against him. *Pirie* v. *Wyld*, 422.

PROHIBITION.

Prohibition—43 Vic. ch. 8, sec. 14—43 Vic. ch. 14, sec. 1—Certiorari—Colonization road—Repairs to—Title to land—Negligence.]—*Held*, that a prohibition would not lie to the Fourth Division Court of the

District of Muskoka, no notice having been given as required by 48 Vic. ch. 14, sec. 1 (O.), amending sec. 14 of 43 Vic. ch. 8 (O.), disputing the jurisdiction of said Court; and that in any case prohibition would not lie in this case, the title to the road, upon which the injury complained of arose, not being in question, the road being a colonization road built by the government before the organization of the townships of Medora and Wood as a municipality, and the question arising not being one of title but of liability to keep in repair a road so built.

Per WILSON, C. J.—The road in question was a colonization road vested in "the Crown or in a public department or board," and which had not been renounced by proclamation, and the municipality were not bound to repair it.

The case was tried before the Division Court Judge, who gave his decision in favor of the plaintiff, but formally reserved the giving of judgment to a subsequent day, to enable the defendants to move for prohibition or certiorari. In the meantime the defendants gave the required notice.

Held, that the defendants could not thus wait and take the chances of a decision in their favor, and finding it adverse, apply for a writ of certiorari and probably obtain it.

Black v. *Wesley*, 8 U. C. L. J. 277; *Gallagher* v. *Bathie*, 2 U. C. L. J. N. S. 73, and *Holmes* v. *Reeve*, 5 P. R. 58, followed. *In re Knight* v. *The United Townships of Medora and Wood*, 138.

PROVINCIAL SECRETARY.

See COMPANY, 1.

PUBLIC WORKS.

1. *Public schools—Suspension of pupil for misconduct—Teacher—Trustees—Resolution passed in absence of parent interested—Mandamus—Malice.*]—On the 3rd of December, 1884, a school teacher dismissed the plaintiff, a boy thirteen years of age, for disobedience, speaking impudently when questioned about it, and refusing to be punished for misconduct. The matter was brought before the trustees, and on 6th January they held a meeting and passed a resolution that the boy could return to shool on his expressing regret for his misconduct. After the receipt of a solicitor's letter on behalf of the father, the trustees, on the 10th February, held another meeting and passed a resolution, that the boy could return to school after one day's suspension. On the 11th February another meeting of the trustees was held and a resolution passed reinstating the resolution of the 6th January. The father was not notified nor was he present at the meetings of the 6th January and 11th February; but he was notified of and was present at, the meeting of the 10th February. The boy returned to school, but relying on the resolution of the 10th February, made no apology, and remained there for several days, but was not interfered with by the teacher, who, however, would give him no instruction. In an action in the Division Court against the teacher and trustees for an alleged wrongful dismissal, the learned Judge dismissed the case against the teacher, but held the trustees liable.

Held, that the action must be dismissed against the trustees: that it was not their act, but that of the

teacher, that caused the boy's removal: that the passing of the resolution as to apologizing was not an expulsion: that the teacher in not instructing the boy was not acting under the trustees' direction; and that they were not liable for not compelling her to give the instruction.

Quære, whether in such a case as this malice must not be shewn, unless followed by some act amounting to assault or trespass; and whether a mandamus, and not an action, was not the proper remedy.

The action of the trustees in proceeding in the absence and without notice to the parties interested, and also the unreasonable conduct of the father, commented on. *In re The Minister of Education and McIntyre* v. *The Public School Trustees of section Eight in the Township of Blanchard et al.*, 439.

2. *New school section—Selection of school site—Change of same—Necessary requisites under 48 Vic. ch. 49, sec. 64—Costs.*]—A new rural school section being formed, it became necessary for the then trustees to provide a school site, &c. A public meeting of the ratepayers was called pursuant to 48 Vic. c. 49, sec. 64 (O.), which nearly all the ratepayers attended, when the site T. was chosen by a majority vote of both the ratepayers and trustees as against the J. C. site.

A complaint against this result was lodged with the School Inspector under s. 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site, at which meeting a unanimous vote was had in favour of a third site called the C. site.

In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal, and to restrain building on the C. site in which it appeared that fifty out of sixty-seven ratepayers approved of the latter site. It was

Held, that the necessary pre-requisite under sec. 64 of the statute, of taking the opinion of the ratepayers, had been complied with, and the selection made was the T. site: that no change of a school site should be made without the consent of a majority of ratepayers present at a special meeting called for that purpose, and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change the site with the consent of the necessary majority.

The whole tendency of recent amendments of the education Acts has been to give the rural school sections greater powers of self-regulation and self-government, and the Courts should not be astute to interfere unless there has been a plain violation of the statute, or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights.

The action was therefore dismissed, but without costs, as it was a new point, and the statute was not plainly expressed. *Wallace et al.* v. *The Board of Public School Trustees for Union School Section Number Nine of the Township of Lobo, in the County of Middlesex, et al.*, 648.

PUBLIC WORKS.

Public works—Expropriation—Compensation—Ownership of roads

—*Soil vested in Crown—22 Vic. ch. 99, sec. 301—Parties.*]—Certain lands on which were two roads called "Water street" and "The Road to the Wharf," being required for public works, were expropriated by the Dominion Government, and the compensation therefor was claimed by the corporation of the village in which the roads were, and by one R. C. S. through or over whose lands the roads ran.

It appeared that the roads were established as public highways by the municipal authorities by by-laws in the years 1842 and 1845, respectively, under 4 and 5 Vic. ch. 10, secs. 39 and 51, although no compensation was paid to the owners therefor.

Held, that although originally the soil and freehold of the roads or streets may have remained in the private owner, subject to the public easement (the right of user); since the year 1858, at all events they became vested in the Crown as representing the Province of Ontario, by virtue of 22 Vic. ch. 99, sec. 301, and that the compensation therefor was payable to the Attorney-General of Ontario, who was ordered to be made a party in order to give protection to the Dominion Government in expropriating the land. *Re Trent Valley Canal. "Re Water Street" and "The Road to the Wharf,"* 687.

QUARTER SESSIONS.

See CANADA TEMPERANCE ACT, 1878, 1.

RAILWAYS AND RAILWAY COMPANIES.

1. *Consolidated Railway Act of 1879, 42 Vic. ch. 9 (D.)—Expropriation of land — Plans and book of reference — Limits of deviation.*] — The defendants having, in 1872, filed their plan and book of reference under the railway act, shewing their terminus at a certain point, and having built and used their line up to that point, desired in 1885 to extend their line about one-third of a mile further on, and took proceedings to expropriate certain land required for that purpose, and possession having been refused, applied to a County Judge for an order for immediate possession. On an application for an injunction to restrain the company from proceeding before the Judge on the ground that no new plan and book of reference shewing the land required had been filed, and in which the company contended that none were necessary, as they were within the limits of the deviation of one mile provided for by the statute, it was

Held, that "deviation" is a term not to be restricted to a lateral variance on either side of the line, but may mean a change *de via* in any direction within the prescribed limits, whether at right angles to or deflecting from or extending beyond the line. *Murphy v. The Kingston and Pembroke R. W. Co.*, 302.

2. *Railways—Fire caused from engine — Negligence — Evidence — Withdrawing case from jury.*] — Action for negligence against the defendants in the conduct of their engine, whereby as alleged fire escaped therefrom and destroyed the plaintiff's property. The only evidence to connect the defendants therewith was that the fire occurred immediately after the engine had passed the plaintiff's barn and combustible manure heap: that as it passed steam was put on, which might

have caused a larger quantity of sparks to escape from the smoke-stack; or, if the ash-pan were full, which there was no evidence to shew, would cause cinders to be forced therefrom: that there was a strong wind blowing across the tract in the direction of the plaintiff's premises: that a cinder too large to come from the smoke-stack was picked up on the manure heap while it was on fire; but it did not clearly appear whether the cinder was from coal or wood, the engine burning coal; that this fire was put out, and five minutes afterwards a fire broke out in a barn adjoining the plaintiff's, and both were consumed. There was a steam saw mill close by, but in a direction opposite from that in which the wind was blowing, and there was evidence that fire therefrom had ignited the saw-dust in the mill-yard on two occasions. No evidence was given of any faulty construction in the engine, but there was evidence that it was of approved make, with proper appliances to prevent, as far as possible, the escape of fire.

Held, ROSE, J., dissenting, that there was no evidence of negligence to go to the jury, and that the case was properly withdrawn from them.

Per ROSE, J., that there should be a new trial, to ascertain, if possible, the cause of the fire, whether from the smoke-stack or the ash-pan, or how otherwise; and, if from either the smoke-stack or ash-pan, whether there was negligence on the part of the defendants.

Per CAMERON, C. J., the putting on of steam when the engine was near the plaintiff's premises did not of itself constitute negligence, it being done in the ordinary course of traffic, the engine having the ordinary and proper appliances for protection against the escape of fire, which it was lawful for the defendants to use. *McGibbon* v. *The Northern and North-Western R. W. Co.*, 307.

3. *Municipal corporations—Bonus to Dominion Railway — Debentures not payable within twenty years—By-law acted upon—Power to repeal — Compliance with conditions — Certificate of engineer—Promulgation—Requisites for—Effect of.*]—By a by-law to grant aid to plaintiff's railway—a Dominion railway—the debentures were made payable more than twenty years from the by-law taking effect, and which the plaintiffs were only to be entitled to on the certificate of the engineer, that the rails had been laid on the line of railway and the first locomotive had passed thereon through the municipality; and no interest was to be payable until the locomotive had so passed and the debentures handed over. The vote for and against the by-law was equal, and clerk, who was also returning officer gave a casting vote in favour of the by-law and returned it to the council as carried by a majority, and it was finally passed by the council. The by-law was subsequently promulgated. The notice of promulgation was not authorized by resolution of the council; and it did not appear whether there was any resolution designating the paper in which the resolution was published; but the paper was the one usually employed by the council, and the account therefore was passed and paid by the council. The by-law came into force on the 1st March, 1880. On 24th July, 1882, the council passed a resolution revoking it. The by-law was acted upon by the plaintiffs, stations built, &c.

Held, following *Canada Atlantic R. W. Co.* v. *Corporation of Ottawa*,

12 A. R. 234, that under sec. 559, sub-sec. 4 of the Municipal Act, R. S. O. ch. 174, a grant by way of bonus may be made to Dominion railways.

Held, also, that promulgation validates any defect in form or substance in the by-law or in the time or manner of passing it; and therefore cured the defect in the by-law in making the debentures payable after the twenty years which was one of form; but that it does not give jurisdiction: and therefore would not cure the error, if such were the case, in passing the by-law without the required majority of votes; but there was a majority, as the clerk had the right to vote under secs. 155, 299.

Held, also, that under the circumstances the gift was not revocable, and therefore there was no power to repeal the by-law.

Held, also, that sec. 319, as amended by 42 Vic, ch. 31 sec. 9 (O.), does not require a resolution for promulgation; but merely that the paper in which the notice is to be published should be designated by resolution; and that there was sufficient publication here.

An objection was raised that the terms of the by-law on which the debentures were to issue had not been complied with:

Held, that the decision thereon rested with the engineer, and he had given his certificate; but even if it was necessary to decide this question, the evidence shewed that the terms had been substantially complied with. *The Canada Atlantic R. W. Co.* v. *The Corporation of the Township of Cambridge*, 392.

4. *Railway—Expropriation—Deviation—One mile limit—Railway Act of 1879, 42 Vic. ch. 9—46 Vic. ch. 64, (D).*]—A railway company after the completion of its line, sought to expropriate a piece of land not marked or referred to on any map or plan filed, or book of reference made by the company, but within one mile's distance of the terminus of the railway as delineated on the filed plan, for the purpose of better utilising a certain other property previously acquired by them as a passenger and freight station.

Held, that under 42 Vic. ch. 9, sec. 8, sub-sec. 11, (D.), this was not permissible, there being no provisions affecting the matter in the special Acts of the company.

Held, also, that 46 Vic. ch. 64, (D.), which empowered the company to hold and own land in any municipality through or in which the main line or any branch was carried for the erection and maintenance thereon of stations, sidings, &c., as might be necessary for the purposes of the company, did not empower them to expropriate against the will of the owner. *Murphy* v. *The Kingston and Pembroke R. W. Co.* 582.

RECEIVER.

See MORTGAGE, 2.

REDEMPTION.

See MORTGAGE, 3.

RE-ENTRY.

Condition of.]—*See* DEED.

REGISTRY LAW.

Registry Act, R. S. O., ch. 111., *sec. 74—Sale of land—Subsequent conveyance—Registration— Priority —Jurisdiction.*]—*Held*, (following *Truesdell* v. *Cook*, 18 Gr. 532, and *Dynes* v. *Bales*, 25 Gr. 593), that the grantee in a subsequent conveyance, registered before the registry of a previous conveyance from the same grantor, of which the grantee had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that this Court had power so to order upon such terms as seemed just. *Weir* v. *The Niagara Grape Company and the Niagara White Grape Company*, 700.

RENT.

Receipt of after action brought.]—*See* LANDLORD AND TENANT, 2.

Occupation.]—*See* WILL, 4.

See also LEASE.

REPAIRS.

To colonization road.]—*See* PROHIBITION.

See also LANDLORD AND TENANT, 1.

REPLEVIN.

See LIEN.

REPRESENTATION.

See VENDORS AND PURCHASERS, 1.

REVISION.

Of assessment.]—*See* MUNICIPAL LAW, 2.

RIPARIAN PROPRIETOR.

See MUNICIPAL LAW, 4.—WATERS AND WATER COURSES, 2.

RIVERS.

See WATERS AND WATER COURSES, 1.

SALVAGE.

Salvage — Jurisdiction of High Court—Admiralty rules—Wrecking company—Services performed on request or under agreement—Quantum meruit.]—A vessel being stranded on the northern shore of Lake Erie, the master telegraphed to the manager of a wrecking company at Detroit, for tugs and wrecking apparatus, to which the manager answered agreeing to furnish same. They were accordingly sent and the vessel rescued and saved. The plaintiffs claimed to recover an amount exceeding the value of the vessel, made up of *per diem* charges for the tugs and apparatus.

Held, that in actions in the High Court, salvors, in the absence of a specific or express agreement to the contrary, must be taken to render their services under and subject to the rule of the Admiralty Court, limiting the maximum amount of salvage to a moiety of the value of the saved vessel, and cargo, if any, which rule is equally applicable to wrecking companies as to ordinary vessel owners: that the agreement

must define a specific amount as to the salvage to be paid or a rule whereby it may be determined; and that there was no agreement here, but merely a request to perform the services.

Semble, that the master of a vessel cannot by express agreement bind the owners to pay salvage beyond the value of the vessel. *The International Wrecking and Transportation Company* v. *Lobb et al.*, 408.

SCHOOLS.

See PUBLIC SCHOOLS, 1, 2.

SCHOOL SITE.

Selection of and change of same.]—*See* PUBLIC SCHOOLS, 2.

SEIZURE.

See INTERPLEADER.

SEWER.

See MUNICIPAL LAW, 4, 5.

SHERIFF.

See INTERPLEADER.

SOLICITOR.

Right to comment in the press on a case during its pendency.]—*See* CONTEMPT OF COURT.

SPECIFIC PERFORMANCE.

See VENDORS' AND PURCHASERS, 3.

SQUATTER.

See EJECTMENT.

STATUTES, CONSTRUCTION OF.

31 *Car. II. ch.* 2, *sec.* 6.]—*See* CONVICTION.

8 *Anne, ch.* 14, *secs.* 6, 7.]—*See* LEASE.

4-5 *Vic. ch.* 10, *secs.* 39, 51.]—*See* PUBLIC WORKS.

22 *Vic. ch.* 99, *sec.* 301.]—*See* PUBLIC WORKS.

27-28 *Vic. ch.* 23, *sec.* 5, *sub-sec.* 18.]—*See* COMPANY, 1.

29 *Vic. ch.* 20, *sec.* 30.]—*See* WILL, 2.

R. S. O. ch. 43, *sec.* 18.]—*See* COUNTY COURTS.

R. S. O. ch. 61, *sec.* 1.]—*See* FORECLOSURE.

R. S. O. ch. 62, *sec.* 10.]—*See* EVIDENCE.

R. S. O. ch. 72, *secs.* 4, 17.]—*See* MAGISTRATE.

R. S. O. ch. 95, *sec.* 4.]—*See* WILL, 4.

R. S. O. ch. 104.]—*See* MORTGAGE, 1.

R. S. O. ch. 106, *sec.* 2.]—*See* DEED.

R. S. O. ch. 108, *sec.* 13.]—*See* WILL, 1.

R. S. O. ch. 108, *sec.* 17.]—*See* FORECLOSURE.

R. S. O. ch. 118.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

R. S. O. ch. 118, *sec.* 2.]—*See* BANKRUPTCY AND INSOLVENCY.

R. S. O. ch. 132.]—*See* WILL, 1.

R. S. O. ch. 147.]—*See* LIEN.

R. S. O. ch. 174, *sec.* 319, and *sec.* 559, *sub-sec.* 4.]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

R. S. O. ch. 180, *secs.* 108, 109, 110, 111.]—*See* ASSESSMENT AND TAXES.

R. S. O. ch. 198, *s.* 30.]—*See* WILL, 1.

41 *Vic. ch.* 8, (*O.*)]—*See* MAGISTRATE.

41 *Vic. ch.* 16, (*D.*)]—*See* CANADA TEMPERANCE ACT, 1878, 2.

41 *Vic. ch.* 40, *sec.* 28, (*D.*)]—*See* INSURANCE, 2.

42 *Vic. ch.* 9, (*D.*)]—*See* RAILWAYS AND RAILWAY COMPANIES, 1, 4.

42 *Vic. ch.* 9, *sec.* 8, *sub-sec.* 11, (*D.*)]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

42 *Vic. ch.* 22, (*D.*)]—*See* TRADE MARKS AND DESIGNS.

42 *Vic. ch.* 31, *sec.* 9, (*O.*)]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

43 *Vic. ch.* 8, *sec.* 14, (*O.*)]—*See* PROHIBITION.

43 *Vic. ch.* 28, (*D.*)]—*See* CANADA TEMPERANCE ACT, 1878, 2.

O. J. Act.]—*See* CONVERSION.

O. J. Act, sec. 90, *sub-sec.* 2.]—*See* MAGISTRATE.

O. J. Act, rule 428.]—*See* MAGISTRATE.

O. J. Act, rules 480, 524.]—*See* MUNICIPAL LAW, 2.

45 *Vic. ch.* 23, *secs.* 9, 10, 11, (*D.*)]—*See* COMPANY, 2.

45 *Vic. ch.* 24, (*O.*)]—*See* MUNICIPAL LAW, 3.

Indian Act, 1880.]—*See* CANADA TEMPERANCE ACT, 1878, 2.

46 *Vic. ch.* 18, *sec.* 495, *sub-sec.* 3, (*D.*)]—*See* LICENSES, 1, 2.

46 *Vic. ch.* 64, (*D.*)]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

Municipal Act, 1883, *sec.* 497, *sub-secs.* 4, 6, *sec.* 503.]—*See* MUNICIPAL LAW, 6.

Municipal Act, 1883, *sec.* 570, *sub-sec.* 3.]—*See* MUNICIPAL LAW, 2.

47 *Vic. ch.* 10, *sec.* 3, (*O.*)]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

47 *Vic. ch.* 14, *secs.* 4, 5. (*O.*)]—*See* COUNTY COURTS.

47 *Vic. ch.* 39, (*D.*)]—*See* COMPANY, 2.

48 *Vic. ch.* 14, *sec.* 1, (*O.*)]—*See* PROHIBITION, 1.

48 *Vic. ch.* 24, (*O.*)]—*See* WATERS AND WATER COURSES, 2.

48 *Vic. ch.* 40, *sec.* 1, (*O.*)]—*See* LICENSES, 1, 2.

48 *Vic. ch.* 49, *sec.* 64, (*O.*)]—*See* PUBLIC SCHOOLS, 2.

STATUTE OF LIMITATIONS

See EJECTMENT.

STATUTE OF USES.

See VENDORS AND PURCHASERS, 3.

STATUTORY CONDITIONS.

See INSURANCE, 1, 2.

STOP ORDER.

See CREDITORS RELIEF ACT, 1880—PRIORITY.

SURVIVORSHIP.

Of right of action.]—*See* COVENANT.

TAX SALE.

See ASSESSMENT AND TAXES, 1.

THUNDER BAY.

See COUNTY COURTS.

TITLE.

By possession.]—*See* WILL, 1.

To land.]—*See* COUNTY COURTS.

Time for objections to.]—*See* VENDORS AND PURCHASERS, 3.

TRADE-MARKS AND DESIGNS.

Trade-mark — Newspaper — Infringement — Assignment of trade-mark—Registration—42 Vic. ch. 22 (D).]—The L. F. P. P. Co. published a newspaper called *The Commercial Traveller and Mercantile Journal*, which was known as *The Commercial Traveller*, and registered it under the Trade Mark and Design Act of 1879 as *The Commercial Traveller's Journal*. The company sold the paper and good-will to the plaintiff, and on the negotiations for the sale the plaintiff saw the defendant, who was then employed by the company as manager and editor, and who showed him the assets of the paper, the printing contracts, &c., and recommended the purchase as a good investment.

After the sale the defendant, who had retained the mail list of the subscribers to the paper, published a new paper called *The Traveller*, and used the list to send copies of his paper to some of the names contained therein. It was shewn in evidence that while the defendant was in the employ of the company he often used the word *Traveller* as designating the paper then known as *The Commercial Traveller*. In an action to restrain the defendant from infringing the plaintiff's trade mark, it was

Held, that the title of the paper published by the defendant was an infringement of the trade mark of the plaintiff, and that the subsequent publication by the defendant of a newspaper under the name of *The Traveller* was calculated to mislead persons, and induce them to believe the plaintiff's paper was the paper referred to.

Held, also, that although the 4th section of the Trade Mark and Design Act of 1879, 42 Vic. ch. 22 (D.), requires registration of the trade mark before the proprietor can bring an action; and the 14th section provides for registration of an assignment, the latter section does not enact that registration shall be necessary to give effect to such assignment. An injunction was therefore granted. *Carey* v. *Goss*, 619.

TRIAL.

Right to begin.]—*See* INSURANCE, 3.

See also NEW TRIAL.

TRUSTS.

Express — Constructive.] — *See* WILL, 1.

TRUSTEES.

See PUBLIC SCHOOLS, 1, 2.

USES, STATUTE OF.

See VENDORS AND PURCHASERS, 3.

ULTRA VIRES.

See COMPANY, 2.

VENDORS AND PURCHASERS

1. *Vendor and purchaser—Mistake—Sale by plan—Representation—Notice.*]—The judgment of O'Connor, J., reported *ante* p. 13, reversed.

Per BOYD, C. The evidence in this case does not come up to the standard laid down in *Dominion Loan Society* v. *Darling*, 5 A. R. 577, by Moss, C.J., that "It must be demonstrated what the terms of the bargain were, and that by mutual mistake they were not incorporated in the writing. The proof must be clear, satisfactory, and conclusive."

The defendant bought lot 7, as contained in S.'s mortgage, and obtained a deed from the executors according to a registered plan which is to be treated as incorporated therewith and he is, even as against his representation to the plaintiff that the piece in dispute was a portion of the property she was in treaty for and subsequently purchased, entitled to claim the benefit of G.'s position as purchaser and registered owner for value.

Per PROUDFOOT, J.—Even if the representation were proved the plaintiff owned no property at the time it was made to be affected by it, and such an expression of opinion should not estop him from purchasing lot 7 eighteen months afterwards. The purchasers at the auction sale got a better bargain than they thought they had made, but they had no knowledge of any right to be interfered with had they chosen to assert their title to the whole lot. This raises no equity against them in the plaintiff's favour.

Even if the defendant had notice of the plaintiff's equity he is entitled to claim the benefit of the want of notice to the purchasers at the auction sale. *Ferguson* v. *Winsor*, 88.

2. *Marriage settlement—Power of appointment—Execution of or delegation of power—Vendor and purchaser—Power of revocation.*]—In a marriage settlement it was provided that "from and after the decease of the survivor of them," the said husband and wife, the lands settled should be held "upon trust for all or any one or more of the children of the said intended marriage * * but if there shall be no child of the said intended marriage, in trust for the said W. K. S. (husband) and his heirs absolutely after the decease of M. M. S. (wife) if he shall survive her, but if he shall die in her lifetime, then" to be held in trust "for such person * * as he the said W. K. S. by any deed or deeds with power of revocation, and new appointment to be by him signed * * or by his last will and testament in writing, or any codicil thereto * * shall direct and appoint * * "

W. K. S. predeceased his wife, leaving no children. By his will he devised to his wife all his real and personal estate, and proceeded as follows: "I do also transfer unto her all the powers vested in me to be-

queath, convey, execute by will or otherwise, all or any of certain properties conveyed to her by deed of settlement * * *." M. M. S. subsequently appointed the lands to her own use, and made a sale of part of them. On the statement of a special case for the opinion of the Court as to whether the purchasers should be compelled to carry out their purchase.

Held, that the will of W. K. S. was not an execution of the power but a valid delegation of it to his wife: that an appointment in favour of herself could only be properly made in pursuance of the power by a deed, with power of revocation, or in favour of another by will: and that a purchaser from her under an execution of the power by deed, would not be compelled to accept the title because of its revocable character. *Smith* v. *McLellan*, 191.

3. *Vendor and purchaser—Conditions of sale—Time for objections Statute of Uses—Discharge of mortgage—Compensation—Specific performance—Presumption of payment of old mortgage.*]—When on a sale of lands the contract provided that the purchaser should be allowed ten days to make requisitions on title, and time was made of the essence of the contract, and the purchaser made certain objections within the ten days, and the answers not being satisfactory refused to complete, whereupon the vendor sued for specific performance and obtained the usual judgment.

Held, that the purchaser could not raise in the Master's office fresh objections not raised within the ten days mentioned in the contract.

In examining the title the purchaser found a mortgage, which matured over 80 years ago, apparently outstanding, and required the vendors to produce the discharge of it, which they declined to do.

Held, that, under all the circumstances, the mortgage must be presumed to have been paid.

Certain owners of the equity of redemption in lands by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto, and to the use of B., his heirs and assigns." This was dated July 17th, 1875, and registered July 21st, 1875.

Held, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B.

The equity of redemption in the said deed conveyed was subject to a mortgage, a discharge of which was registered on July 21st, 1875, the same day as the deed.

Held, that the deed must be assumed to have been delivered before it was registered, and the discharge of the mortgage on registration operated as a re-conveyance to B., who was the assignee of the mortgagor within the meaning of the statute respecting the effect of registering a discharge of a mortgage.

M. having purchased lot 14 for a building lot resisted completion of the contract on the ground that a party wall of the width of nine inches had been built on the line between lots 14 and 15, which at some places came over on to lot 14 to the extent of six inches, and at another place to the extent of nine inches, and that he could not get rid of the wall without engaging in a lawsuit without engaging in a lawsuit with the owner of lot 15, and that the party wall was not suitable to the

class of buildings which he desired to put up, and was worse than useless to him. The evidence shewed the wall did not depreciate the value of the land.

Held, that this being so, and under all the circumstances of this case, specific performance must be decreed, though the matter complained of might have been proper for compensation, had such been sought under the condition of sale relating thereto. *Imperial Bank of Canada* v. *Metcalfe*, 467.

VERDICT.

See INSURANCE, 1.

WAIVER.

See LANDLORD AND TENANT, 1, 2.

See also INSURANCE, 1.

WARRANT.

Regularity of.]—*See* CONVICTION.

WASTE.

See LANDLORD AND TENANT, 1.

WATERS AND WATER COURSES.

1. *Municipal corporation—Negligence — Action — Compensation — Mortgagee, adding as a party.*]—The approaches to a bridge built over a river were supported on trestle work, the water flowing through the trestle work and spreading over the low land until it fell into the river. The municipality subsequently filled in the trestle work and made a solid embankment there whereby the water was penned back, and was sent down in a greater body and with greater force in the regular channel, by reason whereof a great part of the bank of the river upon which the plaintiff's factory was erected, was washed away, and was being so washed away from year to year.

Held, that as the work was done by defendants in such a way as to occasion damage to the plaintiff, whereas it could and should have been done without such effect, this was a matter in which the plaintiff must prosecute his rights by action, and was not the subject of compensation under the arbitration clauses of the Municipal Act.

The land in respect of which the claim was made was mortgaged.

Held, that the mortgagee was not a necessary party, the proceeding not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but as the compensation was only some $50, the Court would not require him to be made a party. *In re Nickle and the Corporation of the Town of Walkerton*, 433.

2. *Riparian proprietor—Reservation in patent of rights of navigation —Ownership of land covered with water—"Navigable waters"—Nuisance—Damages—Injunction—48 Vic. ch. 24, (O.)*]—The judgment of PROUDFOOT, J., reported *ante* 10 O. R. p. 351, reversed.

Per BOYD, C. The effect of the patent is to convey the dry land and the land covered by water two chains out, subject to the rights of the public in the Ottawa as a navigable river. As to the land bordering on the water the plaintiff is a riparian proprietor, and has the right to have the water in front of him open for all navigable purposes, and to enjoy it free from from extraordinary impurities. Even if the land under the water is vested in the plaintiff's grantor he could not derogate from his grant to the water's edge by polluting, filling up, or otherwise cutting off his grantee from the beneficial enjoyment of the river, still less can the defendants be protected in their wrong-doing.

The grant to the patentee of the river-bed two chains out carries, as parcel of it, the water thereon, so that the bed, the bank, and the water are vested as private property in the patentee, subject to the servitude of a common public right of way for the purposes of navigation.

The term "navigable waters" in the patent is to be construed as referring to water of such a depth and situation as is, according to the reasonable course of navigation in the particular locality, practically navigable. The patentee may rightfully use and occupy the land covered by water, but only so much as will not interfere with the public easement; but every encroachment on the water will be at his peril if it is proved that he is guilty of a public nuisance.

There was no evidence to shew that the plaintiff's structure (boat-house) is a nuisance; and whatever may be the nature of the plaintiff's title or occupancy of the water, it is enough that his possession and business are, as against the public, legitimate in order to entitle him to recover as against a wrong-doer.

Even if the plaintiff's place of business was proved to be a nuisance because it invaded the navigable waters of the river, it does not follow that that disposes of the plaintiff's claim for an injunction and damages, as he might well invoke the maxim, *Injuria non excusat injuriam.*

Per FERGUSON, J. There is nothing either on the face of the conveyance to the plaintiff, or in the surrounding circumstances at the time of its execution, to indicate that the grantor intended, if intention could now be of any consequence, to reserve to himself the part of the lot under the water, or any right or title to it The contrary would rather appear, from his being in possession at the time, and having a boat-house situated as the present one is.

By the conveyance to the plaintiff he obtained title to the lands in the stream embraced in the two chains from the bank, but subject to the right of navigation expressed in the patent.

What the plaintiff has done is no nuisance, nor is it shewn that he has caused any injury to navigation, and he is entitled to redress for the grievances of which he complains. Even if the plaintiff is not the owner of the land under the water, he is entitled to redress for the injuries he has sustained as a riparian proprietor merely. *Ratté* v. *Booth*, 491.

WAYS.

Sidewalk.]—*See* MUNICIPAL LAW, 1.

WILL.

1. *Will—Ambiguity — Devise of land not owned by the testator—Error in description—Extrinsic evidence—Guardianship—Express trust—Title by possession—Constructive trust—Statute of Limitations—R. S. O. ch. 108, s. 13, c. 132, c. 198, s. 30—Pleadings—New trial.*]—A testatrix devised the S. ½ of lot 20, con. 9, township of R., to T. L., and the E. ½ of said lot to her two daughters.

It was sought to show that she had at the time of her death no other land than the S. ½ of lot 20, con. 8, of R., and to make the will operate to pass this to T. L.

Held, that, the devise being in its terms free from ambiguity, the Judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shewn that lot 20, in con. 8, was the only land which the testatrix owned, the will could not operate to pass it.

Held, also, that J. L. having been appointed by the Surrogate Court, guardian of her son, T. L., she thereby became an express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet that the guardianship ended and the trust ceased with T. L.'s minority, and as after that J. L. dealt with the land in question as her own for some 22 years, she had acquired a good title to it by possession as against T. L.

Held, also, that T. L., having in his pleadings set up that J. L. had been in possession for the said 22 years as his tenant, could not obtain a new trial on the ground that he could shew by evidence that she had been in as caretaker for him.

Semble, per PROUDFOOT, J., that if J. L. had, after the minority of T. L., continued to manage the property for his benefit, she would then have been a constructive trustee for him, not an express one. *Hickey et al.* v. *Stover et al.*, 106.

2. *Will—Debts—Whether general charge to pay—Trespass—Entry by devisee necessary to maintain.*]—A testator by his will directed his executors to pay all his debts, &c., out of his estate. Then followed specific devises of his estate to his wife, children, and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, &c., then in the next place to sell and dispose of lot B, also so specifically devised. The executors before disposing of lots A and B, sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut.

There was no entry or possession taken by plaintiffs before action commenced.

Held, affirming the judgment of ROSE, J., that by reason of there being no such entry or possession the action was not maintainable.

Per CAMERON, C. J.—To entitle the plaintiffs to recover either at law or in equity, an entry upon the land by the plaintiffs must have been made at a time when they had a right to make such entry to carry the legal possession with it.

Held, also, *per* ROSE, J., (1) that the general language of the will was controlled by the codicil, and so the debts were not charged on the unappropriated estates; and therefore the executors had no power to sell the timber on the land in question: (2) that if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold; and, (3) that the purchaser, not shielded by sec. 30 of 29 Vic. ch. 20 (O.), was bound to see that the power was rightly exercised. *Baker et al.* v. *Mills.*, 253.

3. *Will — Construction — Vesting liable to be divested to let in new members of a class.*]—A testator devised certain land to E. T. "during his and M. A.'s natural life, then and after that to be given to M. A.'s children to them, their heirs and assigns forever."

Held, that the children of M. A. in existence at the testator's death forthwith took vested interests, subject to be partially divested in favour of children of M. A. subsequently coming into existence during the life of M. A., and that the representatives of any child dying before the period of distribution were entitled to claim the share of that child.

Paradis v. *Campbell*, 6 O. R. 632, distinguished. *Latta* v. *Lowry et al.*, 517.

4. *Mistake of title — Occupation rent — Enhanced value — Allowance for improvements — Interest on money expended — Mode of taking account — Will — Construction — Charge on reversionary interest operating from death of testator — Interest on legacies paid under mistake of title — R. S. O. ch. 95, sec. 4 — Evidence as to value.*] —In fixing an occupation rent to be charged against one who had been occupying land under mistake of title, and at the same time in allowance to be made to him for improvements, if such occupation rent is charged on the full increased value (as it should be in such case) then interest should be allowed on the actual costs of proper outlay for lasting improvements as an offset.

Manner of taking the account and contra account in such cases pointed out.

A testator made his will as follows:—"I leave to M. the W. ½ of lot 9 during her natural life. I leave to my son A." (an imbecile) "his board and lodging with £5 per year during his natural life, to be given as hereinafter mentioned. I leave to B." (certain other lands) "under the following restriction: *i. e.*, he is to pay A. £3 every year during his natural life. I leave to R. the W. ½, lot 9, after his mother's death, on the following condition: *i. e.*, £2 in each year to be paid by him to A., and to keep A. in board and lodging during his natural life."

The devise to R. failed, he being an attesting witness.

Held, that Adam's maintenance as from the death of the testator, and not as from the death of M., was a charge on the W. ½ lot 9 in the

hands] of the heirs; and the land having, for some time after the testator's decease, been occupied under mistake of title by R. and his assigns, who had paid for Adam's maintenance, the heirs could not enjoy the land without making good the charge thereon to those who had thus exonerated them.

In this action it was referred to the Master to take an account of the rents and profits received by one who had occupied land under mistake of title, viz., as assignee of a devisee the devise to whom was void, and to fix an occupation rent to be paid by him, and also to fix the sum to be allowed to him in respect to improvements, and to certain legacies charged by the will on the said land and which he had discharged, and also of payments made by him on account of taxes, and it appearing that in discharge of some of the said legacies less than the face value thereof had been paid.

Held, that in computing interest on the sums so paid in respect of the said legacies, it should only be computed on the amounts actually paid, and not on the face value of the legacies, and further that the account should be taken together so that on one side would appear the disbursements for improvements, legacies, and taxes, and on the other the occupation rent.

It is not as a general thing the best rule, in cases of varying opinion as to value, to reject one set of witnesses *in toto* and to adopt the figures of an opposing set. It is rather to be supposed that neither is exactly to be followed, and that truth lies somewhere between the extremes. *Munsie* v. *Lindsay et al.*, 520.

5. *Will—Description of real and personal estate—Appointment of executors—Executor according to the tenor—Description of land—Maintenance—Charge on land—Infant executors—Devastavit.*]—A testator by his will directed his executors, "hereinafter named," to pay his debts and funeral expenses; and then devised the residue as follows: To his son David "lot 16, concession 7, N. H., real and personal property;" the said David to pay to each of his daughters $500, namely, Janet, Mary and Agnes in two years after his death; Margaret and Ellen at 25, and Christina to remain on the farm, the said sum to be given her when she became of age. No executors were named. Parol evidence was admitted to shew that the land mentioned was in the township of Morris; that N. H. meant the north half, and that it was the only land owned by testator. Parol evidence was also admitted to shew that Christina, though spoken of as a minor, was 23 years old when the will was made, and that she was of delicate constitution and of weak mind.

Held, that there was an effectual disposition of the real and personal estate: that to a disposition of personal estate executors need not be expressly named, but may appear by implication, and that David was executor according to the tenor: that as to the land the parol evidence, which was properly admissible, cleared up any ambiguity as to the description; and the parol evidence also shewed that as regards the provision in favour of Christina, she must be treated as an adult; and that the provision for her would include maintenance.

An infant, whether executor or executor *de son tort*, is not liable for a *devastavit*. Legacies directed to be paid out of a mixed residue are a

charge on land. *Young* v. *Purvis*, 597.

6. *Will—Power to sell—Power to mortgage—Estate getting benefit of unauthorized loan—Position of mortgagees in such cases—General charge of debts on residue—Priority of mortgage of specific devisee.*]—A testatrix by her will devised and bequeathed all the rest and residue of her real and personal estate unto R. G. "upon trust to sell my real estate and to call in and convert into money the remainder of my personal estate, with power to demise or lease * * any portion thereof, for any term or terms of years. * * And I declare that the said trustee shall, out of the moneys arising from such sale, calling in and conversion * * pay off the incumbrance, if any, existing on the F. property, and shall divide the balance of the said moneys among my four children."

The remaining property, not included in the residuary estate, was specifically devised by the will among the children of the testator in certain shares.

R. G. mortgaged a certain portion of the residuary real estate to one T. and applied the proceeds of the loan in part in liquidation of the outstanding mortgage on the F. property, and in part otherwise for the benefit of the estate. The property comprised in this mortgage was sold by the Court on proceedings by T., but did not bring enough to pay off the whole mortgage debt.

Held, on administration of the estate by the Court, that the trust of the residue was a mere trust for conversion out and out, and R. G. had no power to make the mortgage in question, nevertheless to the extent to which the estate got the benefit of the loan, the executors of T. were entitled to rank against the estate for the balance of their mortgage debt, but only subsequent to certain mortgages placed by specific devisees since the death of the testatrix on portions of the estate devised to them, including the F. property, without knowledge, so far as appeared, of the source from which the money discharging the F. mortgage came.

Held, also, that the mortgage to T. being invalid, it could only carry interest at 6 per cent., although it provided for interest at 12 per cent.

London and Canadian Loan Co. v. *Wallace*, 8 O. R. 539, distinguished. *Gordon et al.* v. *Gordon et al.*, 611.

See DEED.

WINDING-UP.

See COMPANY, 2.